

November 7, 2003  
DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: Evelyn Self  
Date of Filing: September 29, 2003  
Case Number: TFA-0040

On September 29, 2003, Evelyn Self filed an Appeal from a determination the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) issued on September 15, 2003. The determination responded to a request for information filed 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.

*I. Background*

In a March 26, 2003 FOIA request, Ms. Self requested the following documents pertaining to a series of incidents concerning an employee of the DOE's Office of Security:

- (1) All statements from any witnesses employed by the agency;
- (2) All statements by any employee of a contractor;
- (3) All written correspondence, such as memorandums or letters, and emails between any and all agency personnel concerning:
  - a. How the investigation would be conducted;
  - b. The status of the investigation;
  - c. The findings of the investigation;
  - d. Discussions of the merits of any findings; and
  - e. Discussions of what discipline, if any, should be imposed.

Appeal at 1.

On August 22, 2003, DOE/HQ issued a determination to Ms. Self, in which it released 26 documents responsive to her request. DOE/HQ withheld information from six of the documents, citing FOIA Exemption 6. In her appeal, Ms. Self states that she is

aware of email messages and other documents that are responsive but were not included in the initial FOIA response. I request the Department initiate a more thorough search for these responsive documents. Additionally, I believe that an excessive amount of information in the interview documents have been deleted and withheld under [FOIA Exemption 6]. I request another review of the withheld portions.

## II. Analysis

### A. Adequacy of Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[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. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

DOE's Office of Security (SO) provided us with the following information regarding its search:

SO believed responsive documents were located with individuals involved with the incidents cited in the original FOIA request. . . . Each person reviewed their files and produced any and all documents responsive to the FOIA request, to include email messages. . . . Even after an additional review was completed by all parties . . . , our office sent out an additional request to the original responders to please check their files and emails for one last time, to ensure that no stone was left uncovered.

Electronic mail from Kelly Kabiri, SO, to Steven Goering, OHA (October 16, 2003). SO named six individuals within SO to whom its search was directed. The appellant has named fifteen additional individuals who she believes possess documents responsive to her request. Electronic mail from Evie Self to Steven Goering, OHA (October 30, 2003). We believe that a reasonable search should extend to at least some of these individuals, for example, those involved with the incidents cited in the original FOIA request, but to whom the initial search was not directed. We will therefore remand this matter to DOE/HQ for an additional search. We are providing, under separate cover, a copy of the electronic mail from the appellant in which she names these additional individuals. On remand, a further search for responsive documents should extend to the individuals named by the appellant, or

an explanation should be provided as to why those individuals would not possess documents responsive to the request.<sup>1</sup>

*B. Application of Exemption 6 to Information Withheld from the Requester*

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." *Department 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 a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, 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 *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Fin. Management Serv.*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in disclosure in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-70.

In its August 22 determination, DOE/HQ states,

The names, home telephone numbers and other information of individuals in documents 1, 2, 8, 9, 11, and 13 who provided information as part of an inquiry of the Department have been deleted pursuant to Exemption 6. Release of the identity of these individuals could subject them to harassment, intimidation and other personal intrusions. Moreover, release of the information would not reveal any aspect of the operations or activities of the Government.

Letter from Abel Lopez, DOE/HQ, to Requester (August 22, 2003).

We agree that the individuals whose identities were protected have a strong privacy interest in remaining anonymous. The inquiry in question was conducted in response to allegations that a DOE employee had made racially insensitive remarks in the workplace. Those providing information were co-workers of the accused employee; some were DOE employees, and others were employees of

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<sup>1</sup> We are aware that a number of these individuals are contractor employees who work at DOE/HQ. This, however, does not mean that these individuals would not have access to or be able to identify records to which the appellant is entitled under the FOIA and DOE regulations. If a new search identifies documents that are determined to be contractor records not available to the requester under the FOIA or DOE regulations, this determination should be explained to the requester. See *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); 10 C.F.R. § 1004.3(e) (provision of the DOE FOIA regulations under which certain contractor records are made available to FOIA requesters).

DOE contractors. Given the sensitive nature of the investigation and the potential for harassment, intimidation, or other personal intrusions, we find that significant privacy interests exist in the identities of those individuals. *See Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Accordingly, we find that the individuals whose identities were withheld have a significant privacy interest in maintaining their confidentiality.<sup>2</sup>

Having found a significant privacy interest in the identities of these individuals, we must determine whether release of this information would further the public interest by shedding light on the operations and activities of the Government. The information already released to the appellant clearly sheds light on the operation and activities of the Government in conducting an internal inquiry into alleged employee misconduct. By contrast, the names of the individuals who provided information in the inquiry and other information that could identify them reveals little if anything about the activities of the Government. Weighing the significant privacy interests at stake on one hand, and the slight public interest on the other, we conclude that Exemption 6 was properly applied to protect the identities of the persons who provided information in the inquiry.

However, based on our review of the specific information withheld in this case, it is not apparent that all of the information withheld from the requester would identify the employees in question, and the FOIA requires that “any reasonably 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).

