United States Department of Energy
Office of Hearings and Appeals

In the Matter of Alex Wellerstein	)	
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Filing Date: November 5, 2015	)	Case No.: FIA-15-0064
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	)	

Issued: December 10, 2015

Decision and Order

On November 5, 2015, Alex Wellerstein filed an Appeal from a determination issued to him by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. FOIA 13-00049-K). In that determination, NNSA responded to a request for information that Dr. Wellerstein 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 six documents that it determined to be responsive to the request, withholding significant portions of each pursuant to Exemptions 3 and 6 of the FOIA. This Appeal pertains only to the withholdings taken under Exemption 6.[1] This Appeal will also consider whether NNSA's search for responsive documents was reasonable.

I. Background

On November 12, 2012, NNSA received a FOIA request from Dr. Wellerstein seeking copies of records contained in the Lawrence Livermore National Laboratory (LLNL) and Los Alamos National Laboratory (LANL) archives pertaining to the LLNL projects GNOMON and SUNDIAL and the LANL project TAV, dating from the mid-1950s. In its October 15, 2015, determination letter, NNSA informed Dr. Wellerstein that LANL and its DOE oversight office had located no documents responsive to his request, and that LLNL and its DOE oversight office had identified six responsive documents. NNSA then provided the six responsive documents to Dr. Wellerstein with portions of each document deleted. A significant portion of each document was withheld as classified material protected from disclosure by the Atomic Energy Act of 1954. In addition, the names of authors and recipients of the documents were withheld pursuant to Exemption 6 of the FOIA, which permits the government to withhold information that could invade a person's privacy.

[1] On November 10, 2015, OHA informed Dr. Wellerstein that those withholdings taken pursuant to Exemption 3 related to classified information and would need to be reviewed by the DOE's Office of the Environment, Health, Safety, and Security. However, as we ascertained that portions of the redacted information were withheld solely pursuant to Exemption 6, we will proceed with a review of those redactions in the instant Decision and Order.

In his appeal, Dr. Wellerstein challenges NNSA's use of Exemptions 3 and 6 to withhold information from the copies of the responsive documents it provided to him. As explained above, the application of Exemption 3 to the documents will be addressed in a separate Decision, to be issued after an appellate review of the classified material has been completed. With respect to the application of Exemption 6, Dr. Wellerstein contends first that, even as contractor employees and not federal employees, the names of the authors and recipients, whom he presumes to be laboratory scientists, would "shed light on the operations of the federal government." He also argues that employing Exemption 6 to protect the privacy interests of scientists who are deceased or "publicly known to be weapons designers" is a "gross overreach" of the intended scope of that exemption. Appeal at 1-2.

Dr. Wellerstein also contends that NNSA's search for documents responsive to his request was not sufficiently thorough, for two reasons. First, because one of the reports provided is labeled "Gnomon Interim Report No. 40," he assumes that at least 40 interim reports were issued regarding that project, of which NNSA provided only five. Second, he contends that the search could not have been adequately conducted because no records about the SUNDIAL project were located. Appeal at 1.

II. Analysis

A. Exemption 6

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).

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. 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. Dep't 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). Finally, 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.

The initial step in analyzing whether Exemption 6 has been properly applied is determining whether a significant privacy interest would be compromised by the disclosure of the names that have been redacted from the responsive documents provided to Dr. Wellerstein. 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). The privacy interests

protected by the exemptions to the FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. The extent of an individual's privacy interest in his or her name is diminished under certain circumstances. Generally, employees of the federal government 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). In addition, the privacy interest in an individual's identity diminishes upon death. *Davis v. Dep't of Justice,* 460 F.3d 92, 97-98 (D.C. Cir. 2007) (and cases cited therein).

Dr. Wellerstein contends that one or both of these conditions may apply to the individuals whose names were redacted from the responsive documents. NNSA has stated that the names withheld from the responsive documents are those of contractor employees, not federal employees. Even if, as Dr. Wellerstein contends, those contractor employees were laboratory scientists and therefore important participants in development of thermonuclear weapons, they were not federal employees who, by operation of regulation, have no expectation of privacy regarding their names. We find that, as contractor employees, they retain a significant privacy interest in their names.

Dr. Wellerstein's contention that many of the individuals whose names were withheld are now deceased, however, merits consideration. Assuming that the youngest of the authors and recipients of the GNOMON interim reports were 25 years old at the time the reports were issued, roughly 60 years ago, those same individuals would be 85 years old today, and many of those individuals would be considerably older. By actuarial standards, many of them are likely to be deceased. NNSA stated that information regarding whether the individuals whose names were redacted are living or deceased "is not always known." It further stated that the privacy concern in this instance included "harassment from individuals." E-mail from NNSA to William Schwartz, Staff Attorney, Office of Hearings and Appeals, November 10, 2015.

Because a deceased individual has greatly diminished personal privacy interests in the context of the FOIA when compared to those of a living individual, an individual's life status is an important element in assessing his or her privacy interests. While courts have not ruled on the extent to which an agency must go to ascertain whether an individual has died, the Court of Appeals for the District of Columbia Circuit has held that an agency must take certain "basic steps" to make that determination. *Johnson v. Exec. Off. for U.S. Attorneys,* 310 F.3d 771, 775-76 (D.C. Cir. 2002). NNSA has provided no indication that it attempted to ascertain whether the individuals whose names were redacted are deceased or still living. It therefore did not take any "basic steps" to make that determination. Moreover, without that information, its aim of protecting a privacy interest based on potential harassment falls short of the mark. In the absence of any effort to determine whether the individuals whose names were deleted are still living, we cannot accurately assess the significance of the privacy interest in those names. Without that assessment, we cannot progress to the requisite second and third steps of the analysis to determine whether Exemption 6 requires the protection or permits the release of those names.

We will therefore remand this matter for a new Exemption 6 balancing of the privacy and public interests in the redacted names, beginning with a more focused assessment of the privacy interest in protecting the names of authors and recipients of any documents ultimately determined to be responsive to Dr. Wellerstein's request.

B. 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." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[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*, 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*, Case No. FIA-14-0030 (2014).[2]

We contacted NNSA regarding its search for records about the GNOMON and SUNDIAL projects. We received no clarification regarding its search for GNOMON records. With respect to LLNL's inability to identify any records concerning SUNDIAL, LLNL informed NNSA at an early stage of this process that a search of its archives yielded no responsive documents, because "Sundial is not an approved nickname and does not appear in . . . DOE guidance." Letter from Staff Relations Division, LLNL, to NNSA Livermore Site Office, December 19, 2012, at 1.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request conduct a search reasonably calculated to uncover all relevant documents. LLNL's explanation for its inability to locate any records about SUNDIAL is reasonable, and we therefore find that no additional search is necessary in this regard. With respect to its search for documents related to the GNOMON project, NNSA has not provided us with an explanation of its failure to produce more than five interim reports where, as Dr. Wellerstein has logically contended, 40 or more such reports should exist. Consequently, we will remand this matter to NNSA for a new determination that provides either additional records regarding the GNOMON project or a complete explanation for its inability to do so.

It Is Therefore Ordered That:

(1) The Appeal filed on November 5, 2015, by Alex Wellerstein, Case No. FIA-15-0064, is hereby granted 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 National Nuclear Security Administration, which shall issue a new determination in accordance with the instructions as 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

[2] OHA FOIA decisions issued after November 19, 1996, may be accessed at http://energy.gov/oha/office-hearings-and-appeals.

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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Director
Office of Hearings and Appeals
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