United States Department of Energy
Office of Hearings and Appeals

In the Matter of Douglas P. Harden	)		
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Filing Date: August 3, 2026	)	Case No.:	FIA-26-0052
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Issued: August 18, 2026

Decision and Order

Douglas P. Harden (Appellant) appeals an interim response letter issued to him from the Department of Energy (DOE) Office of Inspector General (OIG), concerning Request Nos. HQ-2026-01482-F and HQ-2026-01258-F, 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 the interim response letter, OIG informed Appellant that it conducted a search and found seventy-eight responsive documents, eighteen of which OIG partially withheld pursuant to FOIA Exemptions 6 and 7(C) and an additional eighteen of which OIG partially withheld pursuant to FOIA Exemptions 5, 6, and 7(C). The remaining forty-two documents were referred to the DOE Office of Environment, Health, Safety and Security (EHSS) and the DOE Office of Intelligence and Counterintelligence (IN) for releasability determinations. Appellant challenged OIG's interim determination. As explained below, we dismiss Appellant's appeal (Appeal) as moot in part and deny it in part.

I. Background

a. FOIA Request and OIG's Interim Determination

On February 26, 2026, and March 27, 2026, Appellant filed FOIA requests seeking "[a]ll records and materials in the possession, custody, or control of the Department of Energy Office of Inspector General that relate to or are contained in the OIG case files numbered 25-0783-C and 25-0782-C. FOIA Request (Feb. 26, 2026) and FOIA Request (Mar. 27, 2026) (hereinafter FOIA Requests). The records pertain to OIG's investigation into two specific allegations made by Appellant, which were that IN failed to adequately address his concerns about a coworker's abuse of leave and that IN was inappropriately maintaining derogatory information in his personnel security file that could impact Appellant's ability to keep a clearance. *See* Document 36. Additional allegations were addressed in a settlement agreement between Appellant and DOE. *Id.* Upon conclusion of the investigation, OIG issued a report concluding that Appellant's allegations were unsubstantiated although not unmeritorious. *Id.* On July 30, 2026, OIG issued its interim response letter indicating that it found seventy-eight responsive documents to the Appellant's request. Interim Response Letter from OIG to Douglas P. Harden at 1 (July 30, 2026). Furthermore, OIG informed Appellant that "Documents 1 through 13, 17, 18, 20, 35[,] and 36 [were] being released

. . . with certain material withheld pursuant to Exemptions 6 and 7(C)"; that "Documents 14 through 16, 19, and 21 through 34 [were] being released . . . with certain material being withheld pursuant to Exemptions 5, 6, and 7(C)"; that Documents 37 through 50 originated from EHSS and thus were referred to EHSS for a releasability determination; that Documents 51 through 72 originated from IN and thus were referred to IN for a releasability determination; and that "Documents 73 through 78 [were] not being processed back to [Appellant] because the documents were either addressed to [him], written by [him], or have already been provided to [him] . . . ." *Id.* at 1–2.

As explained in the interim response, "[t]he information withheld [under Exemption 5] consists of draft investigative reports and emails regarding those draft reports." *Id.* at 2. OIG determined that "disclosure of draft language and investigator comments and dialogue regarding a-then open case would inhibit frank and open discussion of the matter and would hinder the Government's ability to reach sound and well-reasoned solutions." *Id.* Regarding the information withheld under Exemptions 6 and 7(C), OIG explained that "[i]ndividuals involved in OIG enforcement matters, which . . . may include potential subjects, witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation, and other personal intrusions." *Id.*

OIG also noted that, under FOIA, the Appellant's own "name and personal information" appearing in the released documents "would typically be withheld"; however, OIG was "releasing this information to [the Appellant], pursuant to the Privacy Act, 5 U.S.C. § 552a." *Id.* at 2. OIG clarified that "this information could be withheld if the document is requested by someone else under FOIA." *Id.*

b. Appeal Email

On August 3, 2026, Appellant emailed the instant Appeal to DOE's Office of Hearings and Appeals (OHA). Appeal Email from Appellant to OHA (Aug. 3, 2026). Appellant claims that the exemptions were unlawfully invoked by OIG. *Id.* at 1. Specifically, Appellant argues that: (1) Exemption 5 withholdings are void under the "government misconduct exception"; (2) Exemptions 6 and 7(C) privacy redactions are overridden by the public interest; and (3) OIG improperly referred Documents 37 through 50 to EHSS and Documents 51 through 72 to IN. *Id.* at 1–3.

