United States Department of Energy
Office of Hearings and Appeals

In the Matter of KIRO 7	)	
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Filing Date: December 4, 2014	)	Case No.: FIA-14-0083
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	)	

Issued: December 22, 2014

Decision and Order

On December 4, 2014, KIRO 7 (Appellant) filed an Appeal from a determination issued to it by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. 12-00202-J). In that determination, NNSA responded to a request 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. NNSA released 107 documents but redacted portions of those released documents under Exemptions 5, 6, 7(C), and 7(D) of the FOIA. This Appeal, if granted, would release the employee and contractor names withheld under Exemptions 6 and 7(C) from the redacted documents.

I. Background

On May 16, 2014, the Appellant filed a request with NNSA for all misconduct or disciplinary complaints and investigations of agents and agent candidates of the Office of Secure Transportation (OST). Request Letter dated May 16, 2014, from Katie Doptis, Appellant, to FOIA Officer, NNSA. In its determination, NNSA released 107 documents but withheld portions of those documents under Exemptions 5, 6, 7(C), and 7(D) of the FOIA. Determination Letter dated October 31, 2014, from Pamela Arias-Ortega, Authorizing and Denying Official, NNSA, to Appellant. The Appellant challenges only the Exemptions 6 and 7(C) withholdings, i.e., the names and other identifying information of the agents and agent candidates, claiming that it is in the public interest to release the names and that Exemption 7(C) was improperly applied. Appeal Letter dated November 26, 2014, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

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).

A. Exemption 6

Exemption 6 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 the present case, the Appellant argues that the database documents are not the type of files that may be protected under Exemption 6. However, the Supreme Court and other federal courts have given the phrase "personnel and medical files and similar files" a broad meaning when a requested document refers specifically to an individual. *See, e.g., Washington Post*, 456 U.S. at 602; *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals). All the documents contain information that applies to particular individuals, such as names, initials, and signature, and titles.

In determining whether a record may be withheld under Exemption 6, an agency must perform a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the record. If the agency cannot find a significant privacy interest, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (NARFE); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information at issue would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). 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. *See generally NARFE*, 879 F.2d at 874.

As stated above, the initial step in analyzing whether Exemption 6 has been properly applied to withhold information is determining whether or not a significant privacy interest would be compromised by the disclosure of the name of a person who is not a federal employee and information which would identify the federal employees who were the subject of these reprimands. With regard to the names and other identifying information of non-federal employees, it is well settled that the release of an individual's name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir.

2008). Therefore, NNSA correctly concluded that a person who is not an employee of the federal government has a legitimate expectation of privacy under the FOIA and his name and identifying information can be withheld.

With regard to information identifying the names and other identifying information of current federal employees, we find that there is a significant privacy interest. Generally, civilian federal employees who are not involved in law enforcement have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees. *See Office of Pers. Mgmt. Regulation*, 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public). However, federal employees do have an expectation of privacy in other information about them. In *Judicial Watch, Inc., v. Dep't of the Army*, 402 F. Supp. 2d 241 (D.D.C. 2005), the court found that because of the likelihood of documents being published on the Internet and media reporters seeking out the employees "[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent." *Judicial Watch*, 402 F. Supp. 2d at 251.

This case is similar to those cases where we found that federal OIG employees have a significant privacy interest regarding release of their identities in that such a release could subject them to unwanted contact and harassment. *Tim Hadley*, Case No. FIA-14-0038 (2014); *see also Cal-Trim Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment). Release of the names and other identifying information here would divulge the identities of those employees and could subject them to harassment.

Because we find that a protectable privacy interest exists, we must now consider if release of the withheld information would further the public interest by shedding light on the operations and activities of the government. It is clear that release of the names of a non-federal employee would not further the public interest by shedding light on the operations and activities of the government. Release of this information would contribute little, if any, to public understanding of the issues surrounding these matters. We find that the public interest in the withheld names is minimal at best. Release of the information would reveal little, if anything, to the public about the workings of the government. *Elec. Frontier Found. v. Office of the Director of Nat'l Intelligence*, 639 F.3d. 876, 888 (9th Cir. 2010).

As a general matter, the courts have not found that release of individual federal employee names, when presumptively withholdable, provides any light to the workings of a federal agency. *See Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996) ("There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of [various federal employees]"). In reviewing the documents, we find that no additional information regarding OST's operations would be disclosed by release of the withheld information. While the Appellant argues that "[b]y identifying those individuals, the public can learn if supervisors are appropriately managing and tracking every agent whose poor performance could potentially put people at risk. Releasing the names of employees makes both supervisors and subordinates accountable for their actions." Appeal Letter at 1. Such a speculative public interest in detecting potential wrongdoing is insufficient to satisfy the public interest standard required under the FOIA. *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 at 173 (2004); *Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)("[i]f a totally unsupported suggestion that the interest in finding out whether government agents have been

telling the truth justified disclosure of private materials, government agencies would have no defenses against requests for production of private information.") Consequently, we find that there is no public interest that would be furthered by release of the information withheld in the documents.

In applying the Exemption 6 balancing test, we have found that there is a significant privacy interest in the names of the non-federal employee and the names of current federal employees. Additionally, we find that there is little or no public interest that is furthered by release of the withheld information. Balancing these factors pursuant to Exemption 6, we find that release of the withheld information would constitute a clearly unwarranted invasion of personal privacy. Consequently, Exemption 6 was properly invoked to withhold the redacted information.

In our review of a sampling of the documents, we discovered that NNSA released an individual's name in two instances, while withholding his name throughout the rest of the document. When questioned as to why, we were informed that it was inadvertent. E-mail message dated December 17, 2014, from Sandra Lewandowski, NNSA, to Janet R. H. Fishman, Attorney-Examiner, OHA. Courts have routinely held that an agency has waived its protection under a FOIA exemption where there has been an official disclosure or direct acknowledgment by authorized government officials. Thus, waiver of the privilege to withhold information under the FOIA depends upon official release of the information or disclosure under circumstances in which an authorized government official allowed the information to be made public. *See Wolf v. CIA*, 473 F. 3d 370, 379-80 (D.C. Cir. 2007) (holding that an agency waived its ability to refuse to confirm or deny the existence of responsive records pertaining to an individual because a top agency official had discussed that individual during congressional testimony); *see also Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver). Release in this instance was not official. Consequently, NNSA has not waived its application of Exemption 6 with regard to this individual, and may continue to protect his identity by withholding his name where it appears in the responsive documents.

B. **Exemption 7(C)**

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes," if release of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see also* 10 C.F.R. § 1004.10(b)(7)(iii). In its October 31, 2014, notification letter to the Appellant, NNSA claimed that it was withholding information from the documents under Exemption 7(C). Because we found the redacted information properly withholdable under Exemption 6, we do not need to address the application of Exemption 7(C) to that information.

III. Conclusion

After considering the Appellant's arguments, we are convinced that the redacted information was properly withheld under Exemption 6. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by KIRO 7, Case No. FIA-14-0083, 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 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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