United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Lorenzo Venneri	)		
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Filing Date: March 18, 2022	)	Case No.:	FIA-22-0011
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	)		

Issued: April 6, 2022

Decision and Order

On March 18, 2022, Lorenzo Venneri (Appellant) appealed a Determination Letter issued to him by the Department of Energy's (DOE) Idaho Operations Office (ID) regarding Request No. ID-2021-00601-F. In that determination, ID 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. ID withheld responsive documents pursuant to FOIA Exemptions (b)(3) and (b)(6). The Appellant challenged the decision to withhold information pursuant to both exemptions. In this Decision, we deny the appeal.

I. Procedural Background

On February 17, 2021, Appellant filed a FOIA request with DOE seeking records relating to Funding Opportunity Announcement DE-FOA-0002271 ("FOA") that concerned:

> DOE's evaluation of proposals including: scoring, evaluations, and ranking of all submitted proposals under Merit Review Criteria, Federal Merit Review, and Selection/Other Program Factors as described in Section 6.2 and 6.3 of the FOA; the signed Conflict of Interest/Non-Disclosure Agreements and qualification records for all Subject Matter Experts that took part in the Merit Review Panel described in section 6.2.1 of the FOA; the signed Conflict of Interest/Non-Disclosure Agreements for all federal and non-federal Subject Matter Experts that took part in the "Federal Merit Review Panel" described in section 6.2.1.

In processing the request, ID consulted the contracting officer who had worked with the FOA. The contracting officer informed ID's FOIA office that scoring, evaluations, and ranking of proposals were "source selection information," a category of information prohibited from disclosure by the Procurement Integrity Act (the PIA). She also stated that the identities and qualification records for subject matter experts that participate in review panels were source selection information, too. Based on that reasoning, she stated that there were no releasable records responsive to Appellant's request. ID sent Appellant a Determination Letter that provided a link to publicly available information for the FAO at issue and informed him that the requested records were source selection information and would be withheld under FOIA Exemption 3. The letter also asserted that the information sought was pre-decisional and deliberative.

Appellant timely appealed the Determination Letter, arguing that Exemption 3 had been improperly applied. OHA agreed, in part, finding that the qualification records and Conflict of Interest and Non-disclosure agreements did not meet the criteria of any of the enumerated and exhaustive PIA categories that would prohibit disclosure. *Lorenzo Venneri*, OHA Case No. FIA-21-0008 at 3 (2012). OHA denied the appeal as to the remaining requested records because they fell under any PIA category that would prohibit release pursuant to Exemption 3 of the FOIA. *Id.* The matter was remanded to ID for further processing.

On March 17, 2022, ID sent Appellant a new Determination Letter, which again stated that the responsive records that remained at issue would be withheld under Exemption 3, pursuant to the PIA, 41 U.S.C. 2101(7)(J), a category for certain source selection information designated by the agency. In the intervening months, the contracting officer had reviewed the qualification records and Conflict of Interest and Non-disclosure agreements, marked them as "source-selection information," and determined that their release would jeopardize the integrity of DOE's procurement process by breaking the confidentiality that allowed panel members to participate in an unbiased manner. ID also determined that, even if the information could be released, Exemption 3 notwithstanding, the names of the subject matter experts would be exempt from disclosure under Exemption 6, citing the privacy interests of the individuals and the public's interest in protecting the procurement process from undue influence due to actual or perceived threat of professional consequences stemming from their procurement selection.

Appellant timely appealed, making two primary arguments. First, he argues that the spirit of the FOIA indicates that because "Section J provides infinite wiggle room to deny any and all information requests, […] any exemptions under 41 U.S.C. §2101(7)(J) must be carefully scrutinized and rejected unless absolutely bullet proof." Appeal at 1. He further argues that Section J determinations "should only be used if the Contracting Officer has explicitly made and approved a formal FOIA exemption list prior to the [FOA] and included it in the original FOA." *Id.* He states that public scrutiny of the subject matter experts' identities would improve, rather than jeopardize, the integrity of DOE's procurement process because the public would provide accountability. *Id.* at 2. He summarizes his argument by stating that ID's Section J determination "can therefore be questioned and ultimately rejected as it was made after the fact, without original intention, and lacking sufficient exemption merit." *Id.* at 1–2.

