U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

Ryan Mulvey
Cause of Action
1919 Pennsylvania Avenue NW, Suite 650
Washington, DC 20006

JUN 13 2018

Re: FOIA Appeal No. 150080

Dear Mr. Mulvey:

This decision is in response to your letter dated September 25, 2014, appealing the June 27, 2014, Freedom of Information Act (FOIA) determination of Katherine E. Bissell, Deputy Solicitor for Regional Enforcement, Office of the Solicitor (SOL). In your initial request dated November 26, 2013, you asked for all communications between the Office of White House Counsel (OWHC) and SOL concerning OWHC's review of agency records, from January 1, 2012 to present. In response, SOL provided you with 24 pages of emails, with redactions pursuant to exemptions 5 and 6. You have appealed: (1) SOL's redaction of information pursuant to exemption 5, and of the names of lower-level federal employees under exemption 6; and (2) the interpretation of your initial request as being limited to a request for communications regarding the processing of FOIA requests.

Initially, we address your contention that the interpretation of your request was too narrow. Specifically, you object to the interpretation of your request as seeking only communications regarding the processing of FOIA matters, contending that you sought communications between SOL and OWHC for all matters, including congressional committee reports and judicial subpoenas. We have determined that SOL's original interpretation of your request was reasonable. In your FOIA request, as a justification for a fee waiver, you stated that you were seeking information to educate the public about DOL's FOIA policy and procedures for processing records with White House equities. You failed to address any other type of communication in offering this justification for a fee waiver. Thus, the Deputy Solicitor reasonably concluded that your request was limited to a request for communications between OWHC and SOL regarding FOIA matters. If you are interested in other communications, you remain free to file a new FOIA request for this information.

We have conducted a *de novo* review of the material withheld. After this review, we affirm all redactions on 24 pages of emails. Deliberative material on these pages have been withheld pursuant to the deliberative process privilege of exemption 5, and personal identifiers have been withheld pursuant to exemption 6.

Under FOIA, "[a]ny 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). You contend that SOL did not reasonably segregate portions of the records you seek. We disagree. As noted above, we conducted a *de novo* review of the material withheld, and have determined that all of the material withheld is covered by the noted FOIA exemption.

Exemption 5 of FOIA allows an agency to withhold "inter-agency or intra-agency" information that would not be available to a party in litigation with the agency. 5 U.S.C. § 552(b)(5). As an initial matter, exemption 5 requires the agency to determine whether the documents requested are "normally privileged in the civil discovery context." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). One privilege available to government agencies is the deliberative process privilege. This privilege protects confidential intra-agency opinions of governmental personnel whose disclosure "would be injurious to the consultative functions of government." *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 677 (D.C. Cir. 1981) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 149). This privilege, unique to the government, ensures that personnel within an agency feel free to provide decisionmakers with their opinions and recommendations without fear of later being subject to public criticism. Also, the privilege protects against misleading the public by disseminating material suggesting reasons for a course of action that may not have been the ultimate reasons for the agency's action. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The material withheld here was created by SOL and OWHC when deliberating as to DOL's course of action in processing FOIA requests and appeals. In your appeal, you argue that exemption 5's deliberative process privilege does not protect communications between SOL and OWHC, as OWHC does not qualify as an agency for exemption 5 purposes. As support for your argument, you cite *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004), which found that the Office of the President is not an "agency" under the FOIA. *Judicial Watch, Inc.*, 365 F.3d at 1109 n.1. However, communications with the White House by federal agencies qualify for the exemption 5 threshold, irrespective of whether the White House office is itself subject to the FOIA or not. *See Judicial Watch, Inc. v. Consumer Fin. Prot. Bureau*, 60 F.Supp.3d, 1, 10 (D.D.C. 2014) ("it is clear that communications between the CFPB and White House staff [not an agency for the purposes of FOIA] may be 'inter-agency or intra-agency memorandums' for the purposes of Exemption 5's deliberative process privilege."); *Judicial Watch, Inc. v. Dep't of Energy*, 412. F.3d 125, 129 (D.C. Cir. 2005) (deliberations of a Presidential Advisory Group, which was not an agency subject to FOIA, were protected from disclosure under exemption 5). We have determined that the threshold requirement is met here, and the material at issue would reveal the deliberative process of the federal government if disclosed; therefore, this material is covered by the deliberative process privilege.

