United States Department of Energy
Office of Hearings and Appeals

In the Matter of DeShonne E. Massey Sr.	)		
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Filing Date: June 18, 2013	)	Case No.:	FIA-13-0040
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	)		

Issued: July 17, 2013

Decision and Order

On June 18, 2013, DeShonne E. Massey Sr. ("Appellant") filed an Appeal from a determination issued to Appellant on April 30, 2013, by the Department of Energy (DOE) Office of Information Resources (OIR) (FOIA Request Number HQ-2013-00611-F). In its determination, the OIR 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. The OIR divided Appellant's request into two parts. In response to the first part, the OIR located and produced one document. The OIR withheld portions of that document pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). In response to the second part of the request, the OIR stated that it neither confirmed nor denied the existence of any records described. This Appeal, if granted, would require the OIR: 1) to conduct another search for documents responsive to Appellant's request; 2) to release the information it withheld pursuant to Exemption 6; and 3) to acknowledge whether any documents responsive to the second part of the request were discovered, and if so, either release those documents or issue a new determination letter justifying the withholding of those documents.

I. Background

On February 26, 2013, the Appellant submitted a FOIA request seeking several documents. The OIR has divided the request into two parts. Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to DeShonne E. Massey, Sr. (Apr. 30, 2013). First, the request sought "copies of any and all time and attendance records for every Office of Hearings and Appeals (OHA) employee (including those of employees who have retired, been removed, transferred, resigned or otherwise presently unavailable) from August 1, 2007, to April 30, 2012." Second, the request sought "any counseling memoranda or disciplinary actions involving time and attendance for all employees during that timeframe, including, but not limited to, those of employees Avery R. Webster and XXXXXX." *Id.*; FOIA Request from DeShonne E. Massey, Sr. (Feb. 26, 2013).

On April 30, 2013, the OIR issued a determination letter to the Appellant. In response to the first part of the request, the OIR provided Appellant with one document. In that document, the OIR redacted three columns of data pursuant to Exemption 6. The redacted columns consist of the first and last names of OHA employees as well as the particular employee's reason(s) for taking leave in each instance. Determination Letter, at 2. With regard to the second part of Appellant's request, the OIR neither confirmed nor denied the existence of any such records described in the request. The determination letter stated that "[c]onfirmation of the existence of such records would itself reveal exempt information. To acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." *Id.* Subsequently, on June 18, 2013, the OHA received the Appellant's Appeal of the OIR's determination, wherein he challenges the applicability of Exemption 6 in the released document, the OIR's response to the second part of the request under Exemption 6, and the adequacy of the search for responsive records.

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 his appeal, Appellant challenges the OIR's application of Exemption 6 to the released document. Upon review of the unredacted versions of the released document, we conclude that the OIR properly invoked Exemption 6 in support of its withholdings. Appellant also appeals the OIR's response neither confirming nor denying the existence of records described in the second part of the request. After reviewing the subject matter of the request, the method by which the request was processed by the OIR, and the justification offered in the OIR's determination letter, we find that the OIR's response was appropriate and that any other response would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. Finally, Appellant appeals the adequacy of the search for responsive records. Upon review of the facts surrounding the OIR's search, we are satisfied that the search for responsive documents was adequate. Accordingly, we will deny the Appeal.

A. Exemption 6

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)–(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B). 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).

The first question is whether the released records are "personnel and medical files [or] similar files." The term "similar files" was intended by Congress to be interpreted broadly, to include all information that "applies to a particular individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The OIR explained that the withheld information "qualifies as 'similar files' because it is associated with individuals entitled to privacy." Determination Letter, at 2. Our review of the unredacted document reveals that it identifies agency employees by name. Therefore, the withheld information "applies to a particular individual" and is a "similar file" for purposes of Exemption 6.

Exemption 6 is designed to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. at 599. In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008); *see also Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether release of the document 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, 773–74 (1989). Finally, 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 Multi Ag Media*, 515 F.3d at 1229–30; *Ripskis*, 746 F.2d at 3.

Here, the released document consists of a list of entries in the payroll database representing the times worked by OHA employees. Each entry includes the type of time recorded (regular, sick leave, annual leave, etc.), the date, the number of hours, the first and last name of the employee, and, where appropriate, the employee's reason for using leave. The withheld information consists of the first and last names of each employee, and the reasons for using leave. The OIR "determined that the public interest in releasing this information . . . does not outweigh the overriding privacy interests in keeping this information confidential." Determination Letter, at 2.

We first conclude that there is a significant privacy interest that would be compromised by the disclosure of the information. The employees have a personal privacy interest in their payroll entries because the entries reveal the time spent for sick leave, vacation time, training, and other administrative purposes. *See In the Matter of the Washington Examiner*, Case No. FIA-13-0033 (June 10, 2013) (noting that employees have a significant privacy interest in protecting their names from disclosure in "information derived from timesheets"). Furthermore, the employees have a personal privacy interest in the reasons listed for using particular payroll codes, which reveal illness and bereavement information about the individual.

Second, there is a minimal public interest, if any, in revealing the names of the employees and their reasons for using leave. Here, the OIR has segregated the information and released the number of hours worked and the relevant payroll codes. Therefore, in this instance, releasing the names would not shed any further light on the government's activities. *See Long v. Office of*

Pers. Mgmt., 692 F.3d 185, 193 (2d Cir. 2012). Furthermore, releasing the employees' reasons for using leave does not reveal anything about the activities of the agency.

