

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

In the Matter of Tri-Valley CAREs )  
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Filing Date: July 10, 2014 ) Case No.: FIA-14-0042  
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Issued: July 30, 2014

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**Decision and Order**  
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On July 10, 2014, Tri-Valley CAREs (Appellant) filed an Appeal from a determination issued to it on May 13, 2014, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. A FOIA 07-277-R). In that determination, NNSA withheld portions of a document under Exemption 7(F) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal challenges the withholding under Exemption 7(F).

**I. Background**

In May 2008, Tri-Valley CAREs submitted a revised FOIA request to the DOE for a document titled “B368 Select Agent Risk and Threat Assessment,” dated July 14, 2005. Jan. 14, 2011, Determination Letter from Carolyn Becknell, FOIA Officer, NNSA, to Appellant. The responsive document was released to Tri-Valley CAREs after information was redacted under Exemptions 1, 2, and 6. *Id.* NNSA described the information withheld pursuant to Exemption 2 as “High 2” information, i.e., information where “disclosure significantly risks circumvention of agency regulations or statutes.” *See Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981). Tri-Valley CAREs appealed the Exemption 2 withholding on February 25, 2011. February 18, 2011, Appeal Letter from Marylia Kelley, Executive Director, Appellant, to Director, Office of Hearings and Appeals (OHA), DOE. While that appeal was pending, the Supreme Court issued a decision holding that agencies could no longer rely on Exemption 2 to withhold information under the “High 2” category of information. *Milner v. Dep’t of the Navy*, 562 U.S. \_\_\_, 131 S. Ct. 1259, 1264-1271 (2011). *Milner* rejected the reasoning of *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981), and made clear that High 2 no longer existed. Therefore, we remanded this matter to the NNSA. *Tri-Valley CAREs*, Case No. TFA-0463 (May 25, 2011).

On May 13, 2014, NNSA responded to our remand and withheld the Exemption 2 information under Exemption 7(F) of the FOIA. May 13, 2014, Determination Letter from Elizabeth L. Osheim, Authorizing and Denying Officer, NNSA, to Robert Schwartz, Appellant. The Appellant challenged the determination claiming that (1) NNSA did not prove that the requested document was compiled within the scope of DOE's law enforcement capacity; and (2) NNSA did not identify individuals with the specificity required by the Supreme Court. June 12, 2014, Appeal Letter from Scott Yundt, Appellant, to Director, OHA, DOE.

## 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 Protection 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 7(F) of the Freedom of Information Act protects information compiled for law enforcement purposes to the extent that its production "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). This exemption originally protected only law enforcement personnel but was amended to protect the safety of "any individual." *See ACLU v. Dep't of Defense*, 543 F.3d 59, 79 (2d Cir. 2008), *cert. granted, vacated, and remanded on other grounds*, 558 U.S. 1042 (2009) (discussing legislative history of Exemption 7(F) and explaining that the 1986 amendments to FOIA expanded coverage of this exemption to include individuals who are not law enforcement personnel).

As an initial matter, Appellant argues that the agency must prove that the document was within the scope of DOE's law enforcement capacity. Exemption 7 requires that information be "compiled for law enforcement purposes." Consistent with that language, Exemption 7 does not have to be "created" for law enforcement purposes, merely "compiled for law enforcement purposes." *John Doe Agency vs. John Doe Co.*, 493 U.S. 146, 153 (1989). In this case, the very name of the requested document, "B368 Select Agent Risk and Threat Assessment," as well as its contents, indicates that the document was "compiled" for law enforcement purposes.

While Exemption 7(F) has historically been used to withhold names and other identifying information concerning individuals at risk of retaliation and harm, the plain language of the statute indicates that it can also be used to withhold any type of information that creates a risk of harm or retaliation to an individual, not just identifying information. For example, courts have upheld the use of Exemption 7(F) to withhold inundation maps because the maps show which areas downstream from dams are at risk for flooding in the event a dam is damaged. *See Pub. Employees for Envtl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n*, 839 F.

Supp. 2d 304 (D.D.C. 2012), *remanded on other grounds*, 740 F. 3d 195 (D.C. Cir. 2014), *rehearing en banc denied* (May 1, 2014) (approving withholding of inundation maps because of concern that terrorists could use the information in the maps to cause flooding and destruction in populated areas); *Living Rivers, Inc., v. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1322 (D. Utah 2003). The exemption has also been used to withhold the details of the physical structure and security plans of a Bureau of Prisons facility because of the risks to prison security that would be created by disclosure. *See Raheer v. Bureau of Prisons*, No. 09-526, 2011 WL 2014875, at \*10 (D. Or. May 24, 2011).

Despite the Appellant's allegations to the contrary, courts have found that Exemption 7(F) is not limited to "known, named individuals only." *Living Rivers*, 272 F. Supp. 2d at 1321; *accord Pub. Employees for Envtl. Responsibility*, 839 F. Supp. 2d at 328. Similarly, the exemption has been used to protect the company names of private security contractors operating in concert with U.S. military forces in Iraq. *Los Angeles Times Commc'ns v. Dep't of Army*, 442 F. Supp. 2d 880, 898-900 (C.D. Cal. 2006). The court accepted the government's specific assessment that disclosure of the company names might be expected to endanger the life or safety of military personnel, company employees, and civilians of Iraq. *Id.* at 900. Similarly, Exemption 7(F) has been used to protect information regarding seized contraband and information concerning U.S. Customs employees involved in the seizure, storage, and evaluation of the contraband. *Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs and Border Prot.*, 2006 WL 1826185 at \*9 (D.D.C. 2006). Applying the exemption, the court reasoned that the release of this information could place innocent third parties at risk who were located in the vicinity of customs officials, activities, or the seized contraband. *Id.* (citing *Garcia v. Dep't of Justice*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) (protecting names of FBI special agents and other government agents)).

We have reviewed the information withheld by NNSA in this document. The withheld portions are about the protection and security measures used to protect Federal buildings and personnel. The disclosure of this information could enable anyone, including terrorists, to more easily plan operations that would target these facilities. Uncontrolled releases or access to this information by an unauthorized person could endanger the life or physical safety of security police officers, federal employees, and the general public. Therefore, we will uphold NNSA's application of Exemption 7(F) to the withheld information.

### **III. Conclusion**

After considering the Appellant's arguments, we find that NNSA properly applied Exemption 7(F) to the withheld information. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tri-Valley CAREs, Case No. FIA-14-0042, 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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