

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

In the Matter of Charles Robbins)		
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Filing Date: June 25, 2021)	Case No.:	FIA-21-0012
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_____)		

Issued: July 20, 2021

Decision and Order

On June 25, 2021, Charles Robbins (“Appellant”) appealed a determination letter issued by the Department of Energy’s (DOE) Office of Inspector General (OIG) (FOIA Request No. HQ-2020-00411-F). In that determination letter, OIG responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought records regarding email and correspondence pertaining to himself, and email correspondence related to reasonable accommodation that involved certain OIG personnel. FOIA Request from Charles Robbins at 1–2 (January 24, 2020). OIG withheld portions of responsive records pursuant to FOIA Exemption 6, and the Appellant challenged the decision. As explained below, we deny in part and remand in part this Appeal.

I. Background

On January 24, 2020, the Appellant submitted a FOIA request seeking the following information generated or maintained by the DOE-OIG, Office of Management and Administration, and/or Office of Human Resources for the period from October 28, 2019, through January 24, 2020:

Any and all email and correspondence generated or received containing the name Charles Robbins, Charlie Robbins, Charlie or Charles as it applies to Charles Robbins; [a]ll records obtained, updated, or adjusted that contain the name Charles Robbins, [or] Charlie Robbins, ...and [a]ll memorandum or forms generated as required by law to memorialize verbal communication by senior officials...containing the name Charles Robbins [or], Charlie Robbins,... as it applies to Charles Robbins.

FOIA Request from Charles Robbins (January 24, 2020).

The Appellant also requested all email correspondence related to reasonable accommodation generated or received by the following DOE OIG personnel:

John Dupuy, Deputy Inspector General; Jennifer Quinones, Assistant Inspector General; Jack Rouch, Deputy Assistant Inspector General; Earl Omer, Chief of

Staff; Edith Ramos, Supervisory Human Resources Specialist; and Virginia Grebasch, Counsel to the Inspector General.

Id. at 2.

On April 6, 2021, OIG issued a determination letter in which it identified 76 responsive documents. Determination Letter at 2 (April 6, 2021). OIG released Documents 1 through 63, which were partially redacted pursuant to Exemption 6, and it released Document 64 in its entirety. *Id.* OIG also stated that it had redacted certain information from some of the yet unreleased Documents 65 through 76, and it had referred these documents to the Office of Science (OS) for a determination regarding their releasability.¹ *Id.*

In the redacted documents, OIG withheld the names of various individuals on its staff. In its Determination Letter, OIG concluded that the public interest in the identity of the individuals whose names had been withheld does not outweigh the individuals' privacy interests. Determination Letter at 2. OIG identified those privacy interests as the interest in "being free from intrusions into their professional and private lives." *Id.*

On June 25, 2021, DOE's Office of Hearing and Appeals (OHA) received Appellant's appeal. The Appellant alleged that OIG misapplied Exemption 6 to withhold otherwise releasable information. Appeal at 1 (June 25, 2021). In support of his Appeal regarding Exemption 6, the Appellant asserts that, while OIG redacted the names of eight employees in some of the responsive documents that he received, it simultaneously released the names of those eight employees in other responsive documents. Appeal at 1. The Appellant further asserts that the DOE OIG's public website includes the names and position titles of seven OIG management personnel. *Id.* In addition, the Appellant states that in OIG's Determination Letter, it listed the names of the six OIG personnel that the Appellant had listed in his FOIA request. Appeal at 1–2; Determination Letter at 1–2; *see* FOIA Request from Charles Robbins at 2. He asserts that the Determination Letter was "open for public dissemination" and lacked markings indicating that it contained sensitive information. Appeal at 1–2. Finally, the Appellant contends that pursuant to 5 CFR § 293.311, the names of Federal employees are available to the public except in certain job descriptions, and he asserts that those job descriptions are not included within the redacted, responsive documents. Appeal at 2.²

OIG submitted a response to the Appeal. OIG Response at Attachment 1 by OIG Counsel (July 7, 2021). In its response, OIG asserted that 5 CFR § 293.311 does not preclude OIG's redactions of employee names because case precedent establishes that federal employees, including those in sensitive agencies, have an enhanced privacy interest in their identities, and when weighed against