For example, it appears that all pronouns (e.g., “he” and “she”), possessive adjectives (e.g., “his” and “her”), and titles (e.g., “Mr.” and “Ms.”) used to refer to the individuals in question were redacted from the documents at issue. We have previously stated that a pronoun that grammatically takes the place of the name of a person, but that does not itself name the person, is not personal information even when the name itself may be withheld. Such words, in unusual and limited situations, might describe with a degree of certainty some individual (for example, if there was only one woman in an office). In those instances, we have found that pronouns may be withheld. *Eugene Maples*, 26 DOE ¶ 80,159 (1997). In the present case, however, it appears that these words were withheld categorically throughout documents 1, 2, and 13.

Redacted in a similarly categorical fashion were nearly all references to the respective employers of the individuals in question (e.g., whether the individual was employed by a DOE contractor or was “a DOE employee”). There may, in fact, be individual instances where such a description would identify a particular employee. However, these redactions do not seem to have been applied on a case-by-case basis.

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<sup>2</sup> It should be noted that scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996) (*Armstrong*). For example, civilian federal employees normally have no expectation of privacy concerning their names, titles and similar information. See 5 C.F.R. § 293.311. However, the name of a federal employee involved in a workplace situation of a sensitive nature might be withheld pursuant to Exemption 6. *See Armstrong*, 97 F.3d at 582 (dicta indicating that FBI might be entitled in certain factual contexts to use a categorical rule protecting the names of FBI agents pursuant to Exemption 6).

Also withheld were the dates of many events, for example, when particular interviews took place. Again, while there may be specific circumstances where such information would reveal the identity of an individual, we do not find a basis for withholding such information as a rule.

In addition, in a number of instances, conjunctions (such as “and”) between personal identifiers were withheld (e.g., document 2, pages 9, 10, 11; document 13, pages 7, 11). Non-protected segregable words may be withheld when they are so inextricably intertwined with protected material that their release would reveal “only essentially meaningless words and phrases.” *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981). However, the release of conjunctions in this case would convey a particular meaning (e.g., whether a passage is referring to one or two individuals). We see no reason such informative words should be withheld.

We also find the following specific information withheld from the requester does not appear to identify particular individuals:

- (1) Document 2, page 1, five lines at top of page following text “Record By:” Some of this information withheld is too general to identify a specific individual. Moreover, it appears that the identity of the individual is revealed elsewhere in the same document.
- (2) Document 2, page 3, ninth line from bottom of page. This individual is identified elsewhere in the same document.
- (3) Document 2, page 5, last four lines. It appears that the identity of the individual is revealed elsewhere in the same document.
- (4) Document 2, page 8, lines 4 through 11. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.
- (5) Document 2, page 9, 13th line from bottom of page. This individual is identified elsewhere in the same document.
- (6) Document 2, page 10, first line. The third listed individual is identified elsewhere in the same document.
- (7) Document 2, page 10, second line from bottom of page. This individual is identified elsewhere in the same document.
- (8) Document 2, page 11, 15th (first person listed) and 22nd (second person listed) line. This individual is identified elsewhere in the same document.
- (9) Document 2, page 14, fifth line from bottom. It is not clear how release of this line would compromise the identity of any individual.
- (10) Document 2, page 14, last three lines, and page 15, first 11 lines. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not

be released without compromising the identity of any individual. Moreover, it appears that the identity of the individual referred to in this passage is revealed elsewhere in the same document.

- (11) Document 2, page 15, lines 12 and 14. This individual is identified elsewhere in the same document.
- (12) Document 11, 11 lines at bottom of document. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.
- (13) Document 13, page 3, line 17, fourth through sixth words. It is not clear how release of these words would compromise the identity of any individual.
- (14) Document 13, page 6, first line of third paragraph. Revealing the number of interviews conducted would not compromise the identity of any individual.
- (15) Document 13, page 9, sixth line from bottom. It is not clear how release of these words would compromise the identity of any individual.
- (16) Document 13, page 11, end of first line, entire second line. It is not clear how release of these words would compromise the identity of any individual.
- (17) Document 13, page 15, line 9. This individual is identified elsewhere in the same document.
- (18) Document 13, page 16, lines 1 (after first two words) and 2. It is not clear how release of these words would compromise the identity of any individual.
- (19) Document 13, page 25, second bullet, lines 2, 3 and 4. It is not clear how release of these words would compromise the identity of any individual.
- (20) Document 13, page 25, end of last line before "Summary of Allegations and Determination of Credibility." It is not clear how release of these words would compromise the identity of any individual.
- (21) Document 13, page 26, lines 4 (last five words) and 5. It is not clear how release of these words would compromise the identity of any individual.
- (22) Document 13, page 26, last four lines, and page 27, first two lines. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.

### III. *Conclusion*

For the above stated reasons, we will remand this matter to DOE/HQ, which shall issue a new determination to the appellant either releasing the information described above, or explaining with greater specificity why it should remain withheld under FOIA Exemption 6 (or any other applicable FOIA exemption).<sup>3</sup> On remand, DOE/HQ shall also conduct a further search for documents responsive to the appellant's request, as described above. In all other respects, the appeal will be denied.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Evelyn Self on September 29, 2003, OHA Case Number TFA-0040, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the FOIA/Privacy Act Group of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.
- (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 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.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: November 7, 2003

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<sup>3</sup> In addition, two pages at the beginning of document 13 (a title page and an index page) were not released to requester. On remand, these two pages should be released.