United States Department of Energy
Office of Hearings and Appeals

In the Matter of Jeffrey Rosenberg	)	
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Filing Date: January 28, 2025	)	Case No.: FIA-25-0013
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	)	

Issued: March 12, 2025

Decision and Order

Jeffrey Rosenberg (Appellant) appealed a determination letter dated January 14, 2025, issued to him by the Department of Energy's (DOE) Office of Inspector General (OIG) concerning three requests (Request Nos. HQ-2025-00497-F (Request 1), HQ-2025-00505-F (Request 2), and HQ-2025-00506-F (Request 3)) that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination letter, OIG indicated that it could neither confirm nor deny that it possessed records responsive to the Appellant's requests pursuant to Exemptions 6, 7(A), and 7(C) of the FOIA. The Appellant challenges OIG's refusal to confirm or deny the existence of responsive records. In this Decision, we deny the appeal.

I. Background

In October 2024, the Appellant submitted the following FOIA requests:

> Request 1: Any and all information related to investigating the statement of Jermey Baker at Y12 about starting a coup that was reported to Jacob Sederlin and Chad May. If no investigation was done, please provide information as to why there was no investigation into Jermey about his comments about starting a coup. This was reported multiple times by Jeffrey Rosenberg.
>
> Request 2: Any and all information related to the investigation of Alex Wahlen's comments about starting a coup that was reported to Chad May of Y12 and also reported to the Inspector General.
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> Request 3: Any and all records associated with the investigation into the reported time fraud by Jacob Sederlin at Y12 that was reported to Joseph Gooch, Bryan Cross, and the Inspector General.

See Request 1 at 1–2 (Oct. 9, 2024); Request 2 at 1 (Oct. 12, 2024); Request 3 at 1 (Oct. 13, 2024).

DOE's Office of Public Information (OPI) subsequently transferred these FOIA requests to OIG. Email from OPI to DOE's Office of Hearings and Appeals (OHA) (Jan. 30, 2025). On January 14, 2025, OIG issued a determination letter (Determination Letter) to the Appellant. Determination

Letter at 1 (Jan. 14, 2025). In the Determination Letter, OIG indicated that with respect to any "closed" investigations related to the subject matter of the Appellant's FOIA requests, it could "neither confirm nor deny the existence of any such records" pursuant to FOIA Exemptions 6 and 7(C). *Id.* at 1–2. In support of this determination, OIG asserted that "[l]acking an individual's consent, an official acknowledgement of investigation, or an overriding public interest, even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.*

OIG further indicated that with respect to any "open" investigations related to the subject matter of the FOIA requests, it could "neither confirm nor deny the existence of any such records" pursuant to FOIA Exemption 7(A). *Id.* OIG asserted that "[d]eclaring the existence or non-existence of any records responsive to th[ese] request[s] would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence." *Id.*

The Appellant timely appealed the Determination Letter to OHA on January 28, 2025. Appeal Letter Email from Jeffrey Rosenberg to OHA at 1 (Jan. 28, 2025) (Appeal). In the Appeal, the Appellant asserted that "it is of overriding public interest to know about plans and subsequent investigations of [DOE] contractors planning a coup." *Id.* He further argued that "[i]t is of overriding public interest to know of [DOE] contractors committing fraud." *Id.*

On February 3, 2025, OIG submitted a response (OIG Response) to the Appeal. *See* OIG Response (Feb. 3, 2025). In the OIG Response, OIG asserted that it had provided adequate information in the Determination Letter to justify its refusal to admit or deny the existence of records responsive to the Appellant's FOIA requests. *Id.* at 1–3. OIG further argued that the individuals referenced in the Appellant's FOIA requests maintained a substantial privacy interest in the "nondisclosure of their identities and their connection with particular investigations," and the Appellant failed to present evidence demonstrating that these employees "were officials found guilty of allegations of misconduct that would warrant public interest." *Id.* at 2. OIG also asserted that if it acknowledged the existence of any open investigations, "employees working at Y-12 who are involved in criminal activity would be able to submit regular FOIA requests similar to [the Appellant]'s to allow them to know whether their illegal activities have been detected." *Id.*

II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

Agencies may provide a *Glomar* response, in which they refuse to admit or deny that certain records exist, when the records would be exempt from disclosure if they existed and acknowledging their existence or nonexistence would "cause harm cognizable under a[] FOIA exception." *Bartko v. DOJ*, 898 F.3d 51, 63–64 (D.C. Cir. 2018) (quoting *Roth v. Dep't of Just.*

642 F.3d 1161, 1178 (D.C. Cir. 2011)); *see also Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (providing the origin of the term "*Glomar* response").

