

United States Department of Energy
Office of Hearings and Appeals

In the Matter of WyoFile)
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Filing Date: May 7, 2013) Case No.: FIA-13-0028
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Issued: May 23, 2013

Decision and Order

On May 7, 2013, WyoFile (Appellant) filed an Appeal from a determination issued to it, by the National Energy Technology Laboratory (NETL) of the Department of Energy (DOE). In that determination, NETL responded to a request that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NETL withheld documents pursuant to Exemption 7(a) of the FOIA. Thus, this Appeal, if granted, would require NETL to provide the withheld documents.

I. Background

On April 1 and April 2, 2013, the Appellant submitted FOIA Requests to NETL requesting the status of two NETL stimulus grants that were awarded to the North American Power Group.* In its first Request, the Appellant sought documents to determine whether “the accounts [have] been ‘completed’ or suspended or withdrawn or subject to some other action.” Email from Rone Tempest to Shelly Martin, NETL (Apr. 1, 2013). On April 2, 2013, the Appellant submitted another request, stating that it needed the status of the two stimulus grants due to an “update urgent deadline request.” Email from Rone Tempest to Shelly Martin, NETL (Apr. 2, 2013).

On April 23, 2013, NETL responded to the Appellant’s FOIA Request, invoking Exemption 7(a) of the FOIA to withhold the requested information. *See* Determination Letter from R. Paul Detwiler, Chief Counsel, NETL, to Rone Tempest (Apr. 23, 2013). NETL stated that if it disclosed the requested information, it would interfere with ongoing enforcement proceedings, as there is currently an active investigation concerning the requested information. *Id.*

* NETL claims that the Appellant’s April 1 and 2 emails do not constitute FOIA Requests because the Appellant asked NETL to answer certain questions, rather than request particular documents. *See* Email from Paul Detwiler, Chief Counsel, NETL, to Shiwali Patel, Attorney-Examiner, OHA (May 10, 2013). However, as NETL issued a Determination Letter in response to those emails, identifying the April 1 and 2 emails as FOIA Requests, we will deem those emails as FOIA Requests for purposes of this Appeal.

Subsequently, on April 29, 2013, the Appellant filed an Appeal of NETL's Determination, stating that it was not seeking documents that were compiled for law enforcement purposes, and that NETL did not meet its burden in demonstrating that Exemption 7(a) applied to withhold the requested information. Appeal at 1-2. Moreover, the Appellant complains that the individual who responded to the FOIA Request should have recused himself from the FOIA Request because the Appellant contends that he was "part of the chain of events under investigation." *Id.* at 2.

On May 15, 2013, NETL provided OHA with additional information regarding its determination. The NETL stated:

Before this FOIA request had been submitted, the National Energy Technology Laboratory (NETL) had been repeatedly instructed by the U.S. Attorney's Office in Pittsburgh and the DOE IG that NETL should not release any documents regarding the cooperative agreements with North American Power Group (NAPG) or DOE's suspension of those agreements. These instructions were confirmed with Assistant U.S. Attorney Paul Skirtich after this appeal was filed with OHA. The AUSA informed NETL that there is an ongoing investigation of this matter, and that the release of the requested documents at this time could interfere with that investigation.

See Email from Paul Detwiler, Chief Counsel, NETL, to Shiwali Patel, Attorney-Examiner, OHA (May 15, 2013).

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 threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, *i.e.*, as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). However, there is "no requirement that compilation be effected at a specific time." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (rejecting the circuit court's interpretation of "compiled," to mean "originally compiled."). Thus, "[t]he objects sought merely must have been 'compiled' when the Government invokes the Exemption." *Id.* Hence, as the U.S. Attorneys' Office instructed that the documents could not be released due to an ongoing investigation concerning those documents *before* the Appellant filed its FOIA Requests, we conclude that this requirement is satisfied. *See id.*

Moreover, in order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). By law, the Inspector General (IG) is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. In the present case, the IG's investigatory actions, as explained by NETL, were clearly within this statutory mandate.

Determining the applicability of Exemption 7(A) requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. See *Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"). In applying these standards, courts have stated that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. See *Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Thus, when an agency elects to use the "generic" approach, it has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings. *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Here, based on the information provided by NETL regarding the nature of the requested information, we are satisfied that it properly applied Exemption 7(a) to withhold the documents. In order to demonstrate that the categories are functional, we must be able to "trace a rational link between the nature of the document and the alleged likely interference." See *Crooker v. ATF*, 789 F.2d 64, 67 (D.C. Cir. 1986). NETL has categorized the requested documents as pertaining to cooperative agreements with NAPG or DOE's suspension of those agreements, which are related to the ongoing investigations by the IG and the U.S. Attorneys' Office. Thus, NETL has shown a rational link between the document and any potential interference with the investigation by the U.S. Attorneys' Office and the IG.

Thus, NETL has sufficiently explained that a law enforcement proceeding is pending and that release of the requesting information would cause foreseeable harm to the pending investigation. Moreover, NETL provided our Office with additional information that cannot be disclosed as it may compromise the pending investigation. Our review of that information further supports our conclusion that release of the requested information could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. Accordingly, we will deny the Appeal.

III. Conclusion

It Is Therefore Ordered That:

- (1) The Appeal filed by WyoFile, Case No. FIA-13-0028, 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 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.

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Director
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Date: May 23, 2013