The United States District Court for the District of New Jersey provides useful guidance for our current analysis. In *Berger v. I.R.S.*, the court considered whether the Internal Revenue Service properly invoked Exemption 6 to withhold federal time sheets. 487 F.Supp.2d 482 (D.N.J. 2007). The court concluded that "[t]he fact that [the I.R.S. employee] is a public employee does not so lessen her expectation of privacy that disclosure of her time sheets would be appropriate, and her privacy interest outweighs the relatively minimal public interest in the manner in which [the employee] spent her time . . . ." *Id.* at 505. Here, as in *Berger*, there is a significant privacy interest that clearly outweighs a minimal public interest in the information. Therefore, we conclude that the release of the employees' first and last names and their reasons for using leave would constitute a clearly unwarranted invasion of personal privacy.

B. The OIR's Response Neither Confirming nor Denying the Existence of Records

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?

i. Exemption 6

The OIR specifically cites FOIA Exemption 6 as justifying its *Glomar* response for the second part of the request. Determination Letter, at 2. As explained above, Exemption 6 allows an agency to withhold "[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). It is apparent that, if responsive documents were to exist, disclosure would reveal the identities of individuals who have been subject to discipline regarding time and attendance. Therefore, any responsive documents that may exist would be "similar files" under Exemption 6 because such documents would "apply to a particular individual."

There is a significant personal privacy interest in "counseling memoranda [and] disciplinary actions involving time and attendance." Revealing that a particular employee has been subject to disciplinary action may expose that person to embarrassment, shame, stigma, and harassment.

[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.

Further, the status of individuals as Federal employees does not strip them of their privacy interests under Exemption 6. *See Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008). The public interest in disclosure of such counseling memoranda and disciplinary actions is minimal. The D.C. Circuit has found that there is not likely to be a strong public interest in disclosure where there is not "widespread knowledge" and public awareness of a particular instance of official misconduct. *Beck v. Dep't of Justice*, 997 F.2d 1489, 1493–94 (D.C. Cir. 1993). Here, the release of the identity of individuals subject to discipline based on time and attendance would not shed light on the agency's own conduct. As a result, the significant personal privacy interest in avoiding disclosure of embarrassing information clearly outweighs the marginal public interest in such disclosure. Therefore, we conclude that disclosure of the sought records, if they exist, would constitute a clearly unwarranted invasion of personal privacy and would be exempt from disclosure under Exemption 6.

ii. 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 6.

In reviewing this Appeal, we contacted an employee of OIR who is familiar with the processing of the Appellant's FOIA Request. *See* Memorandum of Telephone Conversation between Joan Ogbazghi, OIR, and K.C. Michaels, Office of the General Counsel (July 9, 2013, ≈9:55AM EDT). After reviewing the subject matter of the request, the method by which the request was processed, and the justification offered in the determination letter, we find that the OIR appropriately invoked the *Glomar* response, neither confirming nor denying the existence of the disciplinary 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 have indeed been subject to disciplinary proceedings. 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 would constitute a clearly unwarranted invasion of personal privacy under Exemption 6.

C. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures 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); *accord Truitt*, 897 F.2d at 542. We have not

hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Project on Government Oversight*, Case No. TFA-0489 (2011).

The request was initially assigned for search to three offices: the Office of the Chief Financial Officer (CF), the OHA, and the Office of the Chief Human Capital Officer (HC).

Upon examination of the FOIA record related to the searches conducted by the three offices, we determined that additional information was necessary to evaluate the reasonableness of these searches. On March 8, 2013, the Office of Chief Financial Officer certified that it conducted an automated search of its records. In response to our inquiries, CF provided us with additional information. Email from Jayne Faith, CF, to K.C. Michaels, Office of the General Counsel (July 2, 2013, 10:08AM EDT). CF informed us that it conducted an electronic search of the Automated Time and Attendance Production System (ATAAPS) database for all OHA employees' time and attendance from August 2007 to April 2012. This search produced a report that included all time and attendance records for every OHA employee from August 1, 2007, to April 30, 2012. That report was saved as a Microsoft Excel file and eventually produced to requester. *Id.* On April 16, 2013, the Office of Hearings and Appeals certified that its employees conducted manual searches of their own records. In response to our inquiries, the OHA provided us with additional information. Email from Fred Brown, OHA, to K.C. Michaels, Office of the General Counsel (June 27, 2013, 11:51AM EDT). The OHA explained that its employees searched the physical files where responsive documents, if they were to exist, would likely be located. *Id.* On March 28, 2013, the Office of the Chief Human Capital Officer certified that it conducted a manual search of its records. In response to our inquiries, HC provided us with additional information. Email from Donna Williams Dixon, HC, to K.C. Michaels, Office of the General Counsel (July 2, 2013, 9:56AM EDT). HC explained that it searched the physical files of the employee that would be most likely to have responsive documents, if they were to exist. *Id.*

Based on the foregoing, we are satisfied that the searches conducted by CF, OHA, and HC were adequate. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384–85. Here, the Office of the Chief Financial Officer searched its time and attendance database, the Office of Hearings and Appeals searched the physical files where such records would exist were they to exist, and the Office of the Chief Human Capital Officer searched the physical files of the individual who would be likely to have responsive records, if they exist. As such, we conclude that a reasonable search for responsive documents was conducted.

Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on June 18, 2013, OHA Case Number FIA-13-0040, 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.

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Fax: 202-741-5759
Toll-free: 1-877-684-6448

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

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