In this matter, OIG asserts that if any records responsive to the Appellant's FOIA requests exist, the records would be exempt from disclosure under either Exemptions 6, 7(A), or 7(C) of the FOIA. Therefore, to determine whether OIG's *Glomar* responses are appropriate, we must examine first whether responsive records would be exempt from disclosure under the relevant exemptions of the FOIA, and second, whether confirmation of the existence of such records itself would reveal information exempt under the FOIA.

A. Exemption 6

Exemption 6 of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In order to determine the applicability of Exemption 6 to a record, an agency must first determine whether the record is a personnel, medical, or similar file and, if so, weigh the public interest in disclosure against the privacy interest of the person or persons identified in the record. *See Washington Post Co. v. U.S. Dep't of Health and Human Servs*., 690 F.2d 252, 260 (D.C. Cir. 1982). Thus, Exemption 6 intends to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

As an initial matter, we find that the records in this matter, if they exist, can be considered either "personnel" or "similar" files because each FOIA request concerns the internal investigation of a particular individual's alleged conduct. *See Lepelletier v. F.D.I.C.*, 164 F.3d 37, 46 (D.C. Cir. 1999) ("[T]he phrase, 'similar files' [] include[s] all information that applies to a particular individual."); *Josh Kelety*, OHA Case No. FIA-20-0015, at 3 (Jan. 17, 2020) ("Since records that concern internal investigations and documentation of employee discipline are usually part of an employee's personnel file, the requested records, if they exist, would be considered personnel files for purposes of Exemption 6."). Therefore, having determined that the records would be personnel and/or similar files as required under Exemption 6, we must now undertake a three-step analysis to determine if the records can be withheld from disclosure under the exemption.

First, we must determine if a significant privacy interest would be compromised by the disclosure of the information. Absent a significant privacy interest, the information may not be withheld. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (*NARFE*); *Associated Press v. Dep't of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). As courts have recognized, the subject of an investigation possesses a substantial privacy interest because they may suffer "embarrassment" and "reputational harm" if others learn that they are the target of an investigation. *Safecard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *see also Josh Kelety* at 3–4. Accordingly, because the requested records concern internal investigations of particular individuals, we find that disclosure of such records, if they exist, would compromise a significant privacy interest.

Next, we must consider whether the release of the requested information, if it exists, would further the public interest by shedding light on the operations and activities of the government. *See NARFE*, 879 F.2d at 874. Courts consider two factors in evaluating whether there is a public interest in disclosure. The first factor is "whether 'the public interest sought to be

advanced is a significant one'—one 'more specific than having the information for its own sake.'" *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 639 (9th Cir. 2017); *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 172 (2004). "In considering whether the public interest is significant, 'the only relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'" *Cameranesi*, 856 F.3d at 639–40. The second factor is "whether the requested information 'is likely to advance that interest.'" *Cameranesi*, 856 F.3d at 639; *Favish*, 541 U.S. at 172.

Here, the Appellant argues that "it is of overriding public interest to know about plans and subsequent investigations of [DOE] contractors planning a coup" and "committing fraud." Appeal at 1. The requested records, however, appear to be of more personal interest to the Appellant rather than any type of general interest to the public at large. For example, regarding Request 3, the Appellant does not explain how further information related to the investigation of a single employee's potential "time fraud" would be of "significant" interest to the general public. *See Cameranesi*, 856 F.3d at 639. The Appellant also fails to explain "the extent to which disclosure of [such information] would she[d] light on an agency's performance of its statutory duties." *Id.* at 639–40. Similarly, the Appellant does not provide any context or additional information regarding his allegation that two "DOE contractor[]" employees made comments about "planning a coup." *See* Appeal at 1. As such, we have no information regarding these individuals' job titles or responsibilities. *See Forest Serv. Emples. v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008) (noting that information regarding an "employee's position in [their] employer's hierarchical structure" is a relevant consideration under the Exemption 6 balancing test).

Furthermore, courts have recognized that "where the public interest being asserted is to show that responsible officials acted . . . improperly in the performance of their duties, [] the requester must establish more than a bare suspicion in order to overcome the presumption of legitimacy accorded to official conduct." *Cameranesi*, 856 F.3d at 640. Specifically, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* In this case, even if the Appellant is alleging that "responsible officials" acted improperly by attempting to "start[] a coup,"[1] he has not provided any further evidence or information that would warrant a belief by a reasonable person that DOE officials might have engaged in this alleged "impropriety." *See Cabezas v. F.B.I.*, 109 F.4th 596, 606 (D.C. Cir. 2024) (reasoning that "vague allegations and essentially 'bare suspicion[s]' are not 'evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred'").