You also contend that the material does not qualify for the deliberative process privilege because the material is not "antecedent to the adoption of agency policy." We disagree with your contention. The material we have withheld under the deliberative process privilege are consultations with OWHC prior to the agency's final decisions on FOIA requests and appeals. Thus, they are predecisional. *See Competitive Enter. Inst. v. Envtl. Prot. Agency*, 12 F.Supp.3d 100, 118 (D.D.C. 2014), quoting *Judicial Watch v. U.S. Dep't of Homeland Sec.*, 736 F.Supp.2d. 202 (D.D.C. 2010) (deliberations are "predecisional" if they were "generated as part of a continuous process of agency decision making"). Secondly, you contend that this material is not deliberative because they are "most likely directives from the White House." The material at issue contains deliberations between the agency and OWHC on the course of action to take in response to specific FOIA requests and appeals. Thus, they are deliberative. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006), citing *Coastal States Gas*

Corp, 617 F.2d at 866 (a document is predecisional if "it reflects the give-and-take of the consultative process").

You assert that the attorney-client and attorney work-product privileges of exemption 5 do not apply to the material you seek. Because we have not invoked these privileges in this appeal, we decline to address your arguments in this regard.

Exemption 6 permits the withholding of information contained in "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 Painting Industry of Hawaii Market Recovery Fund v. U.S. Dep't of the Air Force*, 26 F.3d 1479, 1486 (9th Cir. 1994); *Sheet Metal Workers Int'l Ass'n v. U.S. Air Force*, 63 F.3d 994 (10th Cir. 1995); and *Painting and Drywall Work Pres. Fund, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991). The Supreme Court has ruled that the term "similar files" encompasses any government record that concerns a particular individual; the term is not limited to records contained in personnel or medical files. *See, e.g., Dep't of State v. Washington Post*, 456 U.S. 595 (1982). Exemption 6 requires weighing the privacy interest in nondisclosure against the public interest in the release of the records. *See, e.g., Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

For a privacy interest to exist, the information must be such that there is "a substantial probability that a disclosure will cause an interference with personal privacy" and that disclosure could subject the individuals to "unwanted intrusions." *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (NARFE). The materials in this case contain names of lower-level federal employees. We find that the individuals identified in the materials have a privacy interest in this information.

However, the question of whether a privacy interest exists is not our only inquiry. Even if a privacy interest exists in certain information, we must disclose the information if the privacy interest is outweighed by a significant public interest. The test for determining whether a public interest sufficient to justify release of the requested information exists is whether disclosure of the information "sheds light on an agency's performance of its statutory duties." *See NARFE*, 879 F.2d at 879. The requestor has the burden of establishing that disclosure would serve the public interest. *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987); *see also, e.g., National Archives and Records Administration v. Favish,* 541 U.S. 157, 172 (2004). In *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989), the Supreme Court made clear that, for FOIA purposes, "public interest" is limited to the public's right to be informed about the workings of its government. *Id.* at 773. Thus, the test for "public interest" under FOIA is not whether there is a general interest in the information, such as the type of interest that may exist in celebrities, weather events, natural disasters, or high-profile litigation. Rather, "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

In this case, you have not established that the personal information at issue would inform the public in any meaningful way about the workings of the government. Your sole argument for why the names of lower-level DOL employees should be released is that exemption 6 does not protect the identities of lower-level agency employees. However, "'[o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.'" *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978). Courts have routinely upheld the withholding of the names of such agency employees in FOIA cases. *See*, e.g., *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 502 (1994) (the privacy interests agency employees had in regards to their names and home addresses outweighed the "negligible" public interest); *Judicial Watch v. Rossotti*, 285 F.Supp.2d 17, 30 (D.D.C. 2003) (court upheld the use of exemption 6 to withhold the names of "lower-level" IRS employees, unless "the need for that information [was] better demonstrated by a FOIA requester" or there was "compelling evidence of illegal agency activity."). We find that personal privacy interests of the individuals mentioned in this case outweigh any public interest and that we must protect this information under exemption 6.

Our failure to assert any other exemption or defense that may apply in this appeal does not constitute a waiver of that exemption or defense.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), which offers mediation services to help resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are interested in obtaining assistance from OGIS, please visit the OGIS website at https://ogis.archives.gov, or contact them by phone at 1-877-684-6448. Using OGIS services does not affect your right to pursue litigation.

This appeal decision constitutes final agency action for purposes of judicial review. The Freedom of Information Act provides for judicial review of administrative decisions denying a request in whole or in part. 5 U.S.C. § 552(a)(4)(B). You have the option of seeking judicial review of this determination by filing suit against the Department of Labor. A complainant may bring suit in the district court of the United States in the jurisdiction in which the complainant resides or has his or her principal place of business, or in which the agency records are maintained, or in the District of Columbia.

Sincerely,

Rose Marie L. Audette
Associate Solicitor for Management
and Administrative Legal Services

cc: Sharon Hudson, SOL
Katherine Bissell, SOL