

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

In the Matter of Jamileh Mogin)
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Filing Date: April 8, 2013)
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Case No.: FIA-13-0022

Issued: May 6, 2013

Decision and Order

On April 8, 2013, Jamileh Mogin filed an appeal from a determination the Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) Office of General Counsel (NA-GC) issued on February 14, 2013. In its determination, NA-GC responded to a request for documents that Ms. Mogin submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

In a March 10, 2010, request, revised on April 2, 2010, the Appellant sought from NNSA a copy of:

- (1) Correspondence and records concerning Ms. Mogin and regarding an investigation, Case Number 2008-03519, and report, “Inquiry into Allegations of a Hostile Work Environment And Other Inappropriate Conduct.”
- (2) Information provided to and collected by an NNSA Internal Auditor as part of the above-referenced investigation.
- (3) A list of the names of individuals interviewed in the above-referenced investigation and copies of all statements made.
- (4) Correspondence and records regarding Ms. Mogin between Mr. Michael Zmuda, Ms. Dorothy Newell, Dr. Dimitri Kusnezov, the NA-116 Director, NA-121.4 Director, OIJP Director, or NNSA HQ Director, from January 2007 to the present.
- (5) A copy of the 2007 complaint that was made by Ms. Dorothy Newell regarding Ms. Mogin, as referenced in investigation report, Case Number 2008-03519.
- (6) Correspondence and records within DOE Headquarters including individuals such as Dr. Dimitri Kusnezov, Mr. James Cavanaugh (NA-1), Mr. Richard Speidel (NA-44), Bob Smolen, Ms. Janet Deschak (NZ), the NA-116 Director, NA-121.4 Director, OIJP Director, or NNSA HQ Director, from January 2007 to the present, as a result of Ms. Dorothy Newell’s complaint.

NA-GC identified 151 documents responsive to Ms. Mogin's request. NA-GC released 16 of these documents to Ms. Mogin in their entirety, but withheld part or all of the information contained in the other 135 documents pursuant to 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(c), Exemption 5, 6, and 7(C) of the FOIA, respectively. Letter from Elizabeth L. Osheim, NA-GC, to Jamileh Mogin (February 14, 2013) (Determination Letter). In her Appeal, Ms. Mogin challenges the NA-GC's withholdings and the adequacy of its search for documents responsive to her request.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists 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. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

The DOE FOIA regulations further provide that determinations withholding information from a requester must include a "statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption(s) applies to the record withheld, and a statement of why a discretionary release is not appropriate." 10 C.F.R. § 1004.7(b)(1). As explained below, we find that NA-GC's determination in this case did not adequately explain how FOIA Exemptions 5 and 7(C) applied to the information being withheld and, while NA-GC properly withheld certain information under Exemption 6, it also withheld information beyond that for which it provided an adequate explanation in its determination.

A. FOIA Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In its determination, NA-GC characterized the information it withheld under Exemption 5 as being subject to the deliberative process privilege and further stated that "[t]here is also information withheld as client-attorney information." Determination Letter at 2.

Where NA-GC withheld information from documents responsive to Ms. Mogin's request, it labeled the withheld portions of the documents with relevant FOIA exemption numbers, e.g., "(b)(5)" for information withheld under Exemption 5. However, in the documents from which information was

withheld under Exemption 5, NA-GC did not indicate which Exemption 5 privilege (deliberative process or attorney-client, or both) applied to the information withheld from each document. Without this information, it is not possible for us to determine whether Exemption 5 was properly applied in withholding information from the documents in question. For example, large blocks of information are redacted from the report of investigation at issue, (e.g., in Documents 1, 27, and 65) with the redactions marked “(b)(5), (b)(6)”.¹

Further, identification of which Exemption 5 privilege applies to the withholdings in particular documents is necessary to provide an adequate “explanation of how the exemption(s) applies to the record withheld,” as required by the DOE FOIA regulations. 10 C.F.R. § 1004.7(b)(1). This requirement allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office’s review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, for those documents from which information was withheld under Exemption 5, we will remand this matter to NA-GC for a new determination, in which it should specify, with respect to the information withheld from each document, which Exemption 5 privilege it has applied in withholding information. See *Local 94, IFPTE*, Case No. FIA-12-0016 (2012) (“When offices do not specify the exemption or exemptions invoked, we remand the request to the office with instruction to issue a new determination letter.”).

