

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

In the Matter of Bradley P. Jones)		
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Filing Date: October 21, 2015)	Case No.:	FIA-15-0058
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Issued: November 10, 2015

Decision and Order

On October 21, 2015, Bradley P. Jones (Appellant) appealed a determination that he received from the Department of Energy’s (DOE) Office of the Inspector General (OIG) on September 21, 2015 (Request No. HQ-2015-00149-PA and HQ-2015-00303-F). In that determination, OIG responded to a request filed under both the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. OIG released 17 documents, all except one including portions redacted under Exemptions 5, 6, 7(A), 7(C), and 7(D) of the FOIA. The Appellant challenged the use of these exemptions to withhold material and the adequacy of the search conducted. This Appeal, if granted, would require OIG to release the redacted information and conduct a new search.

I. Background

On December 4, 2014, the Appellant filed a request for “all personnel files, security files, investigative files, and other files relating to or concerning” him, excluding those already produced in response to a previous Privacy Act request. Request Letter from Bradley P. Jones to FOIA Requester Service Center and Privacy Act Request Office (December 4, 2014). The Appellant also requested a full copy of the OIG Inspection Report identified as INS-O-15-02, entitled “Allegation Regarding Human Reliability Program Unsuitable Reportable Behaviors at the Office of Secure Transportation,” and “all underlying investigative materials relating to or concerning [him] including, but not limited to, investigative reports, interview notes and summaries, and other documents.” *Id.*

OIG initially sent a partial response, releasing the Official Use Only Inspection Report: INS-O-15-02, with portions withheld under Exemptions 6 and 7(C) respectively. Partial Response Letter from Daniel M. Weeber, Assistant Inspector General for Audits and Administration, OIG, to Bradley P. Jones (March 23, 2015). On September 21, 2015, OIG sent its final response, which

identified 22 responsive documents, although OIG only released 17 documents to the Appellant.¹ Determination Letter from Daniel M. Weeber, Assistant Inspector General for Audits and Administration, OIG, to Bradley P. Jones (September 21, 2015). The Inspection Report, Documents 3 through 5, 7, 8, 10 through 12, and 17 through 21, all had material withheld pursuant to Exemptions 6 and 7(C). *Id.* OIG withheld material from Document 2 under Exemptions 5, 6, 7(A), 7(C), and 7(D). *Id.* OIG released Document 6 with certain material withheld under Exemptions 5, 6, 7(A) and 7(C). *Id.* Document 22 was the only document released in its entirety. *Id.*

On October 21, 2015, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA). Along with challenging the use of the exemptions, the Appellant also challenges the adequacy of the search conducted. Appeal Letter from Daniel C. Schwartz, to Director, OHA, DOE (October 21, 2015). The Appellant further challenges DOE's failure to release all of the responsive documents within the time-period outlined in the FOIA, stating that this is a constructive denial of the request.² *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.

A. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

¹ Documents 4(a), 9, and 13 through 16 originated with either the DOE's Environment, Health, Safety and Security (EHSS) Office or the National Nuclear Security Administration (NNSA). The Determination Letter indicated that these offices would be responding separately to the Appellant. The Determination Letter further stated that OIG withheld material from Documents 13 through 16 pursuant to Exemptions 6 and 7(C).

² The regulations do not provide for an appeal to OHA of the DOE's failure to respond to a FOIA request in a timely fashion. Such a failure does not constitute a denial of a request in whole or in part, a statement that there are no responsive documents, or a denial of a fee waiver request. Consequently, OHA does not have jurisdiction over claims of untimeliness. *See, e.g., EverNu Technology, LLC*, Case No. TFA-0243 (2008); *Citizen Action New Mexico*, Case No. TFA-0203 (2007); *Arlie Bryan Siebert*, Case No. TFA-0157 (2006). Instead, the requester's remedy in such cases is to seek redress in a federal district court. 10 C.F.R. § 1004.5(d)(4); *see also* 5 U.S.C. § 552(a)(6)(C)(i). We will therefore not consider the Appellant's arguments concerning timeliness of DOE's response.

