

United States Department of Energy
Office of Hearings and Appeals

In the Matter of DeShonne E. Massey Sr.)
)
Filing Date: July 17, 2013) Case No.: FIA-13-0051
)
_____)

Issued: August 14, 2013

Decision and Order

On July 17, 2013, DeShonne E. Massey Sr. (“Appellant”) filed an Appeal from a determination issued to Appellant on June 11, 2013, by the Department of Energy (DOE) Office of Information Resources (OIR) (FOIA Request Number HQ-2013-00700-F). In its determination, 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 Appellant requested two types of documents: (1) any and all records containing the hours and/or days that Ann Augustyn, Chief of the Personnel Security and Appeals Division of the Office of Hearings and Appeals (OHA), worked via flexiplace or telecommuting during her entire tenure at DOE; and (2) any and all documents regarding any request by Ms. Augustyn to telecommute or begin a telecommuting program in OHA.

OIR assigned Appellant’s request to OHA and to the Office of the Chief Financial Officer (CFO) to conduct searches of their files for responsive records. OHA’s search did not locate any documents responsive to the request. CFO’s search located one responsive document. DOE produced portions of that document, and withheld the remaining portions pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to DeShonne E. Massey, Sr., at 1 (June 11, 2013).

In this appeal, the Appellant requests that OIR be ordered to: (1) release the information it withheld pursuant to Exemption 6; and (2) conduct a more thorough search for responsive records.

I. Background

On March 11, 2013, the Appellant submitted a FOIA request seeking two categories of documents. FOIA Request from DeShonne E. Massey, Sr. (Mar. 11, 2013). First, the request sought “[c]opies of any and all records that contain the hours and/or days that Office of Hearings and Appeals Chief, Ann Sweeny [sic] Augustyn, worked via Flexiplace or Telecommuting

during her entire tenure/employment at DOE.” *Id.* Second, the request sought “any and all documents, reports, records, correspondence, responses, e-mails (and e-mail chains), drafts, notes, meeting and investigative notes, memoranda, decisions, personnel actions, informal and formal complaints, recommendations, decisions, etc., made, created or generated regarding or in response to Ms. Augustyn’s request to telecommute or to begin a telecommuting program in the Office of Hearings and Appeals.” *Id.*

On June 11, 2013, OIR issued a determination letter to the Appellant. OIR stated that CFO located one document responsive to the Appellant’s request. OIR provided Appellant with portions of that document and withheld four columns of data pursuant to Exemption 6. The document is a report of telework taken by Ann Augustyn since 2003. The redacted columns consist of the date of her telework, the description of her telework, the administrative code that corresponds to that description, and the number of hours of telework that she took. Determination Letter, at 2.

On July 17, 2013, OHA received the Appellant’s Appeal of OIR’s determination, in which he challenges the applicability of Exemption 6 to the released document and the adequacy of the search for responsive records.

The Director of OHA referred this appeal to my office pursuant to a memorandum dated April 10, 2013, which delegates his authority, in cases that he refers 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 OIR’s application of Exemption 6 to the released document. Upon review of the unredacted version of the released document, we conclude that OIR properly invoked Exemption 6 in support of its withholdings. Appellant also appeals the adequacy of the search for responsive records. In our review of the facts surrounding the search, as carried out by OHA and CFO, we contacted both of those offices, which located additional responsive documents. Accordingly, we remand this case to OIR with directions that OIR (1) provide an additional response to Appellant regarding the two additional responsive documents that OHA has located; and (2) assign CFO to make an additional search of CFO records, pending a new estimation of search costs by OIR and the Appellant’s agreement to pay such search costs.

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). FOIA exemptions must be construed 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). OIR explained that the withheld information “qualifies as ‘similar files’ because it is associated with an individual entitled to privacy.” Determination Letter, at 2. Our review of the unredacted document reveals that it identifies an agency employee 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.” *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. HUD*, 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 dates on which Ms. Augustyn engaged in telework. The entries in this report date back to 2003, when CFO began using the Automated Time and Attendance Production System (ATAAPS) database, which it still currently uses to track DOE employee time and attendance. Each entry in this list includes the description of her telework, the code that corresponds to that description, the number of hours of her telework, and the date. 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.