¹ A representative of the DOE Office of Hearings and Appeals (OHA) obtained information from the FOIA Liaison at the DOE Office of Public Information (OPI) regarding the status of the remaining documents. E-mail from OPI to OHA (June 25, 2021). OPI stated that it had received the remaining documents and that it was reviewing them in preparation for an upcoming determination. *Id.*

² One argument the Appellant asserted in his Appeal concerned "the withholding of transcripts of phone calls and meetings with senior management as required by law." *Id.* However, OIG confirmed that "[t]he search [for responsive documents] did not reveal any transcripts from phone calls or meetings." E-mail from OIG to OHA at 1 (July 7, 2021). Since OIG subsequently confirmed that the search did not reveal any transcripts from phone calls or meetings, we need not consider this argument to resolve this Appeal.

the minimal to nonexistent public interest of disclosure in this case, their privacy interests tip the balance in favor of proper withholding under Exemption 6. OIG further argued that because it released the names of individuals at the GS-15 level or above at the time the records were created, any public interest in providing the names of comparatively lower-level employees is diminished. OIG Response at Attachment 1 by OIG Counsel; Email from GIS at OIG to OHA at 1 (July 15, 2021).

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).

A. Exemption 6

Exemption 6 shields from disclosure “[p]ersonnel 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); 10 C.F.R. § 1004.10(b)(6). As a threshold matter, the record must be personnel, medical, or other similar files. *Id.* After it is determined that the information falls into one of those categories, the agency must determine whether the record may be withheld based on an application of a three-part test. *Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 2–3 (3rd Cir. 1984). In applying this test, the agency must first determine whether the disclosure of the record would compromise a significant privacy interest. *Id.* at 2–3. If no such privacy interest exists, then the agency may not withhold the record based on this exemption. *Id.* If the agency determines that a privacy interest does exist in the record, the agency must then decide if the release of the record would serve the interest of the public by shedding “light on an agency’s performance of its statutory duties” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The agency must then determine whether “the potential harm to privacy interests from disclosure [would] outweigh the public interest in disclosure of the requested information” *Ripskis*, 746 F.2d at 3.

The first question is whether the released records are “personnel and medical files [or] similar files.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The term “similar files” was intended by Congress to be interpreted broadly, to include all information that “applies to a particular individual.” *U.S. Dep’t of State v. Wash. Post. Co.* 456 U.S. 595, 602 (1982). In the instant case, the information withheld by OIG qualifies as similar files because it is composed of the specific names of individual employees, and these names apply to particular individuals.

Regarding the next step of the analysis, whether the disclosure of the record would compromise a significant privacy interest, the D.C. Circuit has held that the names of federal employees may qualify for protection as long as there is a “palpable threat to privacy.” *Long v. Immigr. & Customs Enf’t*, 279 F. Supp. 3d 226, 243 (D.D.C. 2017) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152–53 (D.C. Cir. 2006)). The Appellant argues that OIG’s Exemption 6 redactions were improper because disclosure was required under 5 C.F.R. § 293.311. Section 293.311(a) of the Code of

Federal Regulations refers to information “from both the [Official Personnel Folder] OPF and employee performance file system folders...and from other personnel record files... and which are under the control of the Office [Office of Personnel Management].” The regulation identifies six enumerated items of information “about most present and former Federal employees [which] is available to the public” including a federal employee’s “[n]ame; past and present position titles...past and present duty stations...” 5 C.F.R. § 293.311(a). However, the very next subsection of the regulation states, in relevant part, that “an agency will generally not disclose [employee] information [that] [w]ould otherwise be protected from mandatory disclosure under an exemption of the FOIA.” 5 C.F.R. § 293.311(b)(2). 5 C.F.R. § 293.311(b); *see Sai v. Transp. Sec. Admin.*, 315 F. Supp. 3d 218, 260 (D.D.C. 2018) (“The relevant regulation accordingly, by its own terms, does not disarm an otherwise available FOIA exemption.”). Thus, the regulation does not preclude OIG’s redactions of employee names and contact information if OIG’s withholding of this information was proper under Exemption 6.

