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

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| In the Matter of Joseph Schmidt | ) | |
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| Filing Date: June 24, 2019 | ) | Case No.: FIA-19-0019 |
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Issued: July 18, 2019

## Decision and Order

On June 24, 2019, Joseph Schmidt (Appellant) filed an Appeal from a determination issued to him by the Department of Energy's National Nuclear Security Administration (NNSA) on June 4, 2019 (Request No. FOIA 19-00196-M). In that determination, NNSA 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. Citing Exemption 6 of the FOIA, NNSA neither confirmed nor denied the existence or non-existence of any records responsive to the FOIA request. This Appeal, if granted, would require NNSA to acknowledge whether there are any records responsive to the request and, if so, either release those records or issue a new determination justifying the withholding of those records.

## I. Background

On May 2, 2019, the Appellant requested:

> "Any memos, reports, forms, emails, text messages, instant messages, typed or written notes, or other correspondence associated with NA-APM's handling of OIG Complaint NO. 18-0370-C regarding a manager's alleged violation of time and attendance rules and procedures. Managers involved include, but are not limited to: [Named Manager 1] and [Named Manager 2]."

Determination Letter from John E. Weckerle, Authorizing and Denying Official, NNSA to Joseph Schmidt (June 4, 2019).

On June 4, 2019, NNSA responded to the FOIA request stating that absent the consent or proof of death of the named managers or an overriding public interest, it "neither confirms nor denies the

existence or non-existence of any records described in [the] request" pursuant to Exemption 6 of the FOIA. *Id*. NNSA further stated that "an official denial or acknowledgement of an investigation or…investigatory/disciplinary records could reasonably be expected to constitute an unwarranted invasion of personal privacy" and that the "release [would] not reveal anything of significance to the public." *Id*.

On June 24, 2019, the Appellant appealed the determination, stating that "applying Exemption 6 as a blanket to cover any and all documents is inappropriate and constitutes a misuse of the exemption authority." Appeal Letter Email from Joseph Schmidt to OHA Filings (June 23, 2019). He also asserted that he previously received documents in response to a similar FOIA request and that one of the named managers has shared information about the review of the OIG complaint with him, therefore, there should be no issue with providing reasonable information in response to his FOIA request. *Id*.

## II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)-(9). However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(I)-(II).

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records exist would jeopardize the privacy interests that FOIA exemptions are designed to protect. In such cases, a response neither confirming nor denying the existence of responsive documents is appropriate. *See, e.g. Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983). Such a response has often been referred to as a *Glomar* response.[1] OHA has explained that a *Glomar* response is justified when the records sought, if they exist, would be exempt from disclosure under the FOIA and the confirmation of the existence of such records would itself reveal exempt information. *William H. Payne*, OHA Case No. VFA-0243 (1996).

In this matter, NNSA asserts that if any records responsive to this FOIA exist, the records would be exempt from disclosure under Exemption 6 of the FOIA. Therefore, to determine whether NNSA's *Glomar* response is appropriate, we must examine first whether responsive records would be exempt from disclosure under Exemption 6 of the FOIA, and, second, whether confirmation of the existence of such records itself would reveal information exempt under the FOIA.

[1] *Glomar* refers to the first instance in which a Federal court considered the adequacy of such a response. *See Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976) (raising the issue of whether the CIA could refuse to confirm or deny the existence of documents pertaining to Howard Hughes' submarine retrieval ship, the *Hughes Glomar Explorer*).

A. Exemption 6

Exemption 6 applies to "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). In order to determine the applicability of Exemption 6 to a record, an agency must first determine whether the record is a personnel, medical, or similar file and, if so, weigh the public interest in disclosure against the privacy interest of the person or persons identified in the record. *Washington Post Co. v. U.S. Dep't. of Health and Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982). Thus, Exemption 6 intends to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

"[T]he phrase, 'similar files' [] include[s] all information that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999). The records in this matter, if they exist, are clearly "similar files," as the requested records concern at least three particular individuals: the manager whose alleged violation of time and attendance rules and procedures is at issue in the OIG complaint and the two named managers who are involved in the matter. Having determined that the records would be "similar files" as required under Exemption 6, we must now undertake a three-step analysis to determine if the records can be withheld from disclosure under the exemption.