On appeal, Appellant asserts that Ms. Augustyn does not have a personal privacy interest in the dates and amount of hours that she worked as telework. Specifically, Appellant alleges, without citing to any legal authority, that the hours worked by higher-level managers and other federal employees are a matter of public record. Accordingly, Appellant argues that OIR erred in withholding this information.

However, it is well-established that federal employees have a substantial privacy interest in payroll records, including the hours and type of work performed. *See, e.g., Painting & Drywall*

Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300, 1301-02 (D.C. Cir. 1991). Consequently, we conclude that there is a significant privacy interest in the withheld portions of this document.

Further, there is a minimal public interest, if any, in revealing the dates and hours that Ms. Augustyn engaged in telework, and the description and corresponding code of her telework. DOE has a well-established telework program, and for eligible employees, DOE treats hours worked on either regular or unscheduled telework the same as hours worked at an employee's duty station. DOE Order 314.1 (Feb. 11, 2013). Therefore, in this instance, revealing the dates and hours on which Ms. Augustyn engaged in telework and the description and corresponding code of her telework, in which she has a substantial privacy interest, 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); *see also Berger v. I.R.S.*, 487 F.Supp.2d 482, 505 (D.N.J. 2007) ("The fact that [the 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 . . .").

Because there is a substantial personal privacy interest in the withheld portions of this document and because this information is of minimal public interest, OIR was correct to withhold the dates and hours of Ms. Augustyn's telework, and the description and corresponding code of her telework.

B. Adequacy of the Search

Next, Appellant challenges the initial search on the grounds that OIR's response letter did not adequately describe the scope of the search performed. For example, Appellant requests information regarding whether the search was conducted manually and/or electronically. Further, Appellant questions what files or databases were searched and what search terms were used.

In responding to a request for information filed under the FOIA, 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. DOE has 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).

OIR assigned the present request for searches by two offices, which regularly maintain the type of records that might be responsive to this request: OHA and CFO. Determination Letter, at 1. Upon review of those searches, we determined that additional information was required to assess the reasonableness of those searches.

Regarding the search by OHA, OHA conducted its initial search for responsive records on May 15, 2013. Freedom of Information Act Search Certification Form for HQ-2013-00700 signed, by

Fred Brown (May 15, 2013). This search was completed by Fred Brown and Ann Augustyn, the two employees in OHA likely to have responsive records because Mr. Brown is Ms. Augustyn's immediate supervisor and the approving official for any of her time and attendance requests. Memorandum of telephone conversation between Ann Augustyn, Chief of the Personnel Security and Appeals Division, OHA, and James Silvestro, Attorney-Adviser, Office of General Counsel (OGC) (July 24, 2013, 12:24PM EDT).

For his part, Mr. Brown spent approximately 30 minutes manually searching the 15 to 20 personnel files that he maintains in a drawer in his office. Memorandum of telephone conversation between Fred Brown, Deputy Director, OHA, and James Silvestro, Attorney-Adviser, OGC (July 24, 2013, 12:00PM EDT). None of these files contained responsive documents. *Id.* Mr. Brown did not conduct any electronic searches. *Id.*

Following DOE's receipt of this appeal, we contacted Mr. Brown, who then completed an electronic search of all email communication. Memorandum of telephone conversation between Fred Brown, Deputy Director, OHA, and James Silvestro, Attorney-Adviser, OGC (July 25, 2013, 1:35PM EDT). On July 25, 2013, Mr. Brown completed an electronic search of all emails to or from Ms. Augustyn (approximately 270 emails), and did not uncover anything related to telework or flexiplace. Email from Fred Brown, Deputy Director, OHA, to James Silvestro, Attorney-Adviser, OGC (July 25, 2013, 3:23PM).

