

**May 9, 2003**  
**DECISION AND ORDER**  
**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Government Accountability Project

Date of Filing: March 18, 2003

Case Number: TFA-0024

On March 18, 2003, the Government Accountability Project (GAP) filed an Appeal from a determination issued to it by the Department of Energy's Richland Operations Office (DOE/RL). 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 DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

**I. Background**

GAP filed a request for information related to vapor exposures at the Hanford Site tank farms since 1992. Letter from DOE/RL to GAP (February 14, 2003) (Determination Letter). <sup>1/</sup> As part of that request, GAP asked for all employee medical records maintained by the Hanford Environmental Health Foundation (HEHF), dated from January 1992 to the present, related to vapor exposures. *Id.* DOE/RL located medical records for that time period, but withheld the documents in their entirety pursuant to Exemption 6, stating that "any nonexempt material contained in the medical records are so inextricably intertwined with the exempt material that disclosure of it would render the documents meaningless." <sup>2/</sup> *Id.* DOE/RL also determined that the public interest in the documents did not outweigh the privacy interest of the

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<sup>1/</sup> The tank farms contain waste from the Hanford site.

<sup>2/</sup> The Determination was a partial response to GAP's request. DOE/RL continues to review ten boxes of documents in order to determine if the documents are exempt from disclosure under the FOIA. Determination at 1-2.

individuals whose records would be disclosed. *Id.* On March 18, 2003, GAP filed this Appeal, arguing that DOE/RL should have redacted any identifiable information. Letter from GAP to Director, OHA (March 18, 2003). GAP asks that OHA order DOE/RL to either release the withheld material or, in the alternative, (1) to explain in “reasonably specific detail” how release of the documents could violate a privacy interest if all identifying information is redacted; and (2) to explain why the responsive material is so inextricably intertwined with non-exempt material that it cannot be segregated. *Id.*

## II. Analysis

### A. Exemption 6

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). We find that the withheld material passes the threshold test because it is contained in medical files. However, in order to determine whether disclosure of the material would constitute a clearly