

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Dario B. Crosetto)	
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Filing Date: January 6, 2017)	Case No.: FIA-17-0001
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Issued: February 1, 2017

Decision and Order

On January 6, 2017, Mr. Dario B. Crosetto (Appellant) appealed a determination received from the Department of Energy’s (DOE) Office of Public Information (OPI) (HQ-2016-01243-F). In that determination, OPI responded to a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. OPI released nineteen documents, seventeen of which included material redacted under Exemptions 5, 6, and 7(E). The Appellant challenges the adequacy of OPI’s search and use of the above exemptions. This Appeal, if granted, would require OPI to conduct an additional search for responsive records and release currently withheld material.

I. Background

On August 1, 2016, the Appellant requested “the name of the person(s) who gave this order to diverge all my emails addressed to DOE employees/offices to DOE Security” and any internal or external communications that mention Appellant’s name, his company United to End Cancer, his application with DOE, 3D-FLOW OPRA, the 3D-CBS, evaluations of his proposal, or any evaluation of his project. Determination Letter from Alexander C. Morris, OPI, to Appellant (September 30, 2016) at 1. On September 30, 2016, OPI issued a determination and released two complete documents and seventeen partially redacted documents. *Id.* In its Determination Letter, OPI cited Exemption 7(E) to withhold sensitive information and communications about DOE’s security protocols, Exemption 6 to withhold personal mobile phone numbers, and Exemption 5 to withhold information regarding DOE discussions. *Id.* at 5. On January 6, 2017, the Appellant appealed the adequacy of OPI’s search and use of the above exemptions. Appeal Letter to OHA (January 6, 2017).

II. Analysis

A. The adequacy of the search

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply “does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ralph Sletager*, OHA Case No. FIA-14-0030 (2014).¹

We contacted OPI to determine how it conducted the search in this matter. OPI informed us that it directed three different DOE program offices to search for responsive documents: the Office of Environment, Health, Safety, and Security (EHSS); the Office of the Chief Information Officer (OCIO); and the Office of Science (Science). Memorandum of Telephone Conversation between Krishna Bhatt, OPI, and James P. Thompson, III, OHA (January 11, 2017). OPI stated that it forwarded each program office a verbatim copy of the Appellant’s request. *Id.* We contacted each program office to inquire further.

OCIO informed us that it conducted an electronic search of its email systems. Memorandum of Telephone Conversation between Stephen Turner, OCIO, and James P. Thompson, III, OHA (January 11, 2017). OCIO stated that it was aware of the Appellant, and it determined that information regarding Appellant’s request would be contained in OCIO’s email system. *Id.* Accordingly, OCIO conducted an electronic keyword search of its email systems using the search terms “Dario Crosetto”, “United to End Cancer”, “application #0000222704”, “3D-flow OPRA”, “Object Pattern Recognition Algorithm”, and “3D-CBS”. Email from Stephen Turner, OCIO, to James P. Thompson, III, OHA (January 19, 2017). OCIO located and released in part one responsive document. January 11 Memorandum. Based on the above, OCIO conducted a search reasonably calculated to uncover the material sought by the Appellant.

EHSS informed us that it also conducted an electronic search of its email system. Memorandum of Telephone Conversation between William Riddle, EHSS, and James P. Thompson, III, OHA (January 24, 2017). EHSS stated that it identified its email systems as the only potential source for responsive documents due to the office’s knowledge of Appellant and his past interactions with DOE. *Id.* EHSS searched its email system using the search term “Dario Crosetto” and consequently identified several relevant emails. *Id.* Next, EHSS gathered the names of individuals from the first set of emails and used them as keywords to conduct a second search of the email system. *Id.* As a result, EHSS located and released in part several responsive documents. *Id.* Based on the above, EHSS conducted a search reasonably calculated to uncover the material sought by the Appellant.

Science informed us that it received the FOIA request and determined that any material responsive to Appellant’s request would be located within the Office of High Energy Physics (HEP) because HEP is the office that worked on Appellant’s scientific proposal.² Memorandum of Telephone Conversation between Lauren Smith, Science, and James P. Thompson, III, OHA (January 11,

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

² The Appellant submitted a scientific proposal to HEP’s portfolio management database in December of 2015. Email Conversation between Glen Crawford, HEP, and James P. Thompson, III, OHA (January 13, 2017).

2017). HEP searched its hard copy records and email records using the terms “Crosetto,” “United to End Cancer,” “proposal 0000222704,” and “variants therefore.” Email from Glen Crawford, HEP, to James P. Thompson, III, OHA (January 13, 2017). However, Science stated that it only searched for information related to Science’s discussions with *external* parties concerning the Appellant. *Id.* As a result, Science did not locate any responsive documents. *Id.* Based on the above, we cannot conclude Science’s search was reasonably calculated to recover the material sought by the Appellant.

The breadth of the Appellant’s FOIA request included all DOE internal and external communications that mention the criteria provided in the request. While Science processed the request based on its understanding of the Appellant and his prior contact with DOE, restricting the search to external discussions at the outset prevented Science from conducting a search reasonably calculated to uncover all relevant documents. For instance, the Appeal contains copies of alleged email communications that took place between the Appellant and Science employees during the time period contemplated by the request. Appeal Letter at 3-11. Those same emails were not located by Science. Consequently, we find that OPI did not conduct an adequate search. We therefore remand this matter to OPI to conduct a new search that locates all responsive documents in Science.