Second, Appellant argues that ID improperly balanced the subject matter experts' privacy interests against the public's interest in "shedding light on government activities." Appeal at 2. He argues that names are not privacy information because they do not reveal an individual's location or personal data. *Id.* He rejects the idea that the release of the subject matter experts' names could result in professional consequences because their ultimate selections would not be disclosed and, therefore, concludes that the subject matter experts' privacy interest in their names is "small or negligible." *Id.* He further argues that the same information could be obtained by simply asking for a list of reviewers hired during a set period of time and reasons that "[i]f the same information can be obtained by simply changing the request, then the information should be released under all similarly directed requests." *Id.* Appellant points out that some contracting procedures at other agencies make reviewers' names and qualifications public as a matter of course. *Id.* at 2–3. Finally, he argues that the public has a strong public interest in scrutinizing the subject matter experts who

make relevant procurement selections, as well as their qualifications and demographic representation, because the public will have to deal with the outcomes of new nuclear technology, and that millions of lives could be affected. Appeal at 3.

Appellant also questions ID's "commitment to open government and selection process accountability" because of its refusal to release even redacted copies of the Conflict of Interest and Non-disclosure agreements. Appeal at 3. He also notes that ID repeatedly missed the FOIA's statutory deadlines. *Id.* He closes his appeal with the statement, "[t]his office is clearly closed to the public." *Id.*

ID submitted a statement explaining that the Conflict of Interest and Non-Disclosure agreements could be redacted to exclude information that could compromise individuals' privacy. DOE Exhibit 1. ID also confirmed that the agreement templates are available to the public at https://www.energy.gov/sites/default/files/2017/04/f34/ATTACHMENT%202%20Sample%20COI%20Apr017.pdf. DOE Exhibit 2. The publicly available templates ask that some or all of the following information be filled in by the signer:[1] name, FAO number, laboratory contract number, dated signature, organization and/or title, phone number, and email.

II. Analysis

A. Exemption 3

FOIA exemption 3 allows agencies to withhold information which a statute unequivocally and specifically exempts from disclosure. 5 U.S.C. § 552(b)(3). The information must be specifically identified by the statute as exempt from disclosure. *Id.* Furthermore, the statute must exempt the information in a nondiscretionary manner, delineate specific criteria for determining whether the information must be exempt from disclosure, or refer to particular types of information to be withheld. *Id.* As such, we first determine whether the statute at issue creates an exemption from disclosure within the meaning of Exemption 3, and if so, we then determine whether the requested records fall within the law's protection. *CIA v. Sims*, 471 U.S. 159, 167 (1985).

The PIA prohibits the disclosure of source selection information created before the award of a federal contract.[2] 41 U.S.C. § 2102; *Am. Small Bus. League v. DOD*, 372 F. Supp. 3d 1018, 1025 (N.D. Cal. 2019). The statute defines source selection information as:

> [A]ny of the following information prepared for use by a Federal agency to evaluate a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly:

[1] Which form is used depends on whether the panel member is a federal employee, a DOE Contractor employee, or a member of the public.

[2] Because the PIA was enacted prior to 2009, Exemption 3 does not require that it specifically mention 5 U.S.C. § 552(b)(3) to fall under its purview.

> (A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.
>
> (B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.
>
> (C) Source selection plans.
>
> (D) Technical evaluation plans.
>
> (E) Technical evaluations of proposals.
>
> (F) Cost or price evaluations of proposals.
>
> (G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
>
> (H) Rankings of bids, proposals, or competitors.
>
> (I) Reports and evaluations of source selection panels, boards, or advisory councils.
>
> (J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, the head's designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

41 U.S.C. § 2101(7). The statute categorically prohibits the disclosure of certain information and leaves no room for discretion. While subsection J of the definition of source selection information does allow some discretion in categorizing information, it delineates criteria to determine inclusion, as well as particular types of information to be included, and once information is categorized as such, there is no discretion to allow its disclosure. Federal courts and the OHA have previously held that the PIA, and specifically subsection J, is a withholding statute under Exemption 3. *Legal & Safety Emplr. Research Inc. v. United States Dep't of the Army*, 2001 U.S. Dist. LEXIS 26278, at *10 (E.D. Cal. May 4, 2001); *In the Matter of Nuclear Watch New Mexico*, OHA Case No. TFA-0390 at 4–5 (2010). I agree and find that the PIA's prohibition on the disclosure of source selection information is a statutory exemption from disclosure within the meaning of Exemption 3.[3]

