

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

In the Matter of: Synaptix Technology)	
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Filing Date: January 3, 2020)	Case No.: FIA-20-0017
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Issued: January 28, 2020

Decision and Order

On January 3, 2020, Synaptix Technology (Appellant) appealed a Determination Letter issued to it from the Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) regarding Request No. FOIA-19-00243-AG. In that determination, the NNSA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The NNSA withheld responsive information pursuant to FOIA Exemption (b)(6). The Appellant challenged the decision to withhold the information. In this Decision, we deny the Appellant’s appeal.

I. BACKGROUND

On February 18, 2019, Appellant made a Freedom of Information Act (FOIA) request to the Office of Personnel Management (OPM) seeking “all 2018 employee compensation that is releasable as a public record.” Determination Letter at 1 (July 26, 2019) (Determination). Specifically, Appellant sought the following data fields, where available:

1. Fiscal Year
2. Employee #
3. Last Name
4. First Name
5. Middle Name/Initial
6. Race
7. Gender
8. Agency
9. Department
10. Job Title
11. Compensation (base pay, hourly rate, total pay, etc.)
12. Overtime
13. Benefits Pay

14. Date Hired
15. Date Terminated
16. Full-time/Part-time
17. Location of work City/State

OPM referred the salary data portion of the request to the NNSA, which received it on June 12, 2019. *Id.*

On July 26, 2019, NNSA issued a Determination Letter. Exhibit A. After the Appellant timely appealed that determination, NNSA withdrew its initial determination letter and we dismissed the appeal on October 17, 2019.

On December 6, 2019, NNSA issued an updated Determination letter explaining that it had withheld 2018 salaries, performance awards, bonuses, incentive awards, and merit pay amounts pursuant to Exemption 6 of the FOIA, though it released such information for 2018 new hires. Exhibit E at 2. When examining a sample of responsive records, NNSA had determined that the withheld information “would be tantamount to releasing employee performance ratings” because NNSA employees are on a performance-based pay plan. *Id.*

On January 3, 2020, the Appellant timely appealed the NNSA’s determination. Appellant claims that 5 C.F.R. 293.311(a) mandates the disclosure of the requested information and that Exemption 6 does not apply to the requested information. Appeal at 1 (Sept. 17, 2019). It further asserts that 5 C.F.R. 293.311(b), which exempts from disclosure the aforementioned information when it reveals more about the employee than the enumerated data, is inapplicable in this instance. *Id.* Finally, Appellant argues that the public benefit of understanding the government’s employee costs, as well as government employees’ ability to ensure fair pay and equal wage standards, outweighs any “perceived constitution of an unwarranted invasion of privacy.” *Id.*

Appellant, in the course of its original appeal, clarified that the information would not be useful without the employees’ names, departments, job titles, and some estimation of pay (total pay, base pay, or even just grade level). Telephone call between Adrian Ziegler, Synaptix Technology, and Kristin L. Martin, OHA (Sept. 24, 2019). In short, Appellant asserts that redaction of any one of these categories in full would render the entire data set useless to Appellant.

NNSA provided OHA with examples demonstrating how the redacted information, if released, could be combined with information released from an identical request for the previous year’s data to discern the performance rating of employees who were not new hires in 2018. Exhibit 1. This documentation shows a seven-step equation that allows an employee’s performance rating to be accurately discerned if two consecutive years of the requested data for that employee is available. *Id.* NNSA also submitted evidence showing that such data for Fiscal Year 2017 is currently publicly available. *Id.*

II. ANALYSIS

As discussed below, we find that NNSA met its burden to justify that it properly withheld responsive records under Exemption 6.

A. Exemption 6

Exemption 6 allows an agency to withhold an individual’s personal information if its release would constitute a “clearly unwarranted” invasion of privacy. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006). Courts have long held that the “clearly unwarranted” language of Exemption 6 “expresses a carefully considered congressional policy favoring disclosure which instructs the court to tilt the balance in favor of disclosure.” *Wash. Post Co. v. United States Dep’t of Health & Human Servs.*, 690 F.2d 252, 276 (D.C. Cir. 1982) (internal quotation marks omitted). The D.C. Circuit has prescribed a two-part test for determining the proper application of Exemption 6. *Am. Oversight v. United States GSA*, 311 F. Supp. 3d 327, 345 (D.D.C. 2018). First, the withheld record must be a personnel or medical file, or a similar file. *Id.* A record is considered a “similar file” if it “contains personal information identifiable to a particular person.” *Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014). Next, the interests must be balanced by determining whether “disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest,” and, if so, “whether the public interest in disclosure outweighs the individual privacy concerns.” *Am. Oversight*, 311 F. Supp. 3d at 345 (internal quotations omitted).

The information requested in this case consists of information typically found in personnel files, bringing it within the scope of Exemption 6.