B. The applied exemptions

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

1. Exemption 6

Exemption 6 of the FOIA shields from disclosure “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If the agency cannot find a significant privacy interest, the information may not be withheld. *Id.* Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *Id.*; *Reporters Comm. for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 749, 773 (1989). Lastly, the agency

must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *Horner*, 879 F.2d at 874.

The information withheld under Exemption 6 consists of a DOE employee's personal mobile telephone number. In considering whether OPI properly applied Exemption 6, we first note that Exemption 6 has a threshold requirement in that the records at issue must be "personnel and medical files and similar files." In the Determination Letter, OPI stated that the personal mobile telephone number it redacted qualifies as "similar files" because "it is information in which the individual has a privacy interest." Determination Letter at 2. Since the personal mobile telephone number consists of information pertaining to a specific individual, we agree with OPI's finding that the information qualifies as "similar files." See *Washington Post*, 456 U.S. at 602 (all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection).

Given the private nature of the personal mobile telephone number, and particularly the possibility that releasing the information could subject the individual to unwarranted or unsolicited communications, we also find that a significant privacy interest would be compromised if the number were disclosed. As to the public interest, disclosing the withheld information would not shed light on the operations and activities of DOE in its performance of its statutory duties. We therefore find little or no public interest in its disclosure. Accordingly, the privacy interests involved outweigh any public interest in the release of the personal mobile telephone number. We therefore find that OPI properly withheld the information redacted under Exemption 6.

2. Exemption 7(E)

As a preliminary matter, we note that Document 11 contains OPI's sole use of Exemption 5. We spoke with the DOE Office of General Counsel (OGC), and OGC informed us that OPI mistakenly referenced Exemption 5 in Document 11 instead of Exemption 7(E). Email from Felicia L. Isaac, OGC, to James P. Thompson, III, OHA (January 31, 2017). We will therefore analyze the information redacted under Exemption 5 as if OPI instead redacted the same information under Exemption 7(E).

Exemption 7(E) of the FOIA provides that an agency may exempt from disclosure records compiled or recompiled for law enforcement purposes if their production "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); see also *Sussman v. U.S. Marshals Serv.*, 734 F. Supp. 2d 138, 144 (D.D.C. 2010) (withholding general information about the methods by which an agency conducts criminal threat assessments). The "requirement that disclosure risk circumvention of the law 'sets a relatively low bar for the agency to justify withholding.'" *Pub. Emps. for Env'tl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.–Mexico*, 740 F.3d 195, 204–05 (D.C. Cir. 2014). "Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011). Therefore, "documents must first meet a threshold requirement: that the records were 'compiled for law

enforcement purposes.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 777 F.3d 518, 522–23 (D.C. Cir. 2015), *cert. denied sub nom. Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 136 S. Ct. 876, 193 L. Ed. 2d 710 (2016). “[T]he term ‘compiled’ in Exemption 7 requires that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption.” *Id.* “Law enforcement entails more than just investigating and prosecuting individuals after a violation of the law . . . and includes . . . proactive steps designed to prevent criminal activity and to maintain security.” *Id.* To show the disputed documents were compiled for law enforcement purposes, the agency must demonstrate a rational nexus between the agency’s activity and its law enforcement duties. *See Keys v. U.S. Dep’t of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987).

In the present case, OPI properly determined that the information it withheld under Exemption 7 is information compiled for a law enforcement purpose. The documents provided by OPI in response to the FOIA request are exclusively composed of emails that were created or reviewed by either EHSS or Science’s security office. After reviewing the documents, we find that they clearly contain information either generated or compiled to prevent criminal activity or maintain security. Therefore, there is a rational nexus between the creation of the emails and DOE’s law enforcement duties.

Furthermore, upon release, the redacted information would “disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” Our analysis is focused on the first clause of Exemption 7(E) because the Determination Letter states that the redacted portions of the enclosed documents contain information about preventative security techniques that could be used to access DOE information without authorization. Determination Letter at 3. The information OPI redacted does in fact detail security techniques in response to potential threats. Furthermore, the redacted information details how security-related information flowed through the DOE and how DOE used the information to assess potential security threats. Therefore, the redacted documents contain information detailing the techniques and procedures DOE implemented during a law enforcement investigation.

After finding the redacted information discloses techniques and procedures for law enforcement investigations, we also find that releasing the information may create a risk of circumvention of the law. If the currently withheld information were released, individuals could tailor their conduct to increase their chances of successfully circumventing DOE security. For instance, an individual attempting to thwart security might take a different approach after analyzing DOE’s response to certain actions. We therefore find OPI properly withheld information under Exemption 7(E).

C. Segregability

The FOIA also requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). After reviewing the withheld material, we find that OPI released all reasonably segregable information contained in the documents responsive to the Appellant’s request.

III. Conclusion

For the reasons above, we find that OPI did not conduct a search reasonably calculated to uncover the materials sought by the Appellant, and the search was therefore inadequate under FOIA. We also find that OPI properly applied Exemptions 6 and 7(E) to the documents it released to the Appellant.

It Is Therefore Ordered That:

- (1) The Appeal filed on January 6, 2017, by Mr. Dario B. Crosetto, Case No. FIA-17-0001, is hereby granted in part to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy's Office of Public Information, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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