United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Josh Kelety	)		
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Filing Date: December 23, 2019	)	Case No.:	FIA-20-0015
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Issued: January 17, 2020

Decision and Order

On December 23, 2019, Josh Kelety (Appellant) appealed a Determination Letter issued to him from the Department of Energy's (DOE) Richland Operations Office (ROO) regarding Request No. FOI 2020-00252. In that determination, ROO 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, ROO neither confirmed nor denied the existence of any records responsive to the FOIA request. In this Decision, we deny the appeal.

I. BACKGROUND

On December 4, 2019, DOE received the Appellant's request for the following records:

> Any and all records associated with any and all internal investigations into alleged … misconduct committed by [a named person (Individual)], a former member of the Department of Energy special response security team for the Hanford Nuclear Reservation in Benton County, Washington. Please include any full investigative reports (e.g., interviews and report findings) as well as any complaints or notifications of potential misconduct filed by the Individual's supervisors, subordinates, or people not employed by the Department of Energy.[1]

Determination Letter at 1 (December 12, 2019).

On December 12, 2019, ROO responded to the FOIA request, stating that, absent the consent of the Individual, it can "neither confirm nor deny the existence of records responsive to [the] request" pursuant to Exemption 6 of the FOIA. *Id*. ROO further explained that "[w]ithout consent from [the Individual], even to acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." *Id*.

[1] Due to the sensitive nature of the privacy interests this FOIA request involves, the name of the subject of the request has been anonymized.

On December 23, 2019, the Appellant appealed the determination, asserting that the public interest value of any responsive records significantly outweighs the Individual's privacy interests. Appeal at 1 (December 23, 2019). In support of his assertion, the Appellant stated that the Individual, who is a former DOE Contractor employee, is currently facing a charge of assault while acting in his official capacity as an officer with a local police department. *Id.* The Appellant further stated that, according to a preliminary law enforcement investigation, the Individual developed personal relationships with female victims by using his position as a police officer. *Id*. The Appellant argues that if the Individual's personnel files show that he had a history of misconduct while employed at a DOE facility, it is in the public's interest to know about this past misconduct. *Id.* The Appellant also contends that if such DOE personnel files do exist, then it is in the public's interest to know why their local police department either ignored the Individual's record of past misconduct or failed to obtain this information as part of the Individual's pre-hire vetting process. Appeal at 1–2. ROO submitted a response to the Appeal, asserting that the confirmation of the existence of the records would itself reveal that the Individual was involved in misconduct and would reveal personal privacy information that is protected by Exemption 6 of the FOIA. Response from ROO at 1–2 (January 2, 2020).

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 Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B). The FOIA also requires agencies 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 that, in the context of some FOIA requests, even acknowledging certain records' existence would jeopardize the interests that FOIA exemptions are designed to protect. In such cases, a response neither confirming nor denying the existence of responsive documents is appropriate. *Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983); *See also People for the Ethical Treatment of Animals v. NIH, HHS*, 745 F.3d 535(D.C. Cir. 2014). Such a response is commonly referred to as a "Glomar" response.[2] 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, ROO 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 ROO's

[2] *Glomar* refers to a case 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*).

Glomar response is appropriate, we must examine first whether responsive records, if they exist, 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.

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 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). At issue in this request are records of internal investigations and complaints or notifications of potential misconduct filed by the Individual's supervisors, subordinates, or people not employed by the Department of Energy. Determination Letter at 1. Since records that concern internal investigations and documentation of employee discipline are usually part of an employee's personnel file, the requested records, if they exist, would be considered personnel files for purposes of Exemption 6.

Having determined that any responsive records that may exist are of a type covered by Exemption 6, an agency must perform a three-step analysis to determine whether their release would constitute an unwarranted invasion of privacy. 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) (*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.

Having determined that the records, if they exist, would be contained in the Individual's personnel file as required under Exemption 6, we now undertake the three-step analysis discussed above 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). "A substantial privacy interest is anything greater than a *de minimis* privacy interest." *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (2008) (citing *Nat'l Ass'n of Retired Fed. Employees v. Horner* 879 F.2d at 874) (emphasis in original). Private information "includes the prosaic (*e.g.*, place of birth and date of marriage) as well as the intimate and potentially embarrassing." *Painting & Drywall Work Preservation Fund v. Department of Housing & Urban Dev.*, 936 F.2d 1300, 1302 (1991). Here, the records, if they exist, are of a sensitive nature and include information that is potentially

embarrassing because they pertain to the investigation of alleged misconduct. Accordingly, disclosure of the records sought in question would compromise a significant privacy interest.