Appellant made five requests for relief in his Appeal: (1) Reversal of OIG's withholdings and release of the "full, unredacted . . . Documents 14-16, 19, and 21-24"; (2) Release of "all native Word documents, tracked changes, document properties, email attachments, and reviewer comment bubbles"; (3) Reversal of OIG's redactions under Exemptions 6 and 7(C) for all officials acting in their official capacities; (4) Immediate processing and disclosure of referred Documents 37-52; and (5) that OHA "[f]ind that DOE OIG failed to satisfy the statutory foreseeable harm standard . . . ." *Id.* at 4.

c. OIG Response to Appeal

On August 6, 2026, OIG provided its response (Response) to the Appeal. Response (Aug. 6, 2026). In response to Appellant's contention that "the deliberative process privilege ceases to apply when requested records may reveal government misconduct, bad faith, or improper outcome-fixing," OIG states that Appellant's reliance on one singular case is misplaced because it is outside of the FOIA context and that the D.C. Circuit has rejected Appellant's argument. *Id.* at 3. Further, OIG asserted that it properly applied Exemption 5 and satisfied the foreseeable harm requirement. *Id.* With respect to Documents 14–16, 19, and 21–34, "the documents concern identifiable decisions that OIG had not yet finalized including: the procedural disposition of complaints; the effect of Appellant's settlement agreement on the investigation; the scope of the matters OIG would address; the organization and wording of the investigative report; the facts and evidence OIG would rely upon; the characterization of the investigative findings; and the content of the final report ultimately issued as Document 36." *Id.* at 4. OIG provided further information regarding the foreseeable harm of disclosure:

> The OIG's foreseeable harm determination is based on the nature and the function of the particular information withheld, not on a categorical assertion that all drafts or internal emails must remain confidential. For the draft reports, disclosure would expose preliminary findings, abandoned formulations, unresolved questions, proposed organizational structures, and edits the OIG never adopted. Investigators and supervisors use those working materials to test factual propositions, identify weaknesses, correct inaccuracies, consider competing characterizations of the evidence, and refine proposed conclusions. Release of those materials would cause investigators to temper preliminary analyses, avoid recording tentative hypotheses or concerns, and treat each working draft as though it were a final public document. That restraint would diminish the candor and rigor of the review process and would impair the OIG's ability to produce accurate, carefully supported investigative reports.
>
> Disclosure would also risk attributing to OIG preliminary language and conclusions that OIG expressly reconsidered and rejected. For example, disclosure could create the erroneous impression that OIG formally found the allegations "unmeritorious" or that it adopted the broader investigative structure reflected in Document 34, even though neither appeared in the approved report. Preventing the premature disclosure of proposed agency positions and avoiding public confusion concerning reasons or conclusions the agency did not adopt are central interests protected by the deliberative-process privilege. *See Coastal States Gas Corp v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).
>
> For the internal emails, disclosure would reveal how individual investigators and supervisors assessed the settlement agreement, considered procedural options, proposed dispositions, questioned draft findings, and advised the official responsible for approving the final report. Investigators who know that their preliminary views, proposed actions, and candid supervisory exchanges will later be disclosed are likely to moderate their recommendations or avoid memorializing

> concerns that should be addressed during internal review. Supervisors may likewise be less direct in identifying weaknesses, requesting additional support, or proposing substantial revisions. The foreseeable result is a less candid exchange between investigators and management and a corresponding reduction in the quality of OIG's investigative decisions.

Id. at 5–6. OIG confirmed that it did not rely upon or incorporate the privileged documents that it withheld under Exemption 5 in the final report. *Id.* at 7.

OIG also responded to Appellant's argument that "when there is credible evidence that government officials acted improperly, they are not entitled to the right to privacy." *Id.* According to OIG, Appellant materially overstated case law that requires a "context-specific balancing of the privacy interests implicated by disclosure against the extent to which disclosure of the particular identifying information would illuminate agency operations." *Id.* OIG contends that Appellant did not meet the threshold for disclosure of names and contact information for OIG investigators and witnesses because he did not provide any actual evidence of wrongdoing. *Id.* at 8.