5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits the withholding of responsive material that, *inter alia*, reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). In order to be shielded by this privilege – generally referred to as the “deliberative process privilege” – a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

OIG withheld information from Documents 2 and 6 pursuant to Exemption 5 justifying the use of this exemption by stating that the redacted information “reflects the advisory opinions between subordinates and their management.” Determination Letter at 2. The Appellant challenges this withholding stating that “to the extent that those communications include facts or purported facts relating to” him, they should be disclosed and any non-predecisional or non-deliberative portions should be segregated. Appeal Letter at 7. The withheld portions of Documents 2 and 6 were both predecisional and deliberative discussions between employees and management about the options for considering the new information discovered during the inspection concerning the Appellant. We agree with OIG that disclosure of this information is not in the public interest in that it could inhibit frank and open discussions and hinder the Government’s ability to reach sound and well-reasoned solutions. We also find that OIG segregated all non-exempt material.

B. Exemption 7(A)

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).

Moreover, 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. Dep’t 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). By law, OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The OIG is, therefore, a classic example of an organization with a law enforcement mandate.

Determining the applicability of Exemption 7(A) requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of 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); *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, courts have stated 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 Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*);

NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 224 (1978); *Crancer v. Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). 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. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

OIG released Documents 2 and 6 with information withheld under Exemption 7(A) with OIG stating that the withheld material included "information pertaining to an ongoing inspection." Determination Letter at 3. The Appellant alleges that because OIG has already issued its Inspection Report: INS-O-15-02, any investigation regarding him has concluded and no law enforcement proceeding is anticipated; therefore, Exemption 7(A) does not apply. Appeal Letter at 7. Our review of the unredacted documents revealed that the information redacted under this exemption did not pertain to the allegations concerning the Appellant, but instead, the information related to another OIG inspection that branched off from the initial inspection. OIG has not yet released the report in that inspection, therefore there is a pending proceeding and releasing this information could reasonably be expected to cause a foreseeable harm to that inspection.

C. Exemption 6 and 7(C)

Exemption 6 shields 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); *see also* 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the 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). 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 determining whether information may be withheld under Exemption 6 or 7(C), 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. If the agency cannot find a significant privacy interest, the information may not be withheld. *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); *Associated Press v. Dept. of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). 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. *See NARFE*, 879 F.2d at 874; *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 773 (1989). Lastly, the agency must balance the personal privacy interest in the information proposed for withholding against the public interest in the same information. *See NARFE*, 879 F.2d at 874; *Reporters Comm.*, 489 U.S. at 762.

Although the analysis under Exemptions 6 and 7(C) is similar, there are significant differences. One difference is their threshold requirements. An agency may invoke Exemption 7(C) only where the document is compiled for law enforcement purposes. *See, e.g., FBI v. Abramson*, 456 U.S. 615, 622 (1982). Exemption 7(C) thus applies to a narrower class of documents than Exemption 6,

which courts have broadly interpreted to encompass most documents with information pertaining to particular individuals. *See Washington Post*, 456 U.S. at 602; *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008). However, where Exemption 7(C) does apply, it provides greater privacy protections and is easier for an agency to satisfy. This is because, in the third step of the analysis, Exemption 6 protects “clearly unwarranted” invasions of privacy whereas Exemption 7(C) only requires that the privacy invasion be “unwarranted.” *Nat’l Whistleblower Ctr. v. Dep’t of Health*, 849 F. Supp. 2d 13, 26 (D.D.C. 2012). Further, Exemption 6 requires that the disclosure “would constitute” an invasion of privacy whereas Exemption 7 requires only that the invasion “could reasonably be expected to constitute” a privacy invasion. *Id.*

OIG withheld the names of the individuals involved in the OIG investigation, which included subjects, witnesses, sources of information, and other individuals. Determination Letter at 2. OIG also withheld, under these exemptions, information that would tend to disclose the identity of certain individuals; for example, OIG withheld a job title when only one individual held that position. *Id.* OIG, however, did release the names of management-level employees in the Senior Executive Service. Every document released had some information withheld under these two exemptions.

The initial step in analyzing whether Exemptions 6 and 7(C) have been properly applied is determining whether a significant privacy interest would be compromised by the disclosure of the names and identifiers of those involved in this OIG investigation either as OIG employees conducting the investigation or as federal employees participating in the investigation. 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 involved in law enforcement do possess, by virtue of the nature of their work, protectable privacy interests in their identities. *Wood v. FBI*, 432 F.3d 78, 87-89 (2d Cir.) (protecting investigative personnel of FBI’s Office of Professional Responsibility); *Judicial Watch, Inc. v. United States*, 84 F.App’x 335, 338-39 (4th Cir. 2004) (protecting names of lower-level clerical workers at IRS).