For her part of the initial OHA search, Ms. Augustyn electronically searched all of her emails (totaling more than 10,000) for emails to or from "Fred Brown" containing the word "flexiplace," which is what everyone in OHA calls telework. Memorandum of telephone conversation between Ann Augustyn, Chief of the Personnel Security and Appeals Division, OHA, and James Silvestro, Attorney-Adviser, OGC (July 24, 2013, 12:24PM EDT). Ms. Augustyn also manually searched approximately ten filing cabinets where she keeps her personnel files as well as those of the individuals that she supervises. *Id.* Neither of these searches uncovered any responsive records. *Id.*

Following the OIR determination in this matter, however, Ms. Augustyn recalled that she had neglected to search a folder that she maintains, which contains the flexiplace agreements for all OHA employees, including herself. *Id.* Consequently, Ms. Augustyn completed a manual search of that folder. Memorandum of telephone conversation between Ann Augustyn, Chief of the Personnel Security and Appeals Division, OHA, and James Silvestro, OGC (July 30, 2013, 1:24PM EDT). Ms. Augustyn uncovered two additional documents responsive to this request: (1) a Flexiplace Agreement dated July 11, 2000; and (2) a Flexiplace Agreement dated October 26, 2010. Both Agreements included attached supporting materials. Email from Ann Augustyn, Chief of the Personnel Security and Appeals Division, OHA, to James Silvestro, OGC (July 30, 2013, 1:24PM EDT).

OIR will provide an additional response to Appellant regarding these two responsive documents.

Regarding the search by CFO, OIR also assigned the request for search by CFO because CFO is the DOE office that manages the ATAAPS database, which is DOE's electronic time and attendance database. Memorandum of telephone conversation between Paulette Caron, Lead

Fiscal Specialist, CFO, and James Silvestro, Attorney-Adviser, OGC (July 24, 2013, 12:24PM EDT). The ATAAPS database only extends back to 2003, when it was instituted; all prior records, which were physically maintained, were destroyed in accordance with DOE's administrative records retention schedule.¹ *Id.* Further, the ATAAPS system only includes information related to the hours that an employee actually worked, because pursuant to DOE Order 322.1c, any document related to the scheduling and/or approval of regular or situational telework is held by the employee's supervisor and never submitted to CFO. *Id.*

The search on behalf of CFO was completed by Paulette Caron, Lead Fiscal Specialist, because Ms. Caron has access to the ATAAPS database. *Id.* Ms. Caron searched the ATAAPS database by entering Ms. Augustyn's name into the employee field and running a search for all pay periods in which Ms. Augustyn worked flexiplace. *Id.* In response to this search, the ATAAPS database generated a report with 106 entries corresponding to 106 pay periods during which Ms. Augustyn worked flexiplace. *Id.* To verify the accuracy of this report, Ms. Caron selected several entries at random, pulled up the corresponding time and attendance record for each respective pay period, and confirmed that the flexiplace hours in the ATAAPS report were consistent with the hours actually reported to the system. *Id.* After spot checking the accuracy of the report, Ms. Caron printed this report and forwarded it to OIR as the only responsive document found by CFO. *Id.*

While this ATAAPS report, once generated, was responsive to Appellant's request, it is also apparent that CFO does have further documents that are responsive to this request. Specifically, each of the time and attendance records for which an entry was generated within this ATAAPS report is a document related to Ms. Augustyn's flexiplace hours worked.

Accordingly, this matter is remanded to OIR with directions that OIR assign CFO to search for additional responsive documents, including the actual time and attendance records that correspond to each pay period that Ms. Augustyn worked flexiplace. However, because locating and releasing these documents will likely be labor intensive for CFO, OIR should first contact CFO and then provide Appellant with an estimation of the cost of such a search. Only after receiving Appellant's assent to pay such estimated costs should OIR assign CFO to perform this additional search.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on July 17, 2013, OHA Case Number FIA-13-0051, is hereby granted in part, as described in Paragraph 2 below, and denied in all other respects.

(2) The matter is hereby remanded to OIR for additional proceedings consistent with the directions set forth in this 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

¹ Pursuant to "Department of Energy Administrative Records Schedule I: Personnel Records," DOE time and attendance records are only required to be maintained for six years and seven months.

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 a 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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

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

Date: August 14, 2013