II. Analysis

a. Exemption 5

Exemption 5 of FOIA allows an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption includes the deliberative process privilege, which involves records "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (hereinafter *Sears*). Appellant challenges OIG's invocation of Exemption 5 by claiming that the government misconduct exception defeats the deliberative process privilege, that the deliberative process privilege is lost through adoption and implementation of pre-decisional materials into a final determination, and that OIG failed to satisfy the statutory "foreseeable harm" standard. Appeal at 3.

Appellant cites *In re Sealed Case* to support his claim that the government misconduct exception defeats the deliberative process privilege, but he overlooked that the court differentiated between the deliberative process privilege as a common law privilege and within the context of FOIA. 121 F.3d 729, 737 n.5 (D.C. Cir. 1997) (indicating that overcoming the deliberative process privilege by a sufficient showing of need "is not an issue in FOIA cases because the courts have held that the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure."). The D.C. Circuit has "made clear that there is no controlling precedent recognizing a government misconduct exception to Exemption 5." *Rudometkin v. United States*, 140 F.4th 480, 492 (D.C. Cir. 2025) (citing *Protect Democracy Project, Inc. v. Nat'l Sec. Agency*, 10 F.4th 879, 888–89 (D.C. Cir. 2021)). Accordingly, we reject Appellant's claim that a government misconduct exception applies.

Next, we turn to Appellant's second claim that the deliberative process privilege does not apply because portions of the drafts were adopted and implemented in the final report. Appeal at 3. The

D.C. Circuit has considered this argument before and concluded that it "makes little sense" because [w]hatever appears in the final report is already available." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 365 (D.C. Cir. 2021). "Peeking behind [the final report] to discern what portions of drafts were and were not incorporated would reveal the very deliberative process that the privilege protects." *Id.* (citing *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048–1049 (D.C. Cir. 1982)). An agency's adoption of privileged material only strips it of deliberative process protection when the agency "'chooses expressly to adopt or incorporate by reference' the privileged information in its final decision." *Reporters Comm. for Freedom of the Press*, 3 F.4th at 365 (quoting *Sears,* 421 U.S. at 161). The final OIG report did not reference any of the privileged material of the drafts, therefore OIG properly withheld the privileged material under the deliberative process privilege.

Lastly, we turn to Appellant's third argument that OIG failed to satisfy the statutory "foreseeable harm" standard. Appeal at 3. FOIA states, "An agency shall – [] withhold information under this section only if – [] the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)." 5 U.S.C. § 552(a)(8)(A). Courts have clarified that, specifically in the context of the deliberative process privilege, an agency "must connect[] the harms" in a "meaningful way to the information withheld, such as by providing context or insight into the specific decision-making process or deliberations at issue, and how they in particular would be harmed by disclosure." *Jud. Watch, Inc. v. DOJ*, No. 19-800, 2020 U.S. Dist. LEXIS 178773, at *7 (D.C. Cir. 2020) (determining that agency must provide the "link between the alleged harm and the information in the withheld material"). OIG stated in the interim response that "disclosure of draft language and investigator comments and dialogue regarding a-then open case would inhibit frank and open discussion of the matter and would hinder the Government's ability to reach sound and well-reasoned solutions" as well as "risk misleading the public and impair the integrity of the agency's decision-making process." Interim Response at 2. Appellant argues that "OIG relied exclusively on boilerplate phrases, failing the statutory standard." Appeal at 3. In OIG's Response, it elaborated the foreseeable harm in depth, connecting several harms—such as tempering preliminary analyses, diminishing the candor and rigor of the review process, and impairing OIG's ability to produce accurate, carefully supportive investigative reports—to the information withheld—draft reports and internal emails. Response at 5–7. Accordingly, we conclude that OIG has met the statutory "foreseeable harm" standard to justify withholding the deliberative information.

b. Exemptions 6 and 7(C)