B. FOIA Exemptions 6 and 7(C)

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 purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold “records or information compiled for law enforcement purposes, if release 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).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), 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 either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See *Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly

¹ We assume that this marking indicates that *all of the information* so marked was found to be protected by *both* Exemption 5 and Exemption 6, not that there are portions of the information withheld that is protected by one exemption and not the other. Otherwise, the marking would not accurately reflect the FOIA Exemption being applied to the specific information withheld.

unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

1. Withholdings Under Exemption 6

In its determination, NA-GC identified the information withheld under Exemption 6 as “names and contact information of individuals, organizations, titles, email addresses, telephone numbers or other information that would identify individual employees who were interviewed or mentioned in the Case Report.” Determination Letter at 2. NA-GC stated that “[r]elease of this information pertaining to agency employees could cause inevitable harassment.” *Id.* The Appellant argues that “[a]ny privacy interest here is *de minimis* because, to the extent that the records identify individuals, they do so strictly in the context of their positions as government employees.” Appeal at 8.

In prior cases applying Exemption 6, we have recognized a substantial privacy interest held by any person who would be revealed as having participated in an investigation, as he or she may be subject to coercion, harassment, or intimidation based on the mere fact of his or her participation or on the content of his or her statements to investigators. *See, e.g., Ricky W. Ladd*, Case No TFA-0485 (2011). In the present case, we find that those individuals interviewed in the investigation at issue have a similarly substantial privacy interest. In addition, we find that the subjects of the investigation, against whom allegations were made, also have a strong interest in not being publically associated with those allegations. *See Mueller v. Department of Air Force*, 63 F.Supp.2d 738, 743 (E.D. Va. 1999) (citing *Stern v. FBI*, 732 F.2d 84, 92 (D.C. Cir. 1984)).

Thus, having reviewed the information withheld in this case under Exemption 6, we find that NA-GC properly withheld information that would identify either the subjects of the investigation or those interviewed in the process of the investigation. We will therefore deny the present Appeal to the extent to it concerns such information. To the extent that there is other information that was withheld from the Appellant under Exemption 6, we are remanding this matter to NA-GC to either release this information or provide additional justification for its withholding.²

2. Withholdings Under Exemption 7(C)

Regarding documents from which information was withheld by NA-GC under Exemption 7(C), the Appellant argues that these documents were not compiled for law enforcement purposes, asserting that the inquiry at issue “was not conducted for law enforcement purposes; its purpose was to make findings and recommendations about my role as a manager in connection with my interactions with the Los Alamos Site Office.” Appeal at 9. Our review of the relevant documents, however, indicates that among the matters being investigated were allegations of actions that, if true, would be in violation of one or more federal statutes. As such, we find that the documents compiled in connection with the inquiry at issue here were compiled for law enforcement purposes. *See Jefferson v. Department of Justice*, 284 F.3d 172, 177 (D.C. Cir. 2002) (“[I]f the investigation is for a possible violation of law, then the inquiry is for law enforcement purposes, as distinct from customary surveillance of the performance of duties by government employees.”).

² NA-GC also withheld, under Exemption 6, information that would reveal the identities of individuals that were not interviewed in the investigation, nor were the subject of the investigation. For example, NA-GC withheld such information from Document 2.

In its determination, NA-GC stated that it withheld, under Exemption 7(C), “names and information that would disclose the identity of individuals involved in an investigation by federal officers.” Determination Letter at 2. NA-GC’s determination, however, provides no explanation as to why those “involved” in an investigation have a protectable privacy interest under Exemption 7(C). 10 C.F.R. § 1004.7(b)(1). As stated above, such an explanation is required by the DOE FOIA regulations, aids the requester in formulating a meaningful appeal, and facilitates our review of any appeal. NA-GC should, on remand, either release the information withheld under Exemption 7(C) or provide further explanation justifying its withholding. In so doing, NA-GC should bear in mind that we have previously found no “significant privacy interest” would be exposed by the release of the identity of the author of a report of investigation to the Acting Director of the NNSA’s Office of Internal Controls. We reasoned that, “[b]ecause the author was performing his or her official duties, no specific harm or embarrassment would result from release of the author’s name” *Terry Apodaca*, Case No. TFA-0356 (2010).

