

3. Any and all documents related to a report made by Fluor to Ms. Virginia Grebasch on or about September 29, 2014 (“Fluor’s OIG Report”) related to DOE employees receiving free alcohol, meals, entertainment, and gratuities from Dyn McDermott Petroleum Operations Co. (“Dyn McDermott”) and/or from employees of Dyn McDermott.
4. All documents related to DOE OIG’s investigation of any DOE employee, including but not limited to DOE employees William Gibson and Lionel Gele, arising from Fluor’s OIG Report or from any other report provided to DOE 010.
5. All documents related to the result of any 010 investigation arising from Fluor’s 010 Report, the findings of that investigation, the personnel involved in the investigation, and any actions taken by DOE or DOE OIG in response to the investigation.
6. If DOE 010 did not perform an investigation as a result of Fluor’s 010 Report, please provide all documents supporting and revealing why an investigation was not performed.
7. Any and all documents revealing the mitigation plan implemented by DOE to avoid personal conflicts of interest between the SPR Director Acquisition and Sales Division and Acting Contracting Officer, Kelly Gele, and her husband Lionel Gele, who serves as the SPR Assistant Project Manager. Such records include all agreements, risk mitigation plans, exclusionary plans, and coordination plans that would control the decisions, discussions and authority vested in Kelly and Lionel Gele as government employees who both manage portions of the SPR.
8. Any and all documents identifying DOE employees investigated in connection with the investigation of Johnny Craig Guillory and Cajan Welding & Rentals, Ltd., including interview notes with any DOE interviewees.

Id. at 14–16. On May 18, 2023, in response to a request by OIG to specify the parameters for the search, Appellant specified that OIG’s search for records responsive to items 1 and 2 should include the period of “2013 to the present.” Email from Appellant to OIG (May 18, 2023).

OIG conducted a search for responsive records and, on July 21, 2023, issued the OIG Determination Letter. Appeal at 5–10. In the OIG Determination Letter, OIG indicated that its search had not identified any records of closed OIG matters responsive to items 1, 2, and 5 of Appellant’s request and that, pursuant to FOIA Exemption 7(A), it would neither confirm nor deny the existence of any records of open OIG matters responsive to items 1, 2, and 5. *Id.* at 6–7. OIG indicated that its search had not identified any records responsive to item 3 of Appellant’s request, that it could neither confirm nor deny the existence of records requested under item 4 pursuant to FOIA Exemptions 6 and 7(C), that it was not required to create a record responsive to item 6, and that the records requested under item 8 were exempt from disclosure pursuant to 5 U.S.C. § 552(c). *Id.* at 7–10. OIG did not describe how it engaged in its search for the aforementioned records.

With respect to item 7, the OIG Determination Letter indicated that the request should have been assigned to another DOE office. *Id.* at 9. On July 28, 2023, OPI issued the OPI Determination Letter in which it indicated that DOE’s Office of General Counsel (OGC) had conducted a search for records responsive to item 7 of Appellant’s request which had not identified any responsive records. *Id.* at 11–13.

On October 10, 2023, DOE’s Office of Hearings and Appeals (OHA) received Appellant’s appeal. The appeal asserted that the OIG Determination Letter and the OPI Determination Letter failed to provide adequate information concerning the manner of the searches to enable Appellant to

meaningfully appeal them, that OIG's search was inadequate based on Appellant's knowledge of the existence of records responsive to items 1, 2, 3, and 5, and that OPI's search was inadequate based on the short time frame in which OPI conducted its search. Appeal at 1–4. Appellant further alleged that OIG was not entitled to assert Exemption 6 in refusing to admit or deny the existence of records requested under item 4, OIG provided inadequate information to justify its refusal to confirm or deny the existence of records responsive to items 1, 2, and 5, OIG's response to item 6 was nonresponsive to Appellant's request, and the individual named under item 8 was deceased and, therefore, OIG could not refuse to disclose records in anticipation of a future law enforcement proceeding. *Id.* at 2–3.

