

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Kristopher Fair)
)
Filing Date: November 14, 2013) Case No.: FIA-13-0071
_____)

Issued: December 11, 2013

Decision and Order

On November 14, 2013, Kristopher Fair (“Appellant”) filed an Appeal from a determination issued to him on September 30, 2013, by the Office of Intelligence and Counterintelligence (IN) of the Department of Energy (DOE) (FOIA Request No. HQ-2011-01265-F). In its determination, IN released a document responsive 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. IN withheld portions of that document under Exemptions 1, 3 and 6 of the FOIA. The Appellant claims that IN did not conduct an adequate search for records and that it should not have applied Exemptions 1, 3 and 6 to the withheld information. This Decision and Order only pertains to the withholdings under Exemptions 3 and 6 and to the adequacy of IN’s search for requested documents.¹ Thus, this Appeal, if granted, would require IN to conduct another search for the documents that the Appellant requested and to release the information it withheld pursuant to Exemptions 3 and 6.

I. Background

On June 1, 2011, the Appellant submitted a FOIA Request seeking documents pertaining to “[i]nformation related to Chelyabinsk-40 or Chelyabinsk-65 from the in [sic] reference to years 1946-1960.” See Determination Letter from Steven K. Black, Director, IN, to Appellant (Sept. 30, 2013); see FOIA Request from Kristopher Fair, to FOIA-Central Online Request (June 1, 2011). On September 30, 2013, IN responded to the Appellant’s FOIA Request, stating that it released one document that it withheld in part pursuant to Exemptions 1, 3 and 6. *Id.* IN invoked Exemption 6 for certain redactions stating that the withheld information “consists of names and other identifying data concerning persons mentioned in the responding document.” *Id.* IN also invoked Exemption 3 to withhold information pursuant to the Atomic Energy Act and the National Security Act of 1947. *Id.* The Appellant contends that IN should not have

¹ This Appeal has been bifurcated, and the Appellant’s challenge to IN’s invocation of Exemption 1 and the Exemption 3 redactions invoked pursuant to the Atomic Energy Act will be decided in another matter, Case No. FIC-13-0004. See Acknowledgment Letter from William M. Schwartz, Staff Attorney, OHA, to Appellant (Nov. 20, 2013).

invoked Exemption 6, stating that the information it seeks is factual and would not compromise any privacy interest if released. *See* Appeal. Moreover, the Appellant contends that Exemption 3 should not apply as he is requesting information “for public understanding about atomic energy and scientific and nuclear progress.” *Id.*

In addition, the Appellant contests the adequacy of the search for responsive documents, asserting that his FOIA Request should have been processed by all of the relevant DOE offices and its predecessor agencies, including the Atomic Energy Commission and the Energy Research and Development Administration. *Id.* The Appellant further lists the following offices where he claims that searches should have been conducted: Office of the Atomic Energy Commission representative on the Intelligence Advisory Board,² DOE’s Office of Science and Technical Information (OSTI), DOE’s Office of Health, Safety and Security (HSS), IN and “any other unit or branch that monitored the Soviet atomic program between the years 1945 through 1960.” *Id.*

II. Analysis

A. Adequacy of 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).³

The Appellant avers that his original request was for documents pertaining to the:

construction/closing of Chelyabinsk; daily lives of the citizens within Chelyabinsk (such as radioactivity levels, wages of citizens, etc.); specific functions of Chelyabinsk during the period of 1946 – 1950 which include information held by the Atomic Energy Commission from 1946 – 1950 as well as research developments made after 1950 by the AEC and DOE in regards to the functions of Chelyabinsk between 1946 – 1950; and finally, information regarding individual scientists operating inside of Chelyabinsk during this period.

See Appeal. However, according to the FOIA Request that IN processed, the Appellant only sought “information relating to Chelyabinsk-40 or Chelyabinsk-65 from the in [sic] reference to years 1946-1960.” *See* FOIA Request from Kristopher Fair, to FOIA-Central Online Request (June 1, 2011) (FOIA Request Number HQ-2011-01265-F). Thus, IN’s search was appropriately

²The Office of the Atomic Energy Commission representative on the Intelligence Advisory Board no longer exists.

³ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

limited to the documents requested in Appellant's FOIA Request Number HQ-2011-01265-F, rather than what he stated he requested in the instant Appeal.⁴ *See* Determination Letter.

IN provided us with additional information to evaluate the reasonableness of its search. IN explained that its analyst searched its electronic holdings through intelligence databases for reports and that it searched hard copies of its analytical intelligence documents. *See* Email from Debbie Tijani, Management Analyst, IN, to Shiwali Patel, Attorney Examiner, OHA (Dec. 3, 2013). In response to the Appeal, IN conducted an additional search of the electronic holdings and paper files for responsive records, but was still unable to locate responsive records aside from the document that was provided to the Appellant. *Id.* The analyst searched the terms in the original FOIA Request: "information relating to Chelyabinsk-40 or Chelyabinsk-65 from the reference years 1946-1960." *Id.* Based on the foregoing, we are satisfied that IN has conducted an adequate search for documents.

Moreover, DOE's Office of Information Resources (OIR) explained that in addition to forwarding the Appellant's FOIA Request to IN for processing, it also sent the request to other DOE offices. On June 9, 2011, OIR sent the Request to HSS, IN, and OSTI to conduct a search for the requested documents. *See* Memorandum from Brenda Washington, FOIA/PA Specialist, OIR, to Robyn Johnston, HSS and Debbie Tijani, IN (June 9, 2011); Memorandum from Alexander C. Morris, FOIA Officer, to Brenda G. Harrison, FOIA Officer, OSTI (June 9, 2011). On September 2, 2011, HSS responded to the Appellant's FOIA Request, stating that IN and OSTI would respond separately. *See* Determination Letter from Patricia R. Worthington, Director, HSS, to Appellant (Sept. 2, 2011). HSS did not locate any responsive documents. *Id.* OSTI responded to the Appellant's FOIA Request on August 9, 2011. *See* Determination Letter from Brenda G. Harrison, FOIA Contact, OSTI, to Kristopher Fair. Furthermore, the Request was forwarded to the National Nuclear Security Administration (NNSA), which confirmed that it did not have any responsive documents. *See* Email from Carolyn Becknell, NNSA, to Brenda Washington, (June 6, 2011). Finally, OIR also approached the Office of History and Heritage Resources, and that Office confirmed that it would not have any responsive documents. *See* Email from Terry Fehner, Office of History and Heritage Resources, to Alexander C. Morris, FOIA Officer, OIR (Nov. 20, 2013).

As stated above, a search for documents "does not require absolute exhaustion of the files," only a "search reasonably calculated to uncover the sought materials." *See Miller*, 779 F.2d at 1384-85. Thus, based on the foregoing, we are satisfied that an adequate search for responsive documents was conducted.

B. Exemption 3

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

⁴ It appears that in his Appeal, the Appellant is referring to a FOIA Request that was processed by the Office of Science and Technical Information (OSTI) over two years ago. *See* FOIA Request No. OSTI-2011-01437-F. OSTI responded to the Appellant's previous request on August 9, 2011. *See* Determination Letter from Brenda G. Harrison, FOIA Contact, OSTI, to Kristopher Fair (Aug. 9, 2011) (FOIA Request No. OSTI-2011-01437-F).

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 3 of the FOIA provides that an agency may withhold from disclosure information “specifically exempted from disclosure by statute . . . if that statute -- (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3).

Here, IN invoked Exemption 3 to support its withholdings on the cover page and pages 2, 3, 4, 7, 13, 51, 53, 54, 55, 56 and 57. IN stated that on pages 7 and 13, Exemption 1 also applied to the Exemption 3 redactions. *See* Memorandum of Telephone Conversation between Yvonne Burch, Supervisory Management Analyst, IN, and Shiwali Patel, Attorney-Examiner, OHA (Dec. 4, 2013). Accordingly, we will not review the redactions on pages 7 and 13 in this Decision as this matter has been bifurcated, as stated above, so that the Exemption 1 withholdings pertaining to classified information will be decided in a separate matter, OHA Case No. FIC-13-0004. IN explained that it invoked some of the Exemption 3 redactions pursuant to the National Security Act of 1947, 50 U.S.C. § 3001, *et seq.* The National Security Act qualifies as a withholding statute under Exemption 3. *See CIA v. Sims*, 471 U.S. 159, 167 (1985) (“Section 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect ‘intelligence sources and methods,’ clearly ‘refers to particular types of matters,’ 5 U.S.C. § 552(b)(3)(B), and thus qualifies as a withholding statute under Exemption 3.”).