1. Privacy Interest

Courts have long held that employees have a substantial privacy interest in their performance ratings and that those ratings may be withheld under Exemption 6. *See, e.g., Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3-4 (D.C. Cir. 1984); *Tomscha v. Giorgianni*, 2004 U.S. Dist. LEXIS 10057, at *4–5, *13–16 (S.D.N.Y. June 2, 2004). Furthermore, OPM regulations exempt from disclosure lists of “names, present or past position titles, grades, salaries, performance standards, and/or duty stations of Federal employees” when such information is “selected in such a way that would reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” or would be otherwise exempt under the FOIA. 5 C.F.R. 293.311(b). As such, it is the policy of both OPM and the NNSA to withhold salary, bonus, or other related information when that information could be used to “reverse engineer” an employee’s performance rating. Bowman Email.

It is well-established that “bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.” *Ctr. For Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 928–29 (D.C. Cir. 2003) (internal quotation marks omitted) (citing *CIA v. Sims*, 471 U.S. 159, 178 (1985)). Indeed, this “mosaic theory” states that responsive records, when read in the context of other information that is already publicly available, can be more revealing than when read in a vacuum. In such a case, courts consider the additional steps required to reveal such information, as well as the likelihood that such steps will occur.

In the present case, one need only look up the previous year’s salary information and plug the two numbers into an equation to learn, with a high degree of certainty, how an NNSA employee’s

performance was evaluated. This equation is common knowledge among NNSA employees and is simple enough that some employees can “eyeball” the two numbers and learn an employee’s performance rating with a reasonable degree of certainty. Telephone call between Angelia Bowman (NNSA) and Kristin L. Martin (OHA) (Jan. 15, 2020). Were NNSA salary records publicly unavailable for Fiscal Year 2017, the 2018 information would likely not risk the exposure of employees’ performance ratings. However, the availability of the 2017 information creates a significant risk that employee’s performance ratings will become known by their coworkers, which risks harming the employee through intimidation, harassment, or embarrassment. *See Ripskis v. Dep’t of Hous. & Urban Dev.*, 241 U.S. App. D.C. 8, 746 F.2d 1, 3 (1984) (“The claim that these files will contain *no* derogatory information is far from certain. . . . More importantly, disclosure of even favorable information may well embarrass an individual or incite jealousy in his or her co-workers.”). Accordingly, given the nature and relative ease for others to reveal an employee’s performance rating, we find that the mosaic theory applies to the records requested, and that NNSA has demonstrated that the requested records contain information in which its employees hold a substantial privacy interest.

2. Balancing Privacy and Public Interests

Appellant asserts the public interest would be furthered by release of the requested information in that “disclosure of the information sought would “shed light on an agency’s performance of its statutory duties” as well as “further citizens’ right to be informed about what their Government is up to” through the way tax dollars are appropriated and spent by the agency in the way of employee compensation.” Appeal 1-2. Further, Appellant asserts that “[t]he requested data is fundamental to not only the public’s understanding of the employee costs of governmental operations, but also to millions of government employees across the country who can better understand their own pay and hold their employer accountable to fair pay and equal wage standards. Appeal at 1–2 (internal citations omitted). We must balance this public interest against the privacy interests NNSA employees hold in their performance ratings.

The public interest put forth by Appellant can be met without granting this appeal and thereby compromising the privacy interests at stake here. While the public can learn some information about NNSA’s activities and use of tax dollars from the requested data, employee names are not required for the public to do so. Furthermore, the use of performance standards, as well as existing grievance procedures, and the government’s pay scale system provides government employees with appropriate avenues to understand their pay and ensure fair pay and equal wages without compromising their colleagues’ privacy interests. Accordingly, we find that, on balance, the privacy interests of NNSA employees outweigh the public interest in disclosure.

B. Segregability

Under normal circumstances, we might have found that release of the requested financial information would be appropriate if the names and other personally identifying information were withheld. However, the Appellant has stated that such redactions would frustrate the purpose of its request. Moreover, even base salaries cannot be segregated because NNSA’s annual base salary increases are cumulative and permanent, making the above mosaic theory applicable to base salaries.

The privacy concern at issue is dependent on the public availability of the prior year's data. Consequently, we find that the requested information as it pertains to new employees is reasonably segregable from exempt data. NNSA released this information with its revised determination letter. There is no evidence that any other non-exempt data is reasonably segregable while adhering to the Appellant's stated purposes.

III. ORDER

For the foregoing reasons, we find that NNSA appropriately applied Exemption 6 in withholding the requested information for employees who were not new hires in 2018.

It is hereby ordered that the Appeal filed on January 3, 2020, by Synaptix Technology, No. FIA-20-0017, 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 one's 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, College Park, MD 20740
Web: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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