United States Department of Energy
Office of Hearings and Appeals

In the Matter of Avery R. Webster	)	
	)	
Filing Date: May 30, 2013	)	Case No.: FIA-13-0035
	)	
	)	

Issued: June 19, 2013

Decision and Order

On May 30, 2013, Avery R. Webster ("Appellant") filed an Appeal from a determination issued to her on April 17, 2013, by the Department of Energy (DOE) Office of Inspector General (OIG) (FOIA Request Number HQ-2013-00008-FP). In its determination, the OIG responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004, and the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by DOE in 10 C.F.R. Part 1008. In response to the Appellant's request, the OIG informed the Appellant, *inter alia*, that it neither confirmed nor denied the existence of any records described in the four items of the Appellant's request that DOE's Headquarters FOIA Office had referred to the OIG for processing. This Appeal, if granted, would require the OIG to acknowledge whether any responsive documents were discovered, and if so, either release those discovered documents or issue a new determination letter justifying the withholding of these documents.

I. Background

On March 8, 2013, the Appellant submitted a FOIA/PA request requesting copies of a number of documents. On April 4, 2013, items 20–23 of the request were referred to the OIG for processing. Determination Letter from Linda J. Snider, Deputy Inspector General for Management and Administration, OIG, to Avery Webster, at 1 (Apr. 17, 2013). In those items, Appellant asked for the following information:

> 20. Copies of any and all informal and formal complaints filed against Poli A. Marmolejos or any manager under his direct or indirect supervision and/or direction during his entire tenure at the DOE in the Office of Civil Rights and the Office of Hearings and Appeals. (If you are unable to get a list of managers that Mr. Marmolejos has directly or indirectly supervised, please contact me.) Please also include documents and records for complaints that were withdrawn.

> 21. Copies of any and all claims of a Hostile Work Environment created under the direct or indirect supervision and/or direction of Poli A. Marmolejos or any manager under his direct or indirect supervision during his entire tenure at the DOE in the Office of Civil Rights and the Office of Hearings and Appeals. (If you are unable to get a list of managers that Mr. Marmolejos has directly or indirectly supervised, please contact me.) Please include copies of any investigative reports and recommendations.
>
> 22. Copies of any and all investigations, reports and/or actions taken by the DOE in response to complaints filed against Poli A. Marmolejos or any manager under his direct or indirect supervision during his entire tenure at the DOE in the Office of Civil Rights and the Office of Hearings and Appeals. (If you are unable to get a list of managers that Mr. Marmolejos has directly or indirectly supervised, please contact me.)
>
> 23. Copies of documents relating to any and all forced, voluntary or constructive resignations, Reductions-In-Force, transfers, details, retirements, removals and terminations while under the direct or indirect supervision and/or direction of Poli A. Marmolejos. (If you are unable to get a list of managers that Mr. Marmolejos has directly or indirectly supervised, please contact me.) The search for records should include any and all of the above actions that occurred during Mr. Marmolejos' entire tenure at the DOE in the Office of Civil Rights and the Office of Hearings and Appeals.

See id.; FOIA Request from Avery R. Webster (Mar. 8, 2013).

On April 17, 2013, the OIG issued a determination letter to the Appellant informing her that the OIG neither confirmed nor denied the existence of any such records described in the request. Determination Letter, at 2. Citing FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), the determination letter stated that "[l]acking an individual's consent, an official acknowledgement of an investigation, or an overriding public interest, even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* Subsequently, on May 30, 2013, OHA received the Appellant's Appeal of the OIG's determination, wherein she challenges the OIG's response under Exemption 7(C).

The Director, OHA, referred this appeal to my office pursuant to a memorandum dated April 10, 2013, which delegated his authority, in cases that he would refer to me, to issue appellate decisions, as appropriate, under the FOIA and the Privacy Act, consistent with the purposes of the relevant Acts, as implemented by DOE FOIA and Privacy Act regulations, 10 C.F.R. Parts 1004 and 1008.

II. Analysis

In her appeal, Appellant challenges the OIG's response neither confirming nor denying the existence of records described in her request. After reviewing the subject matter of the request,

the method by which the request was processed by the OIG, and the justification offered in the OIG's determination letter, we find that the OIG's response was appropriate and that any other response could reasonably be expected to constitute an unwarranted invasion of personal privacy under Exemption 7(C). Accordingly, we will deny the Appeal.