The only records at issue in this appeal are "the signed Conflict of Interest/Non-Disclosure Agreements and qualification records" described in the original request. These records do not fall within the specifically enumerated categories—subsections (A) through (I) of § 2101(7)—of the PIA. The last time this case was before OHA, these records did not fall under subsection (J) either, however, on remand, they were marked as source selection information by the contracting officer. ID stated that the contracting officer marked them as such because he determined that their disclosure would jeopardize the integrity of ID's procurement process: "The confidentiality of the subject matter experts' participation on the panel is essential to ensure that the reports they provide

[3] The statutory language that is now codified at 41 U.S.C. § 2102(a) was enacted in 1996, Pub. L. 104-106, and originally codified at 41 U.S.C. § 423. Therefore, the provision is not subject to the 2009 requirement that a statute's exemptions from disclosure explicitly refer to FOIA Exemption 3 to be withheld under that exemption.

are not influenced by the potential for either positive or negative professional consequences to the individual based on which proposal is selected." Determination Letter 2 at 2.

ID has permissibly construed subsection (J) to protect identifying information about Merit Review Panel members. It is reasonable to assume that disclosing panel members' identities would subject them to pressure from various interested parties, including displeased bidders who were not selected. Moreover, the disclosure would hinder DOE's ability to evaluate future bids as the potential for disclosure could deter participation in Merit Review Panels. Appellant has provided no case law to support his assertion that use of Exemption 3 based on subsection (J) requires heightened scrutiny. Accordingly, I find that ID has properly met the requirements to bring the relevant documents under subsection (J)'s scope.

Appellant argues that after-the-fact marking appears to be *post hoc* rationalization. However, subsection (J) does not impose a timing requirement for when records must be marked as source selection information. Indeed, the only timing requirement relates to when the information was created. *Am. Small Bus. League*, 372 F. Supp. 3d 1025. One can draw analogies to when records are marked with FOIA exemptions; an exemption is not frivolously applied simply because the document was not marked prior to its request. Appellant does not offer, and OHA did not find, any authority prohibiting the use of subsection (J) in real time as a document's disclosure is considered. As such, ID's use of subsection (J) is not time barred. In fact, Appellant's argument that the source selection information determination was inappropriately made after the fact is specious in light of the procedural history of this case. In its original Determination Letter, ID described the records in question as "source selection information under the Procurement Integrity Act." ID clearly considered the documents source selection information at the time Appellant requested the documents.

For the foregoing reasons, I find that ID properly invoked Exemption 3 and the PIA.

B. Exemption 6

Exemption 6 allows an agency to withhold an individual's personal information if its release would constitute a "clearly unwarranted" invasion of privacy. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006). Courts have long held that the term "clearly unwarranted" expresses "a carefully considered congressional policy favoring disclosure which instructs the court to tilt the balance in favor of disclosure." *Wash. Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 276 (D.C. Cir. 1982) (internal quotation marks omitted). The D.C. Circuit has prescribed a two-part test for determining the proper application of Exemption 6. *Am. Oversight v. United States GSA*, 311 F. Supp. 3d 327, 345 (D.D.C. 2018). First, the withheld record must be a personnel or medical file, or a similar file. *Id.* A record is considered a "similar file" if it "contains personal information identifiable to a particular person." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014).

