

United States Department of Energy  
Office of Hearings and Appeals

In the matter of Milber, Makris, Plousadis & Seiden, LLP )  
Filing Date: June 27, 2013 ) Case No.: FIA-13-0045  
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Issued: July 11, 2013

**Decision and Order**

On June 27, 2013, Milber, Makris, Plousadis & Seiden, LLP (“Appellant” or “MMPS”) filed an Appeal from a determination issued to it on June 4, 2013, by the Office of Health, Safety and Security (HSS) of the Department of Energy (DOE) (FOIA Request Number HQ-2013-01018-F). In its determination, HSS responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004, and withheld a released document in its entirety pursuant to Exemption 7(A). This Appeal, if granted, would require HSS to release the document that it withheld pursuant to FOIA Exemption 7(A).

**I. Background**

On April 29, 2013, the Appellant submitted a FOIA Request seeking the following:

- (1) Report: *Fall Injury at the Brookhaven Graphite Research Reactor in Building 701*, dated November 28, 2012 (“Report”).
- (2) Copy(ies) of Preliminary Notice(s) of Violation to Brookhaven Science Associates, LLC arising out of the November 29, 2011 fall injury at the Brookhaven Graphite Research Reactor in Building 701.
- (3) Copy(ies) of Notice(s) of Violation to Brookhaven Science Associates, LLC arising out of the November 29, 2011 fall injury at the Brookhaven Graphite Research Reactor in Building 701.

FOIA Request from Pamela Smith, MMPS, to DOE Headquarters Office (Apr. 29, 2013). The Appellant represents National Resource Management, LLC (NRM), a third-party defendant in a pending lawsuit involving an individual who allegedly sustained personal injuries as a result of an incident that occurred at the Brookhaven Science Laboratory (“Brookhaven”) on November 29, 2011. *Id.*

On June 4, 2013, HSS issued its determination concerning the Appellant's FOIA Request, stating that it located one responsive document, the November 28, 2012, Report. Determination Letter from John S. Boulden III, Director, Office of Enforcement and Oversight, HSS, to Pamela Smith, MMPS (June 4, 2013). HSS withheld the Report in its entirety pursuant to Exemption 7(a) because it "was produced in furtherance of ongoing DOE enforcement investigation conducted pursuant to 10 C.F.R. Part 851, 'Worker Safety and Health Program.'" *Id.* According to HSS, DOE is investigating whether there was a safety violation at the Brookhaven Science Laboratory to determine how to impose "an appropriate remedy, which could include the assessment of civil penalties." *Id.* at 2. Therefore, this Report "provides a preliminary analysis of facts and circumstances associated with the investigation of the fall injury event" and, as the investigation is still pending, the Report is not a final DOE determination concerning whether any regulatory violations occurred at the Brookhaven site. *Id.* Hence, HSS asserted that the pending investigation would be hindered by the release of the Report. *Id.*

On June 27, 2013, the Appellant appealed HSS's determination, arguing that HSS failed to specify why releasing the investigation report and supporting materials would interfere with pending enforcement proceedings. *Id.* The Appellant further stated that in early 2012, DOE released a similar report, dated November 29, 2011, to NRM, entitled "Building 701 (BGRR) Scissor Lift Fall Brookhaven National Laboratory of November 29, 2011." *Id.* Accordingly, the Appellant contends that the Report at issue in this Appeal "would appear to be a continued investigation of the very same facts, issues, and circumstances which were the focus of the joint BSA/DOE report," and accordingly, DOE "waived" its argument that release of the Report would hinder its investigation. *Id.*

## II. Analysis

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.

The threshold requirement in any Exemption 7 inquiry is whether the documents are 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. Department of Agriculture*, 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). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department 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). Here, HSS explained that the Report was “produced as part of an ongoing enforcement investigation that DOE initiated to determine whether a BNL contractor or subcontractor violated any of the requirements of 10 C.F.R. Part 851, DOE’s *Worker Safety and Health Program*.” See Email from Kathy McCarty, Chief of Staff, Office of Enforcement and Oversight, to Shiwali Patel, Attorney Examiner, OHA (July 3, 2013). Under the Atomic Energy Act, “DOE is authorized to: (1) levy a civil penalty against an indemnified DOE contractor who violates DOE regulations promulgated to protect workers at DOE facilities; or (2) take specific contract action against an indemnified contractor who violates DOE’s worker safety and health requirements.” *Id.*; see 42 U.S.C. § 2282c. Accordingly, we conclude that the Report was compiled for law enforcement purposes.

However, determining the applicability of Exemption 7(A) requires an additional two-step analysis on (1) whether a law enforcement proceeding is pending, and (2) whether release of the 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) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *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 in the past, the courts have found 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 *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993); *Murray, Jacobs & Abel*, OHA Case No. VFA-0050 (1995)\* (*Murray*). It is important to note that 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. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the “generic” approach, it “has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings.” *Bevis*, 801 F.2d at 1389-90; *Murray*, VFA-0050.

For the following reasons, HSS has demonstrated that a law enforcement proceeding is pending and that release of the Report will likely cause foreseeable harm to the proceeding. HSS explained that the Report “reviews the evidence [DOE] has compiled to date, through interviews and document reviews, to assess whether a DOE contractor violated 10 C.F.R. Part 851’s worker safety and health regulations,” and that it does not contain the DOE’s final determination regarding any regulatory findings. See Email from Kathy McCarty, Chief of Staff, Office of Enforcement and Oversight, to Shiwali Patel, Attorney Examiner, OHA (July 3, 2013).

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\* Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://energy.gov/oha>.

Furthermore, HSS has established that harm could be reasonably expected to result if the Report was disclosed. Specifically, it explained that, as the Report contains a “preliminary analysis of facts and circumstances associated” with the accident, and “does not contain the ‘final DOE determination of any regulatory violations,’ then its release would “provide premature insight into DOE’s investigation strategy and hinder DOE’s ability to: (1) control the course of its pending enforcement investigation, and (2) obtain relevant evidence.” *Id.* Moreover, release of the Report “could create a chilling effect on potential witnesses’ desire to discuss regulatory violations, or eliminate potential sources and categories of information DOE is still seeking.” *Id.* Thus, release of the Report may “impair DOE’s efforts to fashion an appropriate remedy best fitted to the circumstances at issue and its regulatory obligations.” *Id.*

Finally, in regards to the Appellant’s claim that the DOE waived any arguments in support of withholding the Report because of the previously released November 29, 2011, report, HSS stated that the previous report was jointly created by BSA/DOE to understand and identify the causes of the accident. *Id.* Unlike the Report at issue in the instant Appeal, the previous report was not conducted pursuant to any federal regulation or to assess any civil remedies. *Id.* The Report at issue, on the other hand, concerns an investigation by the Office of Enforcement and Oversight to ensure compliance with DOE regulations regarding worker safety. Pursuant to the regulations, DOE may fashion “an appropriate penalty or other remedy designed to address any regulatory deficiencies its investigation has revealed.” *Id.* Hence, that the NRM received the 2011 report is inapposite to our conclusion regarding the instant FOIA Request. Thus, we conclude that HSS properly invoked Exemption 7(a) in order to withhold the Report. Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Milber, Makris, Plousadis & Seiden, LLC, OHA Case Number FIA-13-0045, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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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