United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley	)		
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Filing Date: December 11, 2016	)	Case No.:	FIA-16-0057
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Issued: January 3, 2017

Decision and Order

On December 11, 2016, Tim Hadley (Appellant) appealed a determination that he received from the Department of Energy's (DOE) Office of Inspector General (OIG) on December 9, 2016 (Request No. HQ-2014-01474-F). In that determination, OIG 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. OIG released three documents, two of which included material redacted under Exemptions 6 and 7(C) of the FOIA. The Appellant challenges the use of these exemptions to withhold material. This Appeal, if granted, would require OIG to release some or all of the redacted information.

I. Background

On July 23, 2014, the Appellant requested "all notes, reports, invoices, contracts, interview notes, emails, telephone transcripts, and any other information used to compile the following report – DOE/IG-0889 – in 2013 titled 'Concerns with Consulting Contract Administration at Various Department Sites'." Determination Letter from Sarah B. Nelson, Assistant Inspector General for Audits and Administrations, OIG, to Tim Hadley (December 9, 2016). On April 17, 2015, OIG provided the Appellant with 29 responsive documents, and then, on October 6, 2016, provided the Appellant with an additional 135 responsive documents. *Id*. On December 9, 2016, OIG sent the Appellant a letter stating that it had completed a final search for responsive documents.[1] *Id*. In the two documents at issue here, OIG withheld, under Exemptions 6 and 7(C), names and information that would tend to disclose the identity of certain individuals who were involved in this OIG enforcement matter, which included subjects, witnesses, sources of information, and other

[I] In its final review, OIG identified 29 documents for release. Determination Letter at 1. OIG released two documents with redactions, one document in its entirety, and forwarded 27 documents to two other DOE offices for separate determinations concerning their releasability. *Id*.

individuals. *Id*. On December 11, 2016, the Appellant appealed the withholding of this material in these two documents. Email from Tim Hadley to OHA Filings (December 9, 2016).

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.

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*.

The initial step in analyzing whether Exemptions 6 and 7(C) have been properly applied in this matter is to determine whether the disclosure of the names and identifiers of those participating in the instant OIG investigation would compromise 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 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).

We have consistently held that OIG is a law enforcement agency. *See, e.g., Steven Wallace*, Case No. VFA-0735 (2002). The names and information withheld from the responsive documents include that of the subject of the report, the OIG employees who conducted the interviews, and the federal and contract employees who were interviewed. We find that the OIG employees listed in the documents have a significant privacy interest regarding the release of their identities in that such release could subject them to unwanted contact and harassment. Furthermore, those participating in the OIG investigation, even the federal employees, also have a significant privacy interest so they will be free from harassment, intimidation, and other personal intrusions due to their participation. We agree with OIG that the public interest in the identity of individuals who appear in the responsive documents does not outweigh the privacy interests these individuals possess, and find that OIG properly withheld this information.

In this matter, the Appellant requested the background documents used to compile a specific OIG Report, DOE/IG-0889. Although OIG normally withholds a subject's name when publishing its reports, circumstances specific to this case caused OIG to release the subject's name in the report. Memorandum of Telephone Conversation between Geoffrey Gray, OIG, and Brooke DuBois, OHA (December 27, 2016). OIG agreed that since the subject's name is already publicly associated with this report, there is no longer a significant privacy interest that would be compromised by disclosing the subject's name in the released FOIA documents. *Id*. Therefore, we will remand this matter to OIG to release the subject's name where it appears in these documents.

Additionally, throughout the two documents, we found that OIG redacted every personal pronoun. We have previously stated that a pronoun which grammatically takes the place of the name of a person, but which does not name the person itself, is not personal information even when the name itself may be withheld. *See Eugene Maples*, OHA Case No. VFA-0258 (1997).[2] However, in

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

unusual and limited situations, when pronouns might describe with a degree of certainty some individual (for example, if there was only one woman in an office), the pronouns can be withheld. *Id*. We will remand this matter to OIG either to make a determination that this situation requires withholding personal pronouns or to release the information.

Similarly, throughout the documents we found several instances where some words that were redacted do not appear to be exempt under the FOIA. We must provide a requester with all non-exempt material, which may be reasonably segregated from withheld material unless it would pose an "inordinate burden" to do. *See* 10 C.F.R. § 1004.10(c). Thus, we find that the documents should be reviewed to ensure that all releasable information is segregated from the exempt material and provided to the Appellant as required by DOE regulations. *See* 10 C.F.R. § 1004.7(b)(3).

III. Conclusion

Based on the foregoing, we find that although most of OIG's redactions were appropriate under Exemptions 6 and 7(C), OIG may have incorrectly applied the exemptions to the subject's name and personal pronouns and failed to segregate some releasable information. Therefore, we are remanding this matter in accordance with our instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed on December 11, 2016, by Tim Hadley, Case No. FIA-16-0057, is hereby granted in part 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 Inspector General, which shall issue a new determination 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.

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