Next, the interests must be balanced by determining whether "disclosure would compromise a substantial, as opposed to a *de mimimis*, privacy interest," and, if so, "whether the public interest in disclosure outweighs the individual privacy concerns." *Am. Oversight*, 311 F. Supp. 3d at 345 (internal quotations omitted). Threats to privacy must have a "causal relationship between the

disclosure and the threatened invasion of privacy." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). Whether a threat to privacy is *de minimus* depends on "the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *United States Dep't of State v. Ray*, 502 U.S. 164, 182 n. 12 (1991) (citing *Nat'l Ass'n of Retired Fed. Emps.*, 879 F.2d at 877. Furthermore, the Supreme Court has held that "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet […] would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 1961 (1982). It is well-established that individuals' names (federal employees and private citizens), phone numbers (federal and private), and email addresses (federal and private), as well as names of organizations, can be considered privacy information covered by Exemption 6. *Skinner v. United States DOJ*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011) (see string cite).[4]

The public interest must relate to shedding light on the Government's activities. *Nat'l Ass'n of Retired Fed. Emps.*, 879 F.2d at 878–79. If the public would not learn something about "what the Government is up to" from the exact information at issue, there is no public interest in disclosure. *Id.* Any threat to privacy that is not *de minimis* prevails when no public interest in disclosure is presented. *Pinson v. United States DOJ*, 177 F. Supp. 3d 56, 89 (D.D.C. 2016).

Public oversight of government activities can be a legitimate public interest, particularly when considering the FOIA's purpose of shedding light on government activities. However, there are limits on how significant the interest in public oversight is. First, we consider whether the requested information relates to government operations or activities and whether it has high potential to contribute to the public's understanding of those operations or activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). Next, we consider whether the requester can widely disseminate the requested information. *Id.* Where circumstances indicate that public oversight is a mere pretext, it is unlikely to be a legitimate public interest. *Id.*

1. Privacy Interest

It is well-established that individuals have a privacy interest in the nondisclosure of information that could expose them to embarrassment, harassment, or harm to their reputation or physical safety. *King & Spalding, LLP v. United States HHS*, 395 F. Supp. 3d 116, 122 (D.D.C. 2019). ID

[4] *See also Shurtleff v. United States EPA*, 991 F. Supp. 2d 1, 18–19 (D.D.C. 2013) (withholding official agency email addresses where they would reveal employees names or "identify exactly which government offices and agencies were involved."); *Friedman v. United States Secret Serv.*, 282 F. Supp. 3d 291, 301, 308 (D.D.C. 2017) (withholding "names and phone numbers of non-governmental personnel, namely, contractor and research laboratory employees."); *Gov't Accountability Project v. United States Dep't of State*, 699 F. Supp. 2d 97, 106 (D.D.C. 2010) (withholding private email addresses); *Clevenger v. United States DOJ*, No. 18 CV 1568 (LB), 2020 U.S. Dist. LEXIS 65583, at *29–32 (E.D.N.Y. Apr. 3, 2020) (withholding an agency employee's office phone number because disclosure could hinder their future ability to execute their duties); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (withholding names of organizations and agency and private individuals where disclosure could expose the individuals to harassment); *Pavement Coatings Tech. Council v. United States Geological Survey*, 436 F. Supp. 3d 115, 131 (D.D.C. 2019) (*reversed on other grounds*) (stating that "to the extent that identifying information such as an organization's address can implicate the privacy of individuals, releasing such sensitive information about the organization is functionally the same as releasing similar information about the organization's individual members.").

states that the panel members could be subjected to harassment or attempts to influence their professional opinions if their identifying information or contact information is released. These threats to privacy fit into the protected privacy interests outlined in *King & Spalding* as harassment and reputational harm. This harm is not limited to disclosures where a panel member's vote or opinion is revealed. The panel member's very presence on the panel could subject them to harassing calls and emails from unhappy bidders, excessive media inquiries, lobbying by interested organizations, and professional reprisal from bidders who were not selected. Regardless of their status as private or government employees, the panel members face the same threats to their privacy.

Appellant argues that information which is not withheld under Exemption 6 in the context of one FOIA request does not have a privacy interest sufficient to invoke Exemption 6 for any other FOIA request that reaches that information. Federal courts disagree. The subject of a FOIA request adds context to the relevant information that may compromise a privacy interest, such as inclusion on a certain list or committee. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) ("Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse."). As stated previously, release of panel members' identifying information in the context of the specific FAO at issue creates a risk of harassment or reputational harm. Relatedly, what other agencies routinely disclose does not determine whether the panel members for this FAO have a privacy interest in the nondisclosure of their identifying information.

Based the above analysis, ID has clearly shown that the Merit Review Panel members have a significant privacy interest in the nondisclosure of their identifying information, including their names, email addresses, phone numbers, employers, titles, and signatures.