First, we must determine if a significant privacy interest would be compromised by the disclosure of the information. Absent 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). We agree with NNSA's assertion that individuals have a privacy interest in investigations and disciplinary records, and that the disclosure would constitute an unwarranted invasion of privacy. Courts have acknowledged that investigation subjects possess substantial privacy interests because they may suffer embarrassment and reputational harm if others learn that they are the target of a[n]…investigation. *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *see also Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 865 (D.C. Cir. 1981).

Since we have determined that a privacy interest exists, we must now consider 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). In this case, the Appellant asserts that he is concerned that NNSA failed to conduct a proper investigation into possible wrongdoing he reported and failed to report any wrongdoing it did uncover. Appeal at 1. As it relates to Exemption 6 and the FOIA, the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by the "right of the public to obtain the same information." *William H. Payne*, OHA Case No. VFA-0243 (1996). Because there is some public interest in the failure to investigate complaints and report wrongdoing, we must balance that public interest against the aforementioned privacy interest. *See NARFE*, 879 F.2d at 874; *Reporters Comm*., 489 U.S. at 762. In this case, because there is a substantial privacy interest associated with an investigation into wrongdoing, we find that whatever public interest exists would not outweigh the privacy interest of the target of the investigation or those individuals otherwise involved in the investigation. Accordingly, if such records existed, these records could be withheld under Exemption 6.

B. *Glomar* Response

Having established that any responsive records, if they existed, would be exempt from disclosure under Exemption 6 of the FOIA, we must now determine whether confirmation of the existence of such records itself would reveal exempt information. In this case, we find that NNSA appropriately provided a *Glomar* response to this request. Were NNSA to admit the existence of the records, but withhold them under Exemption 6, it would have revealed that the manager who is the subject of the allegations in the OIG complaint was either being investigated or had been investigated and whether the named managers were involved in that investigation. This would clearly compromise their substantial privacy interest in not being associated with an investigation into misconduct.

In his Appeal, the Appellant argues that he filed a similar FOIA request with the DOE Office of the Inspector General (OIG), which provided documents related to the same OIG complaint, using Exemption 6 and 7(c) to redact some information, instead of issuing a blanket denial. Appeal at 1-2. A review of the DOE OIG FOIA request reveals that although both FOIA requests reference the same OIG complaint, the requests are not identical. In the DOE OIG request, the Appellant asks for "documents relating to [his] OIG complaint." Interim Determination Letter (HQ-2019-00159-F) from Alexander C. Morris, FOIA Officer, Office of Public Information, to Joseph Schmidt (November 9, 2018). The responsive records were documents from or to the Appellant or form documents outlining the Appellant's allegations, except for one document, which was a memorandum referring the complaint to NNSA. Determination Letter (HQ-2019-00159-F) from Dustin R. Wright, Assistant Inspector General for Investigations, OIG, to Joseph Schmidt (March 7, 2019). The DOE OIG request related directly to information stemming from the Appellant's OIG complaint, which differs from the NNSA request, which sought records relating to the handling of the OIG Complaint, specifically referencing the manager against whom the allegations were made and two other named managers. Nothing released in response to the DOE OIG request confirms that the managers referenced in the NNSA request are under investigation or participating in an investigation and therefore, their privacy interests are not compromised by the release of those records.

The Individual additionally alleges that one of the named managers has discussed the review of the OIG complaint with him, stating that this acknowledgement entitles him to access to information with any necessary redactions. Appeal at 2. Courts have previously found that an agency waives its right to issue a *Glomar* response when it has officially acknowledged the existence or nonexistence of any records responsive to the FOIA request, since that is what a *Glomar* response is supposed to protect. *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013); *see also Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007). In this case, however, emails and phone calls between the Appellant and the named manager would not constitute an "official acknowledgment" of records responsive to the FOIA request and does not prevent NNSA from issuing a *Glomar* response in this matter.

## III. Conclusion

Based on the foregoing, we find that NNSA appropriately issued a *Glomar* response because any records, if they exist, could be withheld under Exemption 6 of the FOIA, and the confirmation that any such records exist itself would reveal information exempt under the same section of the FOIA.

It is therefore ordered that the Appeal filed on June 24, 2019, by Joseph Schmidt, Case No. FIA-19-0019, is hereby denied.

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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