

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

In the Matter of the Center for Public Integrity and )  
Alexander Cohen )

Filing Date: June 30, 2015 )

Case No.: FIA-15-0035 )

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Issued: July 28, 2015

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**Decision and Order**  
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On June 30, 2015, the Center for Public Integrity and Mr. Alexander Cohen (Appellants) filed an Appeal challenging a Freedom of Information Act (FOIA) determination issued to them by the Office of Inspector General (OIG) of the Department of Energy (Request No. HQ-2015-00184-F). In that determination, OIG responded to a request filed by the Appellants under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. OIG released one document but redacted portions of it pursuant to Exemptions 6 and 7(C) of the FOIA. This Appeal, if granted, would require OIG to release some or all the information it withheld.

**I. Background**

On November 13, 2014, the Center for Public Integrity (CPI), a news media organization, and Mr. Alexander Cohen, of CPI, filed a FOIA request with the Office of Information Resources (OIR) at DOE. Request Letter from Alexander Cohen, CPI, to OIR. The request sought:

- A full copy of the Report of Investigation, the Final Report, the Closing Memo, the Referral Letter, and the Referral Memo for Department of Energy Office of Inspector General investigation DOE/IG-0927.
- All records in your custody or under your control that pertain to Department of Energy Office of Inspector General investigation DOE/IG-0927, including but not limited to letters, e-mails, memoranda, reports, appointment calendars, telephone call logs and any related attachments, and dated up until the date you process this request.

On November 18, 2014, OIR assigned the request to OIG. Letter from Alexander Morris, OIR, to Alexander Cohen, CPI, dated November 18, 2014. OIG, on June 16, 2015, issued a determination stating that it had initially located three documents and would provide additional responsive documents at a later date. Determination Letter from Daniel Weeber, OIG, to Alexander Cohen, CPI, dated June 16, 2015 (Determination Letter) at 1. OIG labeled those documents Document 1, Document 2 and Document 3. *Id.*

In the determination, OIG released Document 1 to the Appellants and stated that it had referred Documents 2 and 3 to the National Nuclear Security Administration (NNSA) for a determination on their release.<sup>1</sup> *Id.* This Appeal relates only to Document 1, which consists of (1) an introductory memo (Memo) from the Inspector General to the Secretary of Energy and (2) an accompanying report (Report) investigating allegations that officials at Sandia National Laboratories (SNL) used federal funds to influence federal and Congressional officials to award a non-competitive extension of Sandia Corporation's contract with DOE.<sup>2</sup> *See* Document 1, Memo, at 1-2.<sup>3</sup> Although OIG released the Memo in its entirety, it redacted portions of the Report to protect the privacy of certain individuals, pursuant to Exemptions 6 and 7(C) of the FOIA. Determination Letter at 1. Specifically, OIG stated that it withheld information that could reveal the identity of subjects, witnesses, sources of information and other individuals. *Id.* at 2. In support of its determination, OIG stated that the public interest in the identity of the individuals did not outweigh those individuals' privacy interests. *Id.*

In their Appeal, the Appellants challenge the redactions in Document 1, contending that the redactions "appear overly broad." Appeal from Peter Newbatt Smith, CPI, to the Office of Hearings and Appeals dated June 23, 2015 (Appeal).<sup>4</sup>

## 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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA's goal of broad disclosure. *See Dep't of the Interior v. Klamath Water Users Prot. Ass'n.*, 532 U.S. 1, 8 (2001). The agency has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

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<sup>1</sup> OIG informed us that Document 2 has been publicly released, but that a decision on the release of Document 3 remains pending with NNSA. Memorandum of Conversation between Geoffrey Gray, OIG, and Gregory Krauss, OHA (July 9, 2015).

<sup>2</sup> Sandia Corporation is the Lockheed Martin subsidiary that operates SNL. Additionally, the Report is titled "Special Inquiry: Alleged Attempts by Sandia National Laboratories to Influence Congress and Federal Officials on a Contract Extension." *See* Document 1.

<sup>3</sup> Since Document 1 consists of two documents, the page numbers restart after the Memo. We have therefore indicated whether the page number refers to the Memo or the Report.

<sup>4</sup> As an example, they indicate that OIG improperly redacted the name of an individual appearing next to the title "Governor of New Mexico." *See* Appeal.

## A. Exemptions 6 and 7(C)

OIG cited both Exemptions 6 and 7(C) for each of the redactions in the document at issue. See Document 1. Exemption 6 shields from disclosure “personnel 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); *see also* 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). Exemption 7(C) allows an agency to withhold “records or information compiled for law enforcement purposes” if release of such law enforcement records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *see also* 10 C.F.R. § 1004.10(b)(7)(iii).

In determining whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. If the agency cannot find a significant privacy interest, the information may not be withheld. *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); *Associated Press v. Dept. of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *See NARFE*, 879 F.2d at 874; *Reporters Comm. for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 749, 773 (1989). Lastly, the agency must balance the personal privacy interest in the information proposed for withholding against the public interest in the same information. *See NARFE*, 879 F.2d at 874; *Reporters Comm.*, 489 U.S. at 762.