2. Public Interest

While the identities of the panel members do shed light on government operations, it is unclear if, how, and to whom Appellant would disseminate the information. Furthermore, the information is unlikely to significantly contribute to the public's oversight of Merit Review Panels unless government misconduct is disclosed. While exposing "government misconduct" may be a strong public interest, the requester must present sufficient evidence to warrant a reasonable person's belief that the alleged misconduct might have occurred. *Lazaridis v. United States Dep't of State*, 934 F. Supp. 2d 21, 36 (D.D.C. 2013). Appellant states that "[a]t this point in time, the public has no evidence that the reviewers are qualified for the evaluation process." In terms of this appeal, the inverse is also true because Appellant has presented no evidence to indicate that the reviewers were not qualified.

Appellant's assertion that the panel members could be "clowns, politicians, or kindergarten teachers" ventures into the absurd. DOE has published selection guidelines requiring that panel members be "be professionally qualified, by training, experience or both, in the particular scientific or technical fields that are the subjects of the Funding Opportunity Announcement (FOA) and applications being reviewed." Department of Energy, MERIT REVIEW GUIDE FOR FINANCIAL ASSISTANCE at 1.2(E) (2020), *available at https://www.energy.gov/sites /default/files/2020/09/f78/MRG%20SEPT%202020.pdf*. With this information publicly available

on DOE's website, the public has access to DOE's requirements for panel members. I find that it is highly unlikely that a reasonable person would believe ID improperly selected the panel members. As Appellant has presented insufficient evidence that DOE, and ID in particular, has failed to follow its rules regarding panel members' qualifications, the sole significant contribution to public oversight of panel members' qualifications is, at this time, purely speculative. Therefore, I find that the interest in public oversight is a general public interest.

Appellant asserts a public interest in evaluating the diversity of the Merit Review Panel for this FAO, including demographics such as panel members' race, familial status, geographic location, education, and employer. It is unclear how this demographic information would inform the public about ID's activities. I find that the interest in learning the demographic information specified is not a public interest in this instance.

Appellant also asserts a public interest in holding ID accountable for selecting panel members that are qualified and unbiased because the public will deal with the health repercussions of having a nuclear facility in their region for decades. He has not stated how learning the identities of the panel members will shed light on the government's activities in this context. The identities of the panel members do not shed light on ID's activities to safeguard the health of those living in a region with a nuclear facility and, therefore, disclosure would not, for this particular interest, fulfill the FOIA's purpose. Therefore, I find that this is not a public interest in this instance.

The record does not indicate that Appellant has used his stated public interests as a pretext. However, based on the above analysis, I conclude that Appellant has articulated only one public interest: the public's general interest in overseeing the selection of Merit Review Panel members for this FAO. The universe of Americans who would find the information useful or interesting is relatively small, consisting primarily of those who had an interest in being selected by this Merit Review Panel. As such, I conclude that the public's interest in general oversight, while legitimate, is slight at best.

3. Balancing

On balance, the panel members' interest in the nondisclosure of their identifying information outweighs the public's interest in overseeing the selection of this Merit Review Panel's members. As stated above, the public interest is general and slight, and widespread dissemination is far from guaranteed.

On the other hand, disclosure of the identifying information would subject the panel members to an unwarranted invasion of privacy by subjecting them to a substantial risk of harassment from those unhappy with the Merit Review Panel's decisions, zealous members of the media, and industry members seeking to influence them or learn inside information. Disclosure also subjects the panel members to a substantial risk of reputational harm as organizations may refuse to work with them in the future in retaliation for not being selected.

Based on the above analysis, I find that ID articulated a strong private interest in withholding the panel members' identifying information, that Appellant articulated a general public interest in oversight, and that, on balance, the significant privacy interests in nondisclosure outweigh the slight

public interest in disclosure. Accordingly, I find that ID properly invoked Exemption 6. Addressing the question of segregability, without the Exemption 6 information, the forms in question are, in essence, blank forms. The blank forms are available at the link in Section I of this decision.

III. Order

It is hereby ordered that the Appeal filed on March 18, 2022, by Lorenzo Venneri, No. FIA-22-0011, 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.

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

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: https://www.archives.gov/ogis Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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