As recognized by case law, there are numerous instances where release of the names of federal employees would not be appropriate. In *Long v. Office of Pers. Mgmt.*, 692 F. 3d 185, 192 (2d Cir. 2012), the Second Circuit found that “federal employees in both the sensitive agencies and the sensitive occupations have a cognizable privacy interest in keeping their names from being disclosed wholesale.” The OIG contends that for purposes of the FOIA, the OIG should be considered a sensitive agency. OIG Response at Attachment 1 (July 7, 2021). Courts have found that “An Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA.” *Ortiz v. U.S. Dep’t of Health and Human Services*, 70 F.3d 729, 732–33 (2d Cir. 1995); *see Brant Construction Co.*, 778 F.2d 1258, 1265. While these cases involve Exemption 7, it is significant that the D.C. District Court has found that FOIA protections for law enforcement personnel extend outside of the investigative context and can be properly held under Exemption 6. In *Henderson v. U.S. Dep’t of Justice*, 157 F.Supp.3d 42 (D.D.C. 2016), the court found that the redacted records at issue did not fall within the scope of Exemption 7 because they were not compiled for law enforcement purposes. *Id.* at 50. However, under Exemption 6, the court found that although the argument that disclosure of third-party information, including employee names, was “less compelling in this instance because the relevant records were not compiled for law enforcement purposes, it is apparent that the third parties’ privacy interest is greater than *de minimis*.” *Id.*

OIG asserts that all OIG personnel, either directly or indirectly, support audits, inspections, and investigations of Departmental personnel, contractors, and grantees. OIG Response at Attachment 1 by OIG Counsel. Given these duties of OIG personnel, and case precedent regarding sensitive agencies and sensitive occupations, we conclude that OIG personnel have an enhanced privacy interest in their identities. This significant privacy interest would be compromised by the disclosure of the withheld identities of OIG personnel in the responsive documents. The protection afforded to OIG employees would be similar to the protection that courts have afforded to the names of Internal Revenue Service (IRS) employees. In *George v. Internal Revenue Serv.*, No. C05-0955 MJJ, 2007 U.S. Dist. LEXIS 36525, at *31 (N.D. Cal. May 14, 2007), pursuant to Exemption 6, the IRS withheld information from case history notes, including the names of IRS employees who were assigned to the plaintiff’s case. The court found that IRS employees have a strong right to privacy in order to fulfill their obligations without fear that taxpayers will attempt to harass or contact employees directly” *George*, 2007 U.S. Dist. LEXIS 36525, at *32; *see also Solers, Inc. v. Internal Revenue Serv.*, 827 F.3d 323, 333 (4th Cir. 2016). In the instant case,

the public release of the identities of OIG employees could have a similar effect where companies and persons under criminal, civil, or administrative scrutiny may reach out to individual employees rather than following the proper process.

Second, there is minimal public interest, if any, in revealing the names of the OIG employees in the responsive documents. The Appellant has not asserted any public interest in knowing the employees' names. As established above, the OIG personnel in the instant case have a legitimate privacy interest. Accordingly, their privacy interests outweighs the non-existent public interest in the exposure of their identities. *See Long v. Immigr. & Customs Enf't*, 279 F. Supp. 3d 226, 244 (D.D.C. 2017) ("In the face of a legitimate privacy interest in nondisclosure and the absence of any countervailing public interest in disclosure, the court concludes Defendant properly withheld the federal employees' names and contact information.").

Furthermore, the situation involving OIG personnel is similar to the employees in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 405 F.Supp.3d 127, 144–45 (D.D.C., 2019). In that case, *Center for Biological Diversity*, the agency, pursuant to Exemption 6, redacted names of low-level employees from responsive documents which largely consisted of internal emails between the agency's offices. *Id.* at 143–44. The court noted that because the agency had released the names of higher-ranking agency officials to the plaintiffs, the public interest in obtaining identifying information of low-level employees was diminished. *Id.* at 144–45. "The Court finds that...the lower-level employees' interest in avoiding harassment outweighs the interest of public disclosure which is moderated by the release of names of higher-ranking agency personnel." *Id.* at 145. In the instant case, OIG has already released the identities of employees who were at the GS-15 level or above at the time the records were created. Email from OIG to OHA at 1 (July 15, 2021). Since OIG already revealed the names of the senior decision-makers in the responsive documents, any public interest in the names of comparatively lower-level OIG employees who had peripheral roles in the matter is diminished. Accordingly, we conclude that OIG properly invoked Exemption 6 as to the names of the lower-level OIG employees in the responsive documents, and we deny this portion of the appeal.

