United States Department of Energy Office of Hearings and Appeals

		Decision and Order		
		Issued August 6, 2018		
Filing Date:	July 11, 2018)))	Case No.:	FIA-18-0029
In the Matter	of Anthony Garzione)		

On July 11, 2018, Mr. Anthony Garzione (Appellant), appealed a determination letter issued by the United States Department of Energy's (DOE) Office of Inspector General (OIG) regarding Request No. HQ-2018-01008-F. In that letter, OIG responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004. OIG withheld all documents responsive to Appellant's FOIA request pursuant to Exemption 7(A) of FOIA. This Appeal, if granted, would release the documents withheld under Exemption 7(A).

I. Background

On April 27, 2018, Appellant submitted a FOIA request for:

"All[] communications . . . [and] information between a) DOE IG, b) the Carlsbad DOE Field Office, c) the office(s) of the DOE EM Division[,] d) contractors[, and] e) any other entity's [sic] privy to and involved in researching case No:. 18-0172-C."

FOIA request from Anthony Garzione (April 27, 2018). According to OIG, case number 18-0172-C (the Case) is a complaint filed with OIG's Hotline which alleges, among other things, criminal conduct. E-mail from OIG Counsel (July 16, 2018). OIG referred the Case to the relevant DOE program office for comment, and considers its review of the Case ongoing. *Id*.

On June 19, 2018, OIG issued a response, invoking Exemption 7(A) of FOIA to withhold the requested records. Determination Letter from Dustin R. Wright, Assistant Inspector General for Investigations, OIG, to Anthony Garzione (June 19, 2018). According to OIG, the responsive documents include case processing forms, printouts, and information concerning investigative activity, the disclosure of which "could prematurely reveal evidence and interfere with the ongoing enforcement proceeding." *Id.*

On July 11, 2018, Appellant appealed OIG's determination to DOE's Office of Hearings and Appeals (OHA). In his appeal, Appellant alleged that there was no ongoing investigation into the Case and that the relevant DOE program office "is never going to investigate or respond to [OIG]." *Id.* Appellant asserted that Exemption 7(A) is not applicable if OIG is not actively "in the 'enforcement proceedings phase' of an 'on going investigation." *Id.*

On August 2, 2018, OIG provided OHA with an affidavit concerning Appellant's appeal and a description of the documents OIG had identified as responsive to Appellant's FOIA request. Affidavit of OIG Counsel (August 2, 2018). In the affidavit, the affiant declared that OIG's review of the Case is ongoing and that the affiant believed that disclosure of the responsive documents listed in the index would hinder OIG's investigation. *Id.* at 1–2.

II. Analysis

FOIA requires that documents held by federal agencies generally be released to the public upon request. The Act, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)–(9). Those nine exemptions are repeated in the DOE regulations implementing FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). We must construe the FOIA exemptions narrowly to maintain FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden to show that withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Exemption 7(A)

The threshold requirement in any Exemption 7 inquiry is whether the documents were compiled for law enforcement purposes, *i.e.*, as part of - or in connection with - an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. USDA*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). The documents at issue in this matter were categorically prepared for a law enforcement purpose; indeed, the only identifying characteristic the Appellant supplied concerning the records was that they pertained to the Case, an OIG investigation of alleged criminal conduct. Accordingly, the documents in this case meet the threshold requirement for withholding under Exemption 7.

However, in order to withhold information under Exemption 7, an organization must not only show that the documents were compiled for law enforcement purposes, but that it has statutory authority to enforce a violation of a law or regulation within its regulatory purview. *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). OIG is statutorily charged with investigating waste, fraud, and abuse in programs and operations administered or financed by DOE. 5 U.S.C. App. §§ 2(2), 4. OIG is, therefore, a classic example of an organization with a law enforcement mandate.

Determining the applicability of Exemption 7(A) requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding.

See Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"). In applying these standards, courts have stated that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. See Murray, Jacobs & Abel, 25 DOE ¶ 80,130 (1995) (Murray); NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 224 (1978); Crancer v. DOJ, 999 F.2d 1302, 1306 (8th Cir. 1993). Even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

In this case, OIG insists that its investigation of the Case is ongoing. E-mail from OIG Counsel (July 16, 2018); Affidavit of OIG Counsel (August 2, 2018). An "enforcement proceeding" need not be presently pending, so long as it is likely to occur. *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C.Cir.2003). While Appellant may take issue with the time required for OIG to perform its work, there is no basis to conclude at this time that OIG has abandoned its investigation or that an enforcement proceeding is unlikely to occur.

The responsive documents OIG identified relate specifically to the status of the ongoing investigation. Affidavit of OIG Counsel (August 2, 2018). Disclosing the status of an ongoing investigation, the material collected at the current stage, and OIG's approach to investigating the Case is precisely the sort of information that, if disclosed, might put targets of investigation on notice and impair OIG's ability to pursue its investigation. *See Judicial Watch, Inc. v. DOJ*, 306 F.Supp.2d 58, 75 (D.D.C. 2004). For these reasons, we find that a law enforcement proceeding is pending, and that the release of information could reasonably be expected to cause some foreseeable harm to that pending enforcement proceeding. Therefore, we find that the requested records were properly withheld, and Appellant's appeal is denied.

III. Order

It is hereby ordered that the appeal filed by Anthony Garzione on July 11, 2018, No. FIA-18-0029, is denied.

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

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

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