Lastly, to determine whether the requested records, if they exist, can be withheld from disclosure under Exemption 6, we must balance the "public interest against the aforementioned privacy interest." *Joseph Schmidt*, OHA Case No. FIA-19-0019 at 4 (July 18, 2019). We find that because there is a substantial privacy interest associated with an investigation into wrongdoing, whatever public interest exists, if any, would not outweigh the privacy interest of the targets of the investigations or those individuals otherwise involved in the investigations.

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[1] As noted previously, the Appellant has not provided any additional information regarding the individuals referenced in his FOIA requests; therefore, it is unclear whether these individuals are "responsible officials." *See Cameranesi*, 856 F.3d at 640.

Having established that any responsive records, if they existed, would be exempt from disclosure under Exemption 6 of the FOIA, we must now determine whether confirmation of the existence of such records itself would reveal exempt information. In this case, we find that OIG appropriately provided a *Glomar* response to the Appellant's FOIA requests. Were OIG to admit the existence of the requested records, but withhold them under Exemption 6, it would reveal that the employees who are the subject of the FOIA requests had been investigated. As OHA has held, "[t]his would clearly compromise their substantial privacy interest in not being associated with an investigation into misconduct." *Joseph Schmidt* at 4 (holding that an agency appropriately provided a *Glomar* response pursuant to Exemption 6 regarding requested records related to an OIG investigation).

B. Exemption 7

As an initial matter, the threshold test for withholding information under any subsection of Exemption 7 is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. *See F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). "OHA has consistently held that the OIG is a law enforcement body and that its investigations and reports involving employee misconduct are compiled for 'law enforcement purposes' within the meaning of Exemption 7." *Avery R. Webster*, OHA Case No. FIA-13-0035 at 3 (June 19, 2013). Accordingly, because the requested records, if they exist, would concern OIG investigations, we conclude that such records were compiled for "law enforcement purposes" within the meaning of Exemption 7. *Id.*

a. Exemption 7(A)

Exemption 7(A) of the FOIA exempts from disclosure records compiled for law enforcement purposes, the disclose of which "could reasonably be expected to interfere with enforcement proceedings." 65 U.S.C. § 552(b)(7)(A). 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. U.S. Dep't of Agric.*, 13 F.3d 260, 263 (8th Cir. 1993); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986).

In this case, OIG indicated that it refused to admit or deny the existence of records related to open OIG cases because doing so "would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence." Determination Letter at 2. Courts have recognized that such a rationale implicates a valid interest protected under Exemption 7(A). *See, e.g., Leopold v. Dep't of Just.*, 301 F. Supp.3d 13, 27–30 (D.D.C. 2018). Accordingly, because "offering any other response could reasonably be expected to interfere with law enforcement proceedings[,]" we find that OIG appropriately provided a *Glomar* response pursuant to Exemption 7(A) with respect to any possible open internal investigations related to the Appellant's FOIA requests. *Petty, Livingston, Dawson & Richards*, OHA Case No. FIA-24-0002 at 5 (Oct. 20, 2023).

b. Exemption 7(C)

Exemption 7(C) of the FOIA exempts from disclosure records compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal

privacy." 65 U.S.C. § 552(b)(7)(C). Similar to Exemption 6, in determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy under Exemption 7(C), courts have employed a balancing test, weighing the privacy interests that would be infringed upon against the public interest in disclosure, if any. *Dep't of Just. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

First, courts have held that targets of law enforcement investigations have substantial privacy interests in the nondisclosure of that information. *See Roth*, 642 F.3d at 1174. Second, for the same reasons as stated in the above Exemption 6 analysis, such substantial privacy interests are not outweighed by whatever public interest exists, if any, in the requested records. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 756 (noting the similarities between the Exemption 6 and Exemption 7(C) balancing tests). Accordingly, we conclude that OIG properly withheld any requested records pertaining to closed investigations, if they exist, pursuant to Exemption 7(C).

Furthermore, because any "acknowledgement or denial of the presence of investigative records concerning the named individuals would either associate the named individuals with an OIG investigation or create a pattern by which *Glomar* responses are indicative of the presence of records," we conclude that OIG appropriately provided *Glomar* responses pursuant to Exemption 7(C). *Petty, Livingston, Dawson & Richards* at 6; *see also Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp.2d 13, 30–31 (D.D.C. 2012) (finding that withholding investigative records in their entirety was necessary to protect privacy interests under Exemption 7(C) where disclosure of even portions of the records would reveal investigative targets or witnesses).

III. Order

It is hereby ordered that the Appeal filed by Jeffrey Rosenberg on January 28, 2025, No. FIA-25-0013, 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.

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