Appellant also challenges OIG's invocation of Exemptions 6 and 7(C) by arguing that the public interest in uncovering official misconduct overrides personal privacy and that "federal officials acting in their official capacity have a substantially diminished privacy interest, particularly when implicated in administrative misconduct." Appeal at 2–3. Exemption 6 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). Exemption 7(C) exempts from disclosure records "compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). While both Exemption 6 and 7(C) were invoked for all withholdings, this decision focuses on the Exemption 7(C) justifications with the understanding that "the standard for evaluating" the privacy interest protected in Exemption 7(C) is "broader than the standard applicable" for Exemption 6. *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Appellant argues that "privacy redactions under Exemptions 6 and 7(C) must yield when the requester provides credible evidence that government officials acted improperly." Appeal at 3–4 (citing *NARA v. Favish*, 541 U.S. 157, 172 (2004)). In *NARA*, the U.S. Supreme Court held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their studies, the requester must establish more than a bare suspicion in order to obtain disclosure." 541 U.S. 157, 172 (2004). Only when the FOIA requester has produced "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" will there be "a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records." *Id.* at 174–175. Appellant alleges that "DOE management and OIG engaged in whistleblower reprisal, violated DOE Order 221.1B, and secretly placed an unauthorized hold flag in Scattered Castles" without offering any evidence to support his claims. As Appellant did not provide evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred, there is no counterweight to balance against the privacy interests in the requested records.

Appellant further argues that "[f]ederal officials acting in their official capacity have a substantially diminished privacy interest, particularly when implicated in administrative misconduct." Appeal at 4. According to the D.C. Circuit, "[t]o determine whether disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy' for purposes of Exemption 7(C), we must 'balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.'" *Roth v. DOJ,* 642 F.3d 1161, 1174 (D.C. Cir. 2011) (quoting *Davis v. DOJ*, 968 F.2d 1276, 1281 (D.C. Cir. 1992)). In the interim response, OIG stated that "[i]ndividuals involved in OIG enforcement matters, which in this case may include potential subjects, witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation, and other personal intrusions." Interim Response at 2. A person named in law enforcement records has a substantial privacy interest under Exemption 7(C) in the nondisclosure of said person's identity. *See, e.g.*, *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (finding that the names and personal identifying information of investigators, suspects, witnesses, and informants should not be disclosed). The only exception to this rule is when disclosure is "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). Given that Appellant has not provided any evidence that OIG is engaged in illegal activity, the exception does not apply here. Therefore, we must weigh the substantial privacy interest for individuals involved in OIG enforcement matters against the public interest in release of the requested information. It is Appellant's "burden to support 'adequately . . . [his] 'public interest' claim with respect to the *specific* information being held.'" *King v. DOJ,* 830 F.2d 210, 234 (D.C. Cir. 1987) (quoting *Senate of the Commonwealth of Puerto Rico v. DOJ,* 823 F.2d 574, 588 (D.C. Cir. 1987) (emphasis in original)). Appellant claims that the public interest is "in knowing the identities of federal officials who abuse executive power." Appeal at 4. However, he failed to provide any support. As such, we cannot find that Appellant has adequately supported his public interest claim. The substantial privacy interest that would be compromised by disclosure outweighs the public interest in release of the requested information, therefore OIG properly withheld information identifying individuals involved in OIG's enforcement matters under Exemption 7(C).

c. Referrals to EHSS and DOE-IN

Lastly, Appellant argues that OIG's referral of Documents 37 through 50 to EHSS and Documents 51 through 72 to IN for releasability determinations is an "impermissible conflict of interest and an unlawful delay tactic under 10 C.F.R. § 1004.4." *Id.* OIG made it clear that by referring Documents 37 through 72 to the originating offices for a releasability determination, the search is ongoing. Section 1004.8(a) of the DOE regulations states that OHA has jurisdiction to consider FOIA appeals in the following relevant circumstances:

> When the Authorizing or Denying Official or FOIA Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . , or when the FOIA Officer has denied a request for expedited processing . . . or for waiver of fees . . . .

10 C.F.R. § 1004.8(a).

In this case, the circumstances for an administrative appeal regarding Documents 37 through 72 do yet not exist because, as of the date of the Appeal, the DOE had not yet denied a request for the records in question in whole or in part, responded that there are no documents responsive to the request, or denied a request for expedited processing or waiver of fees. Accordingly, the portion of the Appeal regarding Documents 37 through 72 must be dismissed.

III. Order

It is hereby ordered that the appeal filed by Douglas P. Harden, on August 3, 2026, Case No. FIA-26-0052, is dismissed as it pertains to Documents 37 through 72 and is denied in all other respects.

Since the DOE has not issued a final determination within the statutory time limit concerning Documents 37–72, Mr. Harden may be deemed to have exhausted his administrative remedies and may proceed with this matter in federal district court. 5 U.S.C. § 552(a)(6)(C)(i). In the alternative, after receiving a final determination from DOE, he may file another Appeal with OHA if he is not satisfied with that determination.

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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
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