OHA contacted OPI and OIG concerning Appellant's appeal. OHA received records indicating that OGC personnel with responsibility for ethics matters conducted a search of their electronic records for items responsive to item 7. OGC Search Records, Atts. 2–3. In one of these records, relevant OGC personnel determined that SPR would be most likely to possess records responsive to item 7 of Appellant's request. *Id.*

On October 17, 2023, OIG submitted a response (OIG Response) to Appellant's appeal. In the OIG Response, OIG indicated that it was conducting an additional search for records responsive to item 3, which could produce records responsive to items 5 and 6, and it would issue a supplemental response. OIG Response at 2. OIG also indicated that it would issue a supplemental response to item 8. *Id.* at 5. However, OIG asserted that it had provided adequate information in the OIG Determination Letter to justify its refusal to admit or deny the existence of records potentially responsive to items 1, 2, 4, and 5. *Id.* at 3.

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. 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).

A. Adequacy of Search

In responding to a request for information filed under the FOIA, an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply “does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep't of State*, 779 F.2d 1378, 1384–85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *E.g.*, *Ralph Sletager*, OHA Case No. FIA-14-0030 (2014).²

² Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

In this case, OIG has decided to conduct an additional search with respect to item 3, which may also reveal records responsive to items 5 and 6.³ Accordingly, this analysis will focus on the adequacy of the searches for records responsive to items 1, 2, and 7.

1. OPI's Search

Documentation provided to OHA concerning OGC's search shows that OGC personnel with responsibility for the subject matter of item 7 of the request performed a search of their electronic records. However, it is apparent from the documentation that OGC would not have received the requested records in the ordinary course of business and that SPR would have had primary responsibility for the requested records if they exist. In order for a search to be adequate, an agency must search all locations reasonably likely to contain responsive materials. *Powell v. IRS*, 280 F. Supp.3d 155, 162–63 (D.D.C. 2017). As SPR is most likely to possess the relevant records, and OPI did not refer the request to SPR to conduct a search, we find that the search for records responsive to item 7 was inadequate.⁴

2. OIG's Search

OIG searched its electronic case management database for records of closed cases containing the phrase "Strategic Petroleum Reserve" and any of the following terms: "gratuities," "gifts," "kickbacks," "favours," "meals," "entertainment," or "bribes." OIG Response at 2–3. OIG limited its search to records generated in 2013 or later pursuant to instructions provided by Appellant. *Id.* at 3. OIG's search of a case management database where the records described in items 1 and 2 of the request are customarily stored, using appropriate search parameters derived from Appellant's request and instructions, was reasonably calculated to uncover responsive records.⁵

B. OIG's Glomar Responses

Agencies may provide a *Glomar* response, in which they refuse to admit or deny that certain records exist, when the records would be exempt from disclosure if they existed and acknowledging their existence or nonexistence would "cause harm cognizable under a[] FOIA exception." *Bartko v. DOJ*, 898 F.3d 51, 63–64 (D.C. Cir. 2018) (quoting *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011)); see also *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (providing the origin of the term "*Glomar* response"). OIG provided *Glomar* responses to Appellant's requests under items 1, 2, and 5 for records of open investigations pursuant to Exemption 7(A). OIG also provided a *Glomar* response to Appellant's request under item 4 for

³ Appellant will be entitled to appeal the results of OIG's additional search pursuant to 10 C.F.R. § 1004.8 following OIG's issuance of a new determination letter.

⁴ In light of our determination that an additional search for records responsive to item 7 of Appellant's request is required, we need not address Appellant's arguments in the appeal concerning the adequacy of the description of the search in the OPI Determination Letter.

⁵ Although OIG did not identify its search parameters in the OIG Determination Letter, we find that this omission was harmless error and that we would have found OIG's search adequate even had Appellant's appeal been informed by a more fulsome description of the search.

records of investigations of DOE employees, which specified the names of two individuals, pursuant to Exemptions 6 and 7(C).