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records are kept 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 records 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] The OHA has explained that a *Glomar* response is justified where 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*, Case No. VFA-0243 (Nov. 15, 1996). Therefore, to determine whether OIG's *Glomar* response is valid, we must examine two questions: First, would such records, if they exist, be exempt from disclosure under the FOIA? Second, would confirmation of the existence of such records itself reveal exempt information?

A. Exemption 7(C)

The OIG specifically cites FOIA Exemption 7(C) as justifying its *Glomar* response. Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under any subsection of Exemption 7 is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Hous. Alliance v. Dep't of Agric.*, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974).

The OHA has consistently held that the OIG is a law enforcement body and that its investigations and reports involving employee misconduct are compiled for "law enforcement purposes" within the meaning of Exemption 7. *In the Matter of Russell Carollo*, Case No. FIA-12-0026 (June 7, 2012), *slip op.* at 2 n.3; *Westinghouse Savannah River Co., LLC*, Case No. VFA-0556 (Mar. 13, 2000).

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy under Exemption 7(C), courts have employed a balancing test, weighing the privacy interests that would be infringed upon against the public interest in disclosure, if any. *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). The Supreme Court has held that where the privacy concerns protected by Exemption 7(C) are present, "the exemption requires the person

[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 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*). We will refer to the OIG's response as a *Glomar* response.

requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *NARA v. Favish*, 541 U.S. 157, 172 (2004).

The courts and OHA have consistently held that individuals have a strong privacy interest in avoiding the stigma of being associated with a law enforcement investigation. *See, e.g.*, *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *Westinghouse Savannah River Co., LLC*. As for the public interest in disclosure, the Appellant asserts in her appeal that there is "overwhelming public interest in agency operations and the mismanagement of agency programs, particularly relating to those under Mr. Marmolejos' supervision. In this regard, some of the responsive documents may include information about the agency's performance or shed light on agency action-information." FOIA Appeal, at 1. We agree that there is a public interest in official misconduct. However, as the Supreme Court stated in *NARA v. Favish*, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." 541 U.S. at 174. The Appellant has not done so here. The allegations contained in the initial FOIA request and in her appeal amount to nothing more than "a bare suspicion" that agency officials acted improperly in the performance of their duties. *See id.* Therefore, we find that if the requested documents were to exist, the privacy interest threatened by disclosure of the potential documents would greatly outweigh any public interest that would be furthered by release of those potential documents.[2]

B. The OIG's *Glomar* Response

The second question that we must address is whether confirmation of the existence of such documents would itself reveal exempt information. We conclude that merely acknowledging that such records exist would reveal information that is exempt from disclosure under FOIA Exemption 7(C).

In reviewing this Appeal, we contacted employees of OIG who are familiar with the processing of the Appellant's FOIA Request. *See* Memorandum of Telephone Conversation between Adrienne Martin, OIG, Geoff Gray, OIG, Karen Sulier, OIG, and K.C. Michaels, Office of the General Counsel (June 6, 2013, ≈12:15AM EDT). After reviewing the subject matter of the request, the method by which the request was processed, and the OIG justification offered in the determination letter, we find that OIG appropriately invoked the *Glomar* response, neither confirming nor denying the existence of the investigatory records sought by the Appellant. As indicated above, if the requested records exist, they would be exempt from disclosure. Likewise, a response acknowledging that responsive records were discovered but are being withheld would necessarily indicate to the requester that the named individuals are indeed subject to a law

[2] In her appeal, the Appellant also states that "the agency failed to conduct a particularized assessment of the public and private interests at stake . . . ." FOIA Appeal, at 1. We note only that such a particularized assessment is not necessary; the Supreme Court has held that in Exemption 7(C) cases, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 776 (1989).

enforcement proceeding. Furthermore, if the agency were to announce that no responsive documents were discovered only in those cases where no records exist, a pattern would develop that would allow a requester to infer that a *Glomar* response actually indicates that responsive documents exist. Thus, we agree that providing any other response to the request could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy under Exemption 7(C).

Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on May 30, 2013, OHA Case Number FIA-13-0035, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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 your right to pursue litigation. You may contact OGIS 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: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Robert F. Brese
Chief Information Officer
U.S. Department of Energy

Date: June 19, 2013