IN states that the National Security Act allows for the redactions in the released document as it contains classified and sensitive unclassified information, such as intelligence methodology and intelligence and counterintelligence personnel involved in these activities. *See* Email from Debbie Tijani, Management Analyst, IN, to Shiwali Patel, Attorney Examiner, OHA (Dec. 3, 2013). IN asserts that release of the withheld information could reveal classified information thereby impacting the operational security of the intelligence community (IC). *See* Memorandum of Telephone Conversation between Yvonne Burch, Supervisory Management Analyst, IN, and Shiwali Patel, Attorney-Examiner, OHA (Dec. 4, 2013). Specifically the identities of individuals on the cover page, and pages 2 and 3, were redacted because those individuals were derivative classifiers (DC) and involved in the analysis of the intelligence document production. *Id.* Exemption 3 was invoked on page 4 because release of that information would reveal intelligence methodology and lead to other classified information. *Id.*; Dec. 3 Email from Debbie Tijani. The redactions on pages 51 (acronym and abbreviations), 53 (bibliography) and 54 (bibliography) conceal the IC methodology and sources, and finally, the information that was redacted on pages 55, 56 and 57, the distribution list, contains the identity of production personnel in the IC. Dec. 3 Email from Debbie Tijani.

Accordingly, based on our review of the released documents and the information provided by IN, we are satisfied that IN properly invoked Exemption 3 in support of its redactions on the cover page and pages 2, 3, 4, 51, 53, 54, 55, 56 and 57 pursuant to the National Security Act.

C. Exemption 6

In addition, IN invoked Exemption 6 to many of the same redactions that it made pursuant to Exemption 3 based on the National Security Act. 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.” *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 privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep’t of Hous. and 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). 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 Ripskis*, 746 F.2d at 3.

Courts have recognized a privacy interest in protecting the identities of employees in both sensitive agencies and sensitive occupations, as those employees “face an increased risk of harassment or attack.” *See Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 192 (2d Cir. 2012); *see also Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 152 (D.C. Cir. 2006) (“We have also read the statute to exempt not just files, but also bits of personal information, such as names and addresses, the release of which would ‘create[] a palpable threat to privacy.’”); *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005) (“whether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure.”). In *Long*, the Second Circuit cited the Office of Personnel Management’s (OPM) list of “sensitive” occupation categories across federal agencies, which included “intelligence” and “intelligence clerk/aide.” *Long*, 692 F.3d at 189, n. 4. The Court explained that “[i]t is not uncommon for courts to recognize a privacy interest in a federal employee’s work status (as opposed to some more intimate detail) if the occupation alone could subject the employee to harassment or attack.” *Id.* at 192. In order to reveal private information, such as the name of an individual involved in intelligence, it must be demonstrated that disclosure of the individual’s identity sheds light on government activity. *Id.* at 193. The Court concluded that “Exemption 6 permits OPM to withhold the names of employees working in the sensitive agencies and sensitive occupations.” *Id.* at 195.

IN stated that it invoked Exemption 6 to the redactions on the cover page and pages 2, 3, 53, 54, 55, 56 and 57 because they contained the names of individuals involved in sensitive intelligence production. *See* Memorandum of Telephone Conversation between Yvonne Burch, Supervisory Management Analyst, IN, and Shiwali Patel, Attorney-Examiner, OHA (Dec. 4, 2013). As such, based on the above case law recognizing a privacy interest in protecting the identities of employees in both sensitive agencies and occupations, we conclude that IN properly invoked Exemption 6 to withhold the names of those individuals. *See Long*, 692 F.3d at 192.

Furthermore, there is no public interest in revealing those names, as the names themselves do not shed light on the government's activities. For that reason, and because of the special nature of the work performed by those individuals whose names were withheld, IN properly withheld the names and other personal information of the individuals it redacted pursuant to Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on November 14, 2013, OHA Case No. FIA-13-0071, 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.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 11, 2013