

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

In the Matter of Wall Street Journal	)	
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Filing Date: February 6, 2013	)	Case No.: FIA-13-0006
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Issued: May 24, 2013

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**Decision and Order**  
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On February 6, 2013, the *Wall Street Journal* (Appellant), published by Dow Jones & Company, Inc, filed an Appeal from a determination issued to Michael Rothfeld, a *Wall Street Journal* reporter, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR responded in part to a Request for Information (Request) that Mr. Rothfeld 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 (Request No. HQ-2011-01032-F). Among the documents OIR released were two reports from which it withheld specific Internet Protocol (IP) addresses under Exemption 6 of the FOIA.<sup>1</sup> This Appeal, if granted, would require the DOE to release to the Appellant the IP addresses withheld under Exemption 6.

**I. Background**

The Appellant requested numerous categories of records concerning IP addresses of computers that have accessed web pages administered by the DOE's Energy Information Administration (EIA) or on which data on energy resources are first made public by the EIA.<sup>2</sup> OIR transferred the Appellant's FOIA Request to EIA to conduct a search for responsive documents.

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<sup>1</sup> An IP address is a number assigned to a modem when it connects to the internet. *See United States v. Stanley*, 2012 WL 5512987 at 2 (W.D. Pa. Nov. 14, 2012).

<sup>2</sup> Specifically, the Request asked for:

- 1) Records describing or listing any Internet Protocol addresses that have been blocked at any time during the specified period (January 7, 2007 to the present) from accessing any web page administered by the EIA or on which data on energy resources is first made public by the EIA.
  
- 2) Records describing the number of web page requests, locations, and names of individuals or entities associated with the IP addresses requested in 1) above.

In a June 8, 2012, determination letter in partial response to the Request, OIR provided the Appellant records recording the IP addresses that were blocked from EIA web pages during the 2011 calendar year and various other correspondence responsive to the Request. January 7, 2013, Determination Letter at 1-2. The OIR redacted from the records IP addresses and other information pursuant to Exemptions 6 and 7 of the FOIA.<sup>3</sup> January 7, 2013, Determination Letter at 2.

In an August 10, 2012, determination letter, OIR provided Appellant with a second partial response to the Request, a report containing logs of IP addresses that accessed the www.eia.gov web site on the dates and times that EIA released its weekly Natural Gas Storage and Petroleum Status Reports from January 1, 2012, to March 23, 2012. The information withheld from the responsive documents consisted of 252,944 IP addresses. OIR stated that the IP addresses were withheld pursuant to Exemption 6 because they “may belong to private individuals.” *See* August 10, 2012, Response Letter from OIR to Appellant. The Appellant subsequently filed an appeal from the August 10 determination.<sup>4</sup> OHA dismissed this appeal on November 16, 2012, upon being informed that OIR was rescinding the August 10 determination letter and issuing another determination letter to provide additional information to justify the decision to withhold the IP addresses.

OIR issued another determination letter on January 7, 2013, “to more completely justify the determination to withhold” the IP addresses from the responsive documents. *See* January 7, 2013, OIR Response Letter to Appellant. OIR conceded that while “some of the redacted IP addresses

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3) Logs of IP addresses that, from January 1, 2007, through March 23, 2012, have accessed www.eia.gov, and any and all web pages administered or controlled by EIA, including those on which its weekly Petroleum Status Report have been released. Such logs should include the IP addresses, the dates and times those IP addresses have accessed the aforementioned web pages, the user agent used by the client to access the webpage, and any other data contained in the logs.

4) Any summary reports or analysis regarding IP addresses that have accessed the aforementioned web pages.

5) Any report or analysis from the specified time period, whether produced within EIA or externally, by another government or a private entity, that related to the general issue or problem of computer programs from external IP addresses that access the EIA web pages on the days of data releases, or relate to specific instances of such.

6) Communications from the specified time period, including but not limited to letters, faxes, or emails, whether within EIA, between EIA and any party in any other government agency or private entity, or between parties external to EIA if the records are in EIA or DOE custody, regarding an external computer program or programs that have accessed the EIA.gov web pages on the dates of data releases, including any communications regarding attempts to mitigate or solve problems such programs have created for the functionality of the EIA web pages.

<sup>3</sup> The Appellant has not appealed the withholding of these IP addresses.

<sup>4</sup> This Appeal was filed under the name of the Wall Street Journal’s parent company, Dow Jones & Company, LLC, Case No. FIA-12-0058.

may not be traceable to individuals . . . some of them are personal and therefore traceable to individuals.” *Id.* According to OIR, the information withheld from the responsive documents consisted of some 252,944 IP addresses, some of which “can be used” to derive personal information protectable pursuant to Exemption 6. OIR went on to state that, in light of the extreme burden of determining and separating the IP addresses of individuals from the other approximately 250,000 total IP addresses, it was not required under the FOIA to segregate the protectable IP addresses of individuals from those of other entities. January 7, 2013, Determination Letter at 2.