Exemption 7(A) of the FOIA exempts from disclosure records “compiled for law enforcement purposes” that “could reasonably be expected to interfere with enforcement proceedings.”⁶ 5 U.S.C. § 552(b)(7)(A). In its *Glomar* response to items 1, 2, and 5, OIG indicated that it refused to admit or deny the existence of records related to open OIG cases because doing so “would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence.” Appeal at 6–8. Courts have recognized that requiring an agency to disclose the existence or nonexistence of a previously unacknowledged investigation would compromise an interest protected under Exemption 7(A). *E.g.*, *Leopold v. DOJ*, 301 F. Supp.3d 13, 27–30 (D.D.C. 2018) Acknowledgement of an investigation when one exists would allow investigative subjects to take defensive action, and failure to provide a *Glomar* response when no investigation exists would create a pattern by which investigative subjects would know that a *Glomar* response indicates the presence of an investigation. *See id.* OIG’s *Glomar* response, with respect to the presence or absence of records of open investigations under items 1, 2, and 5, adequately offered a rationale recognized by courts as implicating an interest protected under Exemption 7(A), and we find that offering any other response could reasonably be expected to interfere with law enforcement proceedings.

Exemption 6 of the FOIA exempts 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). Exemption 7(C) of the FOIA exempts from disclosure records “compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.* § 552(b)(7)(C). OIG’s *Glomar* response related to item 4 stated that “an official acknowledgement of investigation . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Appeal at 8. Appellant’s appeal only challenged the appropriateness of OIG’s *Glomar* response under Exemption 6, and accordingly we may deem the appropriateness of OIG’s *Glomar* response under the broader protections of Exemption 7(C) as conceded. *See DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989) (recognizing that the personal privacy protections under Exemption 7(C) are more expansive than those under Exemption 6).

Even if Appellant had challenged OIG’s *Glomar* response under Exemption 7(C), it is apparent that OIG’s invocation of a *Glomar* response was appropriate. Targets of law enforcement investigations have substantial privacy interests in the nondisclosure of that information. *Roth v. DOJ*, 642 F.3d 1161, 1174 (D.C. Cir. 2011). Appellant’s request specified two named individuals about whom information was sought, and any disclosure of records would necessarily compromise their privacy interests even with their names redacted because the connection between their identities and the investigative materials would be readily apparent. *See Nat’l Whistleblower Ctr. v. Dep’t of Health & Human Servs.*, 849 F. Supp.2d 13, 30–31 (D.D.C. 2012) (finding that withholding investigative records in their entirety was necessary to protect privacy interests under

⁶ Appellant did not dispute that OIG would have compiled any records responsive to its request for a law enforcement purpose. Even had Appellant done so, OHA has previously recognized that records compiled in connection with an OIG investigation are “categorically prepared for a law enforcement purpose.” *Anthony Garzione*, OHA Case No. FIA-18-0029 at 2 (2018).

Exemption 7(C) where disclosure of even portions of the records would reveal investigative targets or witnesses). As any responsive records would be subject to withholding in their entirety, and acknowledgement or denial of the presence of investigative records concerning the named individuals would either associate the named individuals with an OIG investigation or create a pattern by which *Glomar* responses are indicative of the presence of records, we find that offering any other response could reasonably be expected to interfere with the named individuals' privacy interests under Exemption 7(C).

III. Order

It is hereby ordered that the Appeal filed by Petty, Livingston, Dawson & Richards P.C. on October 10, 2023, No. FIA-24-0002, is dismissed as moot as to the adequacy of OIG's search for records concerning closed OIG matters responsive to items 3, 5, and 6, and OIG's search for records responsive to item 8, based on OIG's decision to withdraw its determinations pertaining to these items and conduct additional searches. The Appeal is granted with respect to OPI's search for records responsive to item 7, and denied in all other respects. This matter is remanded to OIG and OPI to issue new responses in accordance with the explanation provided above.

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:

Office of Government Information Services
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