Having determined that a privacy interest exists, we now consider the second step of the analysis and determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *See Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d at 874; *United Status DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Courts consider two factors in evaluating whether there is a public interest in disclosure. The first factor is "whether 'the public interest sought to be advanced is a significant one'—one 'more specific than having the information for its own sake.'" *Cameranesi v. United States DOD*, 856 F.3d 626, 639 (9th Cir. 2017); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (*Favish*). The second factor is "whether the requested information 'is likely to advance that interest.'" *Cameranesi*, 856 F.3d at 639; *Favish*, 541 U.S. at 172. Here, the Appeal asserts a stated public interest of shedding light on the activities at the Department of Energy. Appeal at 1. If the information sought in the request "sheds light on an agency's performance of its statutory duties," then it would benefit the general public. (See *Reporters Committee*, 489 U.S. at 773). In the instant case, the general public would have a viable interest in knowing whether DOE is maintaining public safety standards at its sites by undertaking necessary investigatory and disciplinary actions regarding alleged misconduct. Because there is a FOIA public interest in disclosure of the requested records, we must balance that public interest against the aforementioned privacy interest. *See Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d at 874; *Reporters Comm.*, 489 U.S. at 762.

Since there is both a significant privacy interest in nondisclosure and a FOIA public interest in disclosure of the requested information, we must balance those competing interests to determine whether the public interest in disclosure outweighs the privacy interests against disclosure. *News-Press v. United States Dep't of Homeland Sec.*, 489 F.3d 1173 (2007); *See Washington Post Co.*, 690 F.2d at 262. Case law has held that "where the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, then the requester must establish more than a bare suspicion in order to overcome the presumption of legitimacy accorded to official conduct." *Cameranesi*, 856 F.3d at 640; *Favish*, 541 U.S. at 174. Specifically, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Cameranesi*, 856 F.3d at 640; *Favish*, 541 U.S. at 174.

In this case, there is a significant public interest in knowing whether the DOE is maintaining public safety standards at DOE sites by conducting necessary investigations into alleged misconduct by DOE employees and DOE contractor-employees. However, the requester has not produced sufficient evidence that would warrant a belief by a reasonable person that the DOE might have engaged in Government impropriety. The requester stated that the Individual is currently facing a criminal charge which allegedly occurred while he was acting in an official capacity as an officer with a local police department. Appeal at 1. However, these allegations are not related to his previous position as a former DOE contractor. In fact, the requester produced no evidence that the Individual engaged in misconduct while working as a DOE contractor employee or DOE employee, nor has the requester produced any evidence that the DOE engaged in impropriety. Accordingly, the requester did not establish a reasonable belief that Government impropriety by the DOE might

have occurred. Accordingly, we find that whatever public interest exists would not outweigh the privacy interest of the alleged target of the investigation. Therefore, if such records exist, these records could be withheld under Exemption 6.

B. *Glomar* Response

Having established that any responsive records, if they exist, 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. Courts have upheld *Glomar* responses to requests seeking records which might reveal that an individual government employee was investigated for misconduct or received a disciplinary action, because "even acknowledging the existence of misconduct or disciplinary records here would cause an unwarranted invasion of personal privacy." *Lewis v. DOJ*, 733 F.Supp.2d 97, 112 (D.D.C. 2010); *Smith v. FBI*, 663 F. Supp. 2d 1, 5 (D.D.C. 2009); *See Beck v. DOJ*, 997 F.2d 1489 (D.C. Cir. 1993) (affirming Glomar response for request for records concerning misconduct by two DEA agents).

In the present case, the FOIA request was for any and all records including investigative reports on the Individual that involve alleged misconduct. Were ROO to admit the existence of records, but withhold them under Exemption 6, it would have revealed that the Individual's employment records contain disciplinary action for misconduct. This would clearly compromise the Individual's substantial privacy interest in not having it known whether his employment records contain or do not contain disciplinary action for misconduct. Moreover, were ROO to admit the existence of any adverse action or disciplinary reports on the Individual, this disclosure would necessarily reveal information from the Individual's personnel file, the disclosure of which would constitute a clearly unwarranted invasion of privacy which is protected by Exemption 6. Accordingly, we find that ROO's *Glomar* response in this case was proper.

III. CONCLUSION

Based on the foregoing, we find that ROO 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 would, itself, reveal information exempt under the same section of the FOIA.

IV. ORDER

It is hereby ordered that the Appeal filed on December 23, 2019, by Josh Kelety, No. FIA-20-0015, is 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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