C. Adequacy of NA-GC’s Search for Responsive Documents

The Appellant, citing NA-GC’s Determination Letter, states that

the Department did not contact the following persons and offices likely to have records responsive to the request: (1) Ms. Dorothy Newell of the Los Alamos Site Office; (2) the Los Alamos Site Office; (3) Dr. Dimitri Kusnezov; (4) Mr. James Cavanaugh; (5) Mr. Richard Speidel; and (6) Mr. Bob Smolen. Although the Department obtained from the offices that it did contact 151 documents that it identified as responsive to my request, the omission of the above offices and persons means that the search was not adequate. For instance, hard copies of responsive documents maintained by the Los Alamos Site Office or in the personal office files of the persons listed above likely would not have been captured in the limited search that was conducted.

Appeal at 11.

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).

In response to our inquiry, NA-GC provided us with additional information to evaluate the reasonableness of its search. It stated that the following organizations searched for and provided responsive records:

1. Los Alamos Site Office (LASO)
2. Office of Human Capital Management Services (OHCMS)

3. Office of Field Financial Management (OFFM), Financial Review and Performance Assessment Department (FRPAD) – Federal Officers (identified as “internal auditor” in Ms. Mogin’s request)
4. Office of Management and Budget (NA-MB)
5. Office of General Counsel (GC)

A search was conducted for all persons identified in Item IV of Ms. Mogin’s appeal. The program office/site office searched for records in their files and also contacted the named individuals to search for responsive records.

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At the time of the request, NA-MB was responsible for collecting records of NNSA HQ personnel to include Dr. Kusnezov, Mr. Cavanagh, Mr. Speidel and Mr. Smolen. NA-MB provided all responsive records regarding these individuals.

Email from Christina H. Hamblen, NA/GC, to Steven Goering, OHA (April 9, 2013). NA/GC further stated that it inadvertently left off the Los Alamos Site Office in its final response letter to the Appellant, “but LASO was contacted and provided responsive records pertaining to Ms. Newell and other individuals named.” *Id.* Based on the information provided by NA-GC, we are satisfied that it conducted a search reasonably calculated to uncover documents responsive to the Appellant’s request, and that the search was therefore adequate under the FOIA. In this respect, we will deny the present Appeal.

Finally, we note here several issues that, though not explicitly raised in the present Appeal, NA GC should address on remand. First, certain information withheld from the requester appears to not have been labeled with reference to any FOIA Exemption (in Document 1 at page 3, Document 27 at page 3, Document 65 at page 3, Documents 36, 87, 104, 10, 111, 112, 113, 117, and 142). Second, certain information withheld from Document 93 is labeled “(b)(7)e,” though NA-GC does not state in its determination that it withheld information under FOIA Exemption 7(E). Third, as noted above, the DOE FOIA regulations provide that determinations withholding information from a requester must include “a statement of why a discretionary release is not appropriate.” Thus, on remand, to the extent that NA-GC continues to withhold information from the Appellant, they shall explain in their new determination letter how there is no public interest in the release of that information.

Fourth, one of the exhibits provided by the Appellant indicates that her initial request was made to the DOE under the Privacy Act. In email correspondence with the requester, NA-GC stated that “the investigation report (case 2008-03519) originated in the NNSA Office of Field Financial Management (OFFM) and those reports are not maintained in a system of records. . . . Therefore, your request will be processed as a FOIA request.” Exhibit 3 at 3. We note, however, that documents responsive to the Appellant’s request appear to have been located in offices other than OFFM. On remand, NA-GC should determine whether any of the documents responsive to the Appellant’s request were located “among records under the control of [DOE] from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” 5 U.S.C. § 552a(a)(5) (Privacy Act definition

of “system of records”).³ To the extent that responsive documents were located among such records, NA-GC should process the Appellant’s request under both the FOIA and Privacy Act.

It Is Therefore Ordered That:

- (1) The Appeal filed on April 8, 2013, by Jamileh Mogin, OHA Case No. FIA-13-0022, is hereby remanded in accordance with Paragraph (2) set forth below. In all other respects, the Appeal is hereby denied.
- (2) The National Nuclear Security Administration Office of General Counsel shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) 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 an 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:

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Toll-free: 1-877-684-6448

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Date: May 6, 2013

³ The Privacy Act provides an individual access to any record or information pertaining to him in a “system of records” as defined in the Act, independent of whether the records in question have been previously identified by the DOE in a Privacy Act system of records notice. 5 U.S.C. § 552a(d)(1).