As previously mentioned, we have consistently held that OIG is a law enforcement agency. *See, e.g., Steven Wallace*, Case No. VFA-0735 (2002). We, therefore, find that the OIG employees listed in the documents have a significant privacy interest regarding release of their identities in that such release could subject them to unwanted contact and harassment. Furthermore, the names of those participating in the OIG investigation also have a significant privacy interest so they will be free from harassment, intimidation, and other personal intrusions. We agree with OIG that the public interest in the identity of individuals who appear in investigative files does not outweigh the privacy interests these individuals possess.

Throughout the documents, we found that sometimes “[he or she] stated” was redacted while other times only the “he or she” was redacted. When asked about this inconsistency, OIG informed us that their policy was to redact “he or she” in order to protect the identity of the individual, and that any redaction of the word “stated” was inadvertent. Email from Karen Sulier, OIG, to Brooke DuBois, OHA (November 11, 2015). Although the effect of these inadvertent redactions was

insignificant, we must remand the documents back to OIG to correct the redactions to cover only exempt material.

D. Exemption 7(D)

Exemption 7(D) of the FOIA provides that “records or information compiled for law enforcement purposes” may be withheld, “but only to the extent that the production of such” documents could reasonably be expected to disclose the identity of a confidential source...which furnished information on a confidential basis...and, in the case of a record or information compiled by...an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.” 5 U.S.C. § 552(b)(7)(D); 10 C.F.R. § 1004.10(b)(7)(iv). Exemption 7(D) is designed to protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential. *Ortiz v. Dep’t of Health and Human Services*, 70 F.3d 729, 732 (2d. Cir. 1995). A source is confidential if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. *Id.*, citing *United States v. Landano*, 508 U.S. 165 (1993).

OIG withheld material under Exemption 7(D) from Document 2. Document 2 is a lengthy document that included every step taken in the inspection concerning the allegations outlined in the IG Report requested by the Appellant. The Appellant claimed that the DOE “offered no indication that there were guarantees of confidentiality made in connection with the withheld information.” Appeal Letter at 9. Our review of Document 2, however, revealed that OIG used Exemption 7(D) to redact interview statements where the witness requested confidentiality. OIG did not redact the paragraph preceding the summary of the witness’s testimony, which states that the witness requested confidentiality.

E. Adequacy of the Search

The FOIA requires that a search be reasonable, not exhaustive. “[T]he standard of reasonableness which we apply to agency search procedures 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 v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). In cases such as these, “[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1981) (emphasis in original). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g. Project on Government Oversight*, Case No. TFA-0489 (2011).

On December 16, 2014, the Office of the Chief Information Officer (CIO) transferred the Appellant’s request to OIG to search for responsive documents. In his Appeal, the Appellant asserts that DOE should have other responsive records including, but not limited to “reports in his Human Reliability Program file (including derogatory reports); his medical and psychiatric files; his performance appraisals; his Notifications of Personnel Action (Standard Form 50); his training records; and any other personnel records not previously provided.” Appeal at 3-4. We contacted

CIO and inquired as to why they only sent this request to OIG. CIO stated that they misread the request, and was not aware the Appellant wanted anything outside of what OIG would have. Memorandum of Telephone Conversation with Cathy Harrell (October 27, 2015). CIO informed OHA that they are willing to expand the search to more DOE offices to locate any other responsive documents. *Id.* Based on this information, we will remand this request back to CIO for further processing.

III. Conclusion

Based on the foregoing, we find that although OIG properly applied Exemptions 5, 6, 7(A), 7(C), and 7(D) to withhold information from the responsive documents, we remand the documents to OIG to correct its redactions of the word “stated” in accordance with our instructions set forth above. We also find that the search conducted was not adequate, and remand the request to CIO for an adequate search.

It Is Therefore Ordered That:

- (1) The Appeal filed on October 21, 2015, by Bradley P. Jones, Case No. FIA-15-0058, is hereby granted to the extent set forth in paragraph (2) below and denied in all other aspects.
- (2) This matter is hereby remanded to the Department of Energy’s Office of the Inspector General and Office of the Chief Information Officer, which shall issue new determinations 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.
- (4) 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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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Date: November 10, 2015