United States Department of Energy
Office of Hearings and Appeals

In the Matter of Avery R. Webster	)		
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Filing Date: June 18, 2013	)	Case No.:	FIA-13-0039
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	)		

Issued: July 17, 2013

Decision and Order

On June 18, 2013, Avery R. Webster ("Appellant") filed an Appeal from a determination issued to her on May 10, 2013, by the Department of Energy (DOE) Office of Information Resources (OIR) (FOIA Request Number HQ-2013-00610-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. By letter dated February 28, 2013, the OIR advised Appellant that in response to the FOIA request a search for responsive documents would be conducted of the files of DOE's Office of Hearings and Appeals (OHA) and the Office of the Chief Human Capital Officer (HC). In response to the Appellant's request, OHA identified seventeen (17) documents responsive to the Appellant's request and HC identified four (4) documents responsive to the Appellant's request. The OIR released twelve (12) documents to the Appellant in their entirety and withheld portions of nine (9) documents pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Specifically, the Appellant contends that the searches conducted by OHA and HC were inadequate and requests that additional searches be conducted. Further, the Appellant appeals the applicability of Exemption 6 to the withheld material. This Appeal, if granted, would require OHA and HC to conduct additional searches for documents that the Appellant requested as well as require OIR to release the information it withheld pursuant to Exemption 6.

I. Background

On February 26, 2013, the Appellant submitted a FOIA request seeking:

> "copies of ALL management training records/documents for the following DOE managers in the Office of Hearings and Appeals (OHA):
>
> 1. Poli A. Marmolejos (Mr. Marmolejos' records should also include any management courses attempted, taken, completed or recommended while in DOE's Office of Civil Rights)

2. Fred L. Brown
3. Ann S. Augustyn
4. Janet N. Freimuth"

The Appellant specified in the request that Appellant was seeking "all documents located in all systems of records or otherwise, including those in the possession of the managers themselves." Additionally, the Appellant requested that the documents include "relevant information such as: all management courses attempted or completed, dates completed, course description(s), etc." The Appellant also asked for "documents that contain recommendations for management courses, a requirement to complete a management course or a request for a management course for each of the managers listed above." FOIA request from Avery R. Webster (Feb. 26, 2013). The OIR assigned the Office of Hearings and Appeals (OHA) and the Office of the Chief Human Capital Officer (HC) to conduct a search for responsive records. Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Avery Webster, at 1 (May 10, 2013).

On May 10, 2013, the OIR issued a Determination Letter and provided the Appellant with twenty-one (21) documents. In nine (9) of those documents, OIR withheld, pursuant to Exemption 6 of the FOIA, information consisting of the course titles and codes related to private information about the OHA employees who took the courses. *Id.* at 2. Subsequently, on June 18, 2013, OHA received the Appellant's Appeal of the OIR's determination, wherein she challenges the applicability of Exemption 6 and challenges the adequacy of the search for responsive records.

The Director, Office of Hearings and Appeals, 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 its appeal, Appellant challenges the OIR's application of Exemption 6 of the FOIA to the nine (9) documents that were released in part. Appellant also appeals the adequacy of the search for responsive records. Upon review of the unredacted versions of those nine (9) documents and the facts of OHA's search and HC's search, we conclude that the OIR properly invoked Exemption 6 in support of its withholdings. We are also 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 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); *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 information 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 Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

OIR invoked FOIA Exemption 6 to redact information from nine (9) documents released to the Appellant. The information redacted by OIR consisted of the course titles and codes related to private information about the OHA employees who took the courses. The Appellant contends that OIR improperly withheld this information. Appeal at 1. We disagree.

We agree with OIR that there are legitimate privacy concerns that would be raised by the release of the course titles and codes in question. We have reviewed unredacted copies of the documents found to be responsive to the Appellant's request, and note that OIR only withheld a small number of course titles and course codes, releasing the balance to the Applicant. After reviewing the unredacted copies of the documents we conclude that the course titles and course codes withheld by OIR implicate personal privacy information about the OHA employees who took those specific courses, and that the release of that personal information could result in injury, embarrassment, jealousy, or harassment. Therefore, we find that substantial privacy interests would be implicated by the release of the course titles and codes withheld by OIR.

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. The information withheld by OIR would reveal little about the operations and activities of the government. The release of the small number of withheld names and codes of courses which specific employees have completed or attended would, to some extent, shed light on the way in which the Department trains its employees.

Therefore, we find that there is a limited public interest in the disclosure of the information at issue.

In determining whether a record may be withheld under exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees,* 879 F.2d at 874. We have concluded above that there is a substantial privacy interest at stake in this case. We have also concluded that there is a limited public interest in the disclosure of the withheld information. After a thorough examination, however, we find that the privacy interest at issue outweighs the public interest in the disclosure of the information. Disclosure of personal privacy information that could lead to injury, embarrassment, jealousy or harassment would have a deleterious effect on employee morale and workplace efficiency. Under these circumstances, and after weighing the privacy interests in confidentiality against the public interest in disclosure, we determine that release of the information at issue would constitute a clearly unwarranted invasion of personal privacy.

We have reviewed the information that was withheld from the Appellant and have determined that OIR segregated and released to the Appellant all information that is not subject to withholding under Exemption 6. Having found that the OIR properly withheld personal information regarding employees from the documents it released to the Appellant, we will deny the portion of the Appeal challenging OIR's withholding of information pursuant to Exemption 6 of the FOIA.

B. 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 two offices: the Office of Hearings and Appeals (OHA) and the Office of the Chief Human Capital Officer (HC).

On February 28, 2013, OHA certified that it searched its records. The search certification indicates that Poli A. Marmolejos, Fred. L. Brown, Janet N. Freimuth, and Ann S. Augustyn performed manual and automated searches of their staff records and email accounts. The search certification indicates that Patricia G. Spencer also conducted a manual and automated search through staff records and email accounts. In response to our inquiries, OHA provided us with additional information. Memorandum of telephone conversation between William Schwartz, Office of Hearings and Appeals, and Sean Tshikororo, Attorney-Adviser, Office of General

Counsel (July 3, 2013, 10:51AM EDT). OHA informed us that the four individuals named in the Appellant's request searched their profiles on DOE's "CHRIS" online system and also searched hard copies of relevant records in their offices. OHA also stated that Patricia G. Spencer, OHA Administrative Support Staff, conducted a search for records on the CHRIS online system and in hard copy. OHA indicated that Ms. Spencer returned duplicates of the records turned over by the four managers. Since a self-search by employees for their own management training records as well as a search by administrative support staff for those employees' management training records would be reasonably calculated to identify responsive documents, we conclude that OHA conducted a reasonable search.

On February 28, 2013, HC certified that it searched its records. The search certification indicates that HC conducted an automated search of "DOEInfo" training records by the named employees' first and last names. In response to our inquiries, HC provided us with additional information. Email from Bonnie Chin, Office of Learning and Development, to Sean Tshikororo, Attorney-Adviser, Office of General Counsel (July 3, 2013, 1:16PM EDT). HC informed us that they searched the DOEInfo database for the management training records of the four requested employees. HC also informed us that because the DOEInfo database does not contain course descriptions, that information was not included in the materials delivered to OIR. Since a search of the DOEInfo database for the management training records of DOE employees using the employee's first and last names would be reasonably calculated to identify responsive documents, we conclude that HC conducted a reasonable search.

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 Hearings and Appeals searched both physical files and online accounts and the Office of the Chief Human Capital Officer searched its DOEInfo database. 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-13-0039, 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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Robert F. Brese
Chief Information Officer
U.S. Department of Energy

Date: July __, 2013