On February 6, 2013, the Appellant submitted the present Appeal, in which it contends that the withheld IP addresses in the responsive documents should be disclosed. The Appellant argues that the withheld IP addresses are not personally identifiable information under Exemption 6 and that, because little or no privacy interest exists in an IP address, Exemption 6 mandates that the IP addresses be released. The Appellant also argues that, with regard to IP addresses of corporations and other non-natural persons, such entities’ privacy interests cannot be protected under Exemption 6 and the IP addresses may not be withheld solely because EIA believes that it would be too burdensome to segregate IP addresses belonging to individuals. January 29, 2013, Appeal Letter at 2-6.

## 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 further 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.

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 injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

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 significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (*NARFE*); *see also Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). 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. Dep’t 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 would

constitute a clearly unwarranted invasion of personal privacy. *See generally, NARFE*, 879 F.2d 873 at 874.

OIR invoked FOIA Exemption 6 to redact the IP addresses from the report it provided to the Appellant. It justified its withholding of the IP addresses by stating that they “may belong to private individuals” and therefore qualify as “similar files” under Exemption 6. OIR also determined that “releasing the information could subject these individuals to undesired or unsolicited communications or harassment.” Determination Letter at 2. It concluded that “the public interest in releasing the information does not outweigh the overriding privacy interests in keeping the information confidential.” *Id.* Upon our inquiry, OIR affirmed that, using publicly available software, some of the IP addresses, could be used to identify specific private individuals who used the EIA sites.

#### ***A. Applicability of Exemption 6 to the Withheld Material***

The initial step in analyzing whether Exemption 6 has been properly applied to withhold information is, as stated above, determining whether or not a significant privacy interest would be compromised by the disclosure of the IP addresses. We agree with OIR and the Appellant that there is no privacy interest associated with IP addresses that do not reveal the identity of a specific individual. *See Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) (“Exemption 6 is applicable only to individuals.”) However, EIA has informed us that a small number of the withheld IP addresses would reveal individual users’ names. While the IP addresses themselves do not reveal the names of individual users of the EIA web sites, the IP addresses (when processed with certain software) could be used to reveal the identity of individual users of its sites. It is well settled that the release of an individual’s name to the public implicates a privacy interest under the FOIA. *Center for Contract Compliance*, Case No. FIA-12-0047 (2012); *Another Way BPA*, Case No. TFA-0437 (2010).<sup>5</sup> Further, the fact that the personal identities of the users are not immediately apparent and would have to be derived from the IP addresses themselves does not negate the protected status of the individual’s names for purposes of the FOIA. *NARFE* at 879 F.2d at 878 (“where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain”).

Having identified a privacy interest in a portion of the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public’s understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of information, its disclosure is not “affected with the public interest.” *Id.*; *see also NARFE v. Horner*, 879 F.2d at 879. In the present case, we see little, if any, information about the workings of government that would be revealed if the IP addresses that could disclose individuals’ names were released. In weighing the substantial privacy interests of the identity of individuals that are discoverable in the requested IP address records with the slight, if any, public interest in

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<sup>5</sup> The Appellant has cited a number of criminal cases holding that, for the purposes of the Fourth Amendment of the U.S. Constitution, there is no reasonable expectation of privacy in an IP address. However, we find that the privacy interests protected under the FOIA are different than those protected under the Fourth Amendment. *See Reporters Committee*, 489 U.S. at 763 n. 13 (1989) (“The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is protected by the Constitution”).

release of those IP addresses, we find that release of those IP addresses would constitute a clearly unwarranted invasion of personal privacy. Consequently, the IP addresses that could reveal the names of individuals were properly withheld under Exemption 6.

### ***B. Segregability***

Despite our finding above, the majority of the withheld IP addresses would not reveal the identity of individual users. OIR has justified its withholding of all of the IP addresses by asserting that the FOIA does not require that it undertake the immense burden of separating the relatively few withholdable IP addresses from the more than 250,000 IP addresses responsive to the Appellant's Request.

The FOIA requires that "any reasonably segregable portion of a record" must be released pursuant to a request. 5 U.S.C. §552(b). However, if exempt and non-exempt material are "inextricably intertwined," reasonable segregation is not possible. *Mead Data Central v. Dep't of the Air Force*, 556 F. 2d 242 at 260 (D.C. Cir. 1977). In the present case, we are satisfied, based upon reliable information provided by EIA regarding the users that visit its website, that withholdable IP addresses are contained in the universe of IP addresses encompassed by the Appellant's entire FOIA Request. We have been informed by EIA that to completely process the Appellant's FOIA Request and separate the releasable IP addresses from the IP addresses that are protected under Exemption 6, EIA would have to expend some 3,000 worker hours and more than \$235,000. Additionally, EIA would be required to develop new software to sort the IP addresses. Given the immense effort that would be required to segregate the releasable IP addresses, we find that the non-exempt IP addresses are inextricably intertwined with the withholdable Exemption 6 IP addresses and thus all of the withheld IP addresses are not subject to release under the FOIA. *See Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867-68 (9th Cir. 1982) ("Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions such that exclusion of exempt information would impose significant costs on the agency"). Consequently we find that OIR properly withheld the all of the IP addresses pursuant to the FOIA and that the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on February 6, 2013, by Wall Street Journal, OHA Case No. FIA-13-0006, is 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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