1. Waiver and Inadvertent Disclosures

The Appellant also asserts that some of the employees whose names OIG redacted in the responsive documents pursuant to Exemption 6, were also disclosed in other parts of the same responsive documents.³ However, courts have generally found that an inadvertent disclosure does not result in a waiver of FOIA exemptions. *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (ruling that inconsistent redactions of names of confidential sources does not waive government's ability to invoke Exemption 7(D)); *Ford v. West*, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (rejecting claim that defendant's inadvertent release of names constituted waiver). Accordingly, to the extent that there are inconsistencies in some of OIG's redactions, we find that inadvertent disclosures do not waive OIG's ability to invoke Exemption 6 as to the redacted names in the responsive documents.

The Appellant further asserts that OIG's Determination Letter listed the names of the six OIG personnel that the Appellant had listed in his FOIA request, and by doing so, OIG made a public disclosure which waives OIG's ability to invoke Exemption 6 for those six OIG employees.

³ The Appellant did not provide any examples to support his assertion. OHA examined a sample of the responsive documents for inconsistent redactions and found a few inconsistent redactions. *See Documents 7, 9, 10, and 18.*

However, OIG's Determination Letter only contains the six names of OIG personnel because the Determination Letter copied the original FOIA request verbatim in order to restate the information which the FOIA request sought. The D.C. Circuit has held that a plaintiff must establish three elements to prove an official public disclosure has occurred. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).⁴ One of those elements is that the information must "match the information previously disclosed." *Fitzgibbon*, 911 F.2d 755, 765 (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)). In the instant case, the information in the Determination Letter does not match the information in the responsive documents. The responsive documents that were redacted consisted of email messages. Each email concerns a different piece of information. Because the Appellant did not establish this element, we need not decide whether the other two elements have been met. By failing to satisfy the element requiring that the information must match the previously disclosed information, the Appellant has not established that an official public disclosure has occurred.

2. Unresolved Inconsistency

The Appellant further contends that the OIG's public website includes the names and position titles of seven OIG management personnel. He indicates that OIG has waived its ability to invoke Exemption 6 as to these OIG management personnel. The OIG stated that it has disclosed the identities of OIG personnel in positions of GS-15 or higher in the documents in question. Therefore, to the extent that the responsive documents contained the management names identified by the Appellant, those names were released to him. However, there is one unresolved inconsistency involving one management SES level employee (Employee X).

A review of the responsive documents reflects that OIG withheld the name of Employee X pursuant to Exemption 6. A Government Information Specialist (GIS) at OIG confirmed that in its responsive documents, OIG had redacted the names and contact information of federal employees in positions of GS-15 and below. E-mail from OIG to OHA at 1 (June 30, 2021). A representative of OHA contacted the OIG GIS to obtain additional information concerning the reason OIG withheld the name of Employee X when that person is listed as an SES level employee on the DOE OIG public website. The GIS explained that OIG redacted Employee X's name from the responsive documents because, at the time that the responsive records were created, Employee X was a GS-15 employee. Memorandum of Telephone Conversation between GIS (OIG) and OHA (July 14, 2021). However, an updated email from the GIS and OIG Counsel stated that the DOE OIG *released* the identities of employees who were at the GS-15 level at the time the records were created. Email from GIS at OIG to OHA at 1 (July 15, 2021). Thus, there is an unresolved inconsistency in OIG's rationale for withholding the name of Employee X. Due to this unresolved inconsistency, we are unable to determine whether OIG's redaction of Employee X's identity was proper. Therefore, we will remand the matter to OIG to further evaluate its basis for withholding Employee X's name and to either release the name or provide another determination explaining its reasons for withholding the name.

⁴ "First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed Third, we held that the information requested must already have been made public through an official and documented disclosure." *Fitzgibbon*, 911 F.2d 755, 765 (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)).

III. Order

It is hereby ordered that the appeal filed on June 25, 2021, by Charles Robbins, Case No. FIA-21-0012, is remanded in part and denied in all other respects. This matter is hereby referred to the Department of Energy's (DOE) Office of Inspector General (OIG), which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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.

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 the right to pursue litigation. OGIS may be contacted in any of the following ways:

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