Although the analysis under Exemptions 6 and 7(C) is similar, there are significant differences. One difference is their threshold requirements. An agency may invoke Exemption 7(C) only where the document is compiled for law enforcement purposes. *See, e.g., FBI v. Abramson*, 456 U.S. 615, 622 (1982). Exemption 7(C) thus applies to a narrower class of documents than Exemption 6, which courts have broadly interpreted to encompass most documents with information pertaining to particular individuals. *See Washington Post*, 456 U.S. at 602; *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008). However, where Exemption 7(C) does apply, it provides greater privacy protections and is easier for an agency to satisfy. This is because, in the third step of the analysis, Exemption 6 protects “clearly unwarranted” invasions of privacy whereas Exemption 7(C) only requires that the privacy invasion be “unwarranted.” *Nat’l Whistleblower Ctr. v. Dep’t of Health*, 849 F. Supp. 2d 13, 26 (D.D.C. 2012). Further, Exemption 6 requires that the disclosure “would constitute” an invasion of privacy whereas Exemption 7 requires only that the invasion “could reasonably be expected to constitute” a privacy invasion. *Id.*

In the instant matter, we find that Document 1 meets the threshold requirement for Exemption 7(C) because it was compiled for law enforcement purposes. By law, the OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. *See* Dorothy Pritchett, TFA-0112 (2005) (citing 5 U.S.C. App. 3 § 4). In conducting the investigation that led to the Report, OIG’s activities were within its law enforcement mandate

because the Report examined whether certain SNL activities violated various statutory and regulatory provisions. *See* Document 1, Memo, at 2.<sup>5</sup> Given that the threshold requirement for Exemption 7(C) is met, we may restrict our analysis to whether Exemption 7(C) applies to the redactions at issue, since Exemption 7(C) is the broader of the two exemptions. *See Nat'l Whistleblower Ctr.*, 849 F. Supp. 2d at 26; *Caroline C. Roberts*, TFA-0022 (2003). Accordingly, we proceed to determine whether release of any of the redacted information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

## **B. Balancing Test**

To evaluate OIG's withholding of the information in Document 1, we must first determine the privacy interests at stake. OIG stated that the individuals whose identities it withheld "are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 2. It added that those individuals have an interest in "being free from intrusions into their professional and private lives." *Id.*

The events described in Document 1 took place mostly between 2009 and 2011. *See* Document 1, Report, at 2-11. Our review of the redacted names, titles, and other identifying information found that, around the time period of those events, about 20 of the referenced individuals were employed by Sandia Corporation or its parent company, Lockheed Martin, or otherwise did not work in the federal government. Memo of Conversation between Geoffrey Gray, OIG, and Gregory Krauss, OHA (July 6, 2015) (Gray Memo). A few of those individuals, as of early 2009, were former government officials, including one former Member of Congress. *See* Gray Memo. We also identified 10 individuals who were federal officials at the time of the activities described in the Report, including officials at NNSA and in Congress. *Id.* Some of those individuals have since left their federal positions. *Id.* Finally, one referenced individual was a White House official in 2009 and another was a Governor. *Id.*

OIG emphasized that many of the individuals mentioned in the Report were individuals that SNL officials considered contacting but that were never, in fact, contacted. *See* Gray Memo. The information OIG provided us also indicated that 10 individuals whose names were redacted, including individuals from both inside and outside government at the time of the events, served as witnesses during the investigation. *See id.*

The number of individuals involved here would make it cumbersome and impractical to assign a privacy interest to each person without revealing that individual's identity. In general, we observe that the mention of any individual's name in a law enforcement file is likely to engender comment and speculation and carry a stigmatizing effect. *See, e.g. Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987)). Nevertheless, the individuals with the strongest privacy interest here may be those who were SNL employees or who held other private sector positions. Indeed, the privacy interests afforded

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<sup>5</sup> We also note that the threshold requirement for Exemption 6 is met in this case. Courts have interpreted the phrase "similar files" as extending the scope of Exemption 6 to most records containing information about an individual, including administrative investigative documents such as Document 1. *See Wood v. FBI*, 432 F.3d 78, 87 (2d Cir. 2005) (stating investigative files constitute "similar files" under Exemption 6).

to private individuals under Exemption 7(C) are so substantial that the exemption almost always protects the names and addresses of all such individuals from disclosure. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Reporters Comm.*, 489 U.S. at 774 (FOIA's purpose is to open government to scrutiny, not to share government information held on private citizens).

With regard to individuals who are described as serving at NNSA or in Congress, their privacy interests are also significant. Although the privacy interest of government officials may be "somewhat diminished," such officials "do not surrender all rights to personal privacy when they accept a public appointment." *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998) (citation and quotation omitted). Moreover, government employees have an interest in controlling information that "could conceivably subject them to annoyance or harassment in either their official or private lives." *Judicial Watch, Inc., v. Dep't of the Army*, 402 F. Supp. 2d 241, 251-52 (D.D.C. 2005) (citation and quotation omitted); *see also KIRO 7*, FIA-14-0083 (2014). To be sure, the privacy interests of top government officials may not be as substantial as the privacy interests of lower-ranking officials. *See Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). Nevertheless, even well-known politicians have privacy interests that may merit protection under Exemption 7(C). *See, e.g., Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 894 n. 9 (D.C. Cir. 1995) (presidential candidate Ross Perot had privacy interests for purposes of Exemption 7(C)); *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1091-92 (D.C. Cir. 2014) (former Congressman Tom DeLay had a privacy interest under Exemption 7(C)) in withholding investigative files requested from FBI).

Having found that the individuals whose identities are protected here hold strong privacy interests, we next consider if release of the withheld information would further the public interest by "shed[ding] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773. "Disclosure of information that 'reveals little or nothing about an agency's own conduct' does not further the public interest envisaged by FOIA." *Quinon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (quoting *Reporters Comm.*, 489 U.S. at 773). The question before us, accordingly, is whether release of any of the withheld names and identifying information would shed light on DOE or NNSA's conduct or performance.

In this regard, releasing the identifying information of non-DOE or NNSA employees, such as Members of Congress or private sector individuals, is unlikely to provide insight into agency activities. Further, if any public interest exists in releasing information identifying DOE or NNSA officials, that interest is lessened by a few factors. First, as OIG explained, the report found misconduct by SNL officials but not by DOE or NNSA employees. Memo of Telephone Conversation between Geoffrey Gray, OIG, and Gregory Krauss, OHA (July 21, 2015). A strong public interest is often implicated where a high-level official is implicated in wrongdoing. *See Stern*, 737 F.2d at 93-94; *Forest Serv. Emps. for Envtl. Ethics*, 524 F.3d at 1025. However, that is not the fact pattern in the instant matter. Second, DOE and NNSA officials were among those who served as witnesses in the investigation. *See Gray Memo*; E-mail from Geoffrey Gray, OIG, to Gregory Krauss, OHA (July 23, 2015). We believe that releasing the names of those witnesses would run counter to the public's interest in encouraging agency officials to cooperate in OIG

investigations. *See Dean v. FDIC*, 389 F. Supp. 2d 780, 794-96 (E.D. Ky. 2005) (withholding identifying information of witnesses in OIG investigation by FDIC).

Third, we note that, in their Appeal, the Appellants provided no argument as to the public interest that would be advanced by releasing the withheld names. Arguably, the Appellants had a duty to explain what that public interest may be. *See Associated Press v. Dept. of Defense*, 549 F.3d 62, 66 (2d Cir. 2008) (“The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA.”) Consequently, we find that the public interest in releasing the redacted information is minimal.

In the last step of our analysis, we balance the public and private interests so as to determine whether release of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Given the significant privacy interests we have identified and the limited public interest, we find that the balance tips strongly in favor of withholding the redacted identifying information. We therefore will not disturb OIG’s approach.<sup>6</sup>

### **C. Additional Releasable Information**

It has been held that an agency “may not rely on an otherwise valid exemption to justify withholding information that is already in the ‘public domain.’” *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). Our review found instances in which OIG redacted names or titles in the Report that appeared elsewhere in Document 1, such as in the introductory Memo. We therefore partially remand this matter to OIG to review whether to release any information in Document 1 that it released elsewhere in the same document.

We also found that in redacting identifying information related to some individuals, OIG redacted verbs such as “stated,” “replied” and “told” that did not protect the privacy of any individual. The FOIA requires that “[a]ny reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . .” 5 U.S.C. § 552(b). In reviewing its redactions on remand, OIG should consider whether it may be possible to release additional information without compromising the identity of any of the unnamed individuals.

It Is Therefore Ordered That:

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<sup>6</sup> OIG told us that in balancing the private and public interests involved, OIG decided to release the names of former Secretary of Energy Chu and former Deputy Secretary of Energy Dan Poneman because those officials were the two highest ranking officials in the Department at the time of the events. Memo of Telephone Conversation between Geoffrey Gray, OIG, and Gregory Krauss, OHA (July 23, 2015).

OIG also told us that it released the name of Heather Wilson, a private consultant and a former Member of Congress, because it found no basis for withholding the name of her company, Heather Wilson, LLC, and because the company name revealed her identity. Memo of Telephone Conversation between Geoffrey Gray, OIG, and Gregory Krauss, OHA (July 20, 2015).

- (1) The Appeal filed on June 30, 2015, by the Appellants, Case No. FIA-15-0035, is hereby denied in part and remanded in part, as set forth in Paragraph (2) below.
- (2) This matter is hereby remanded in part to the Department of Energy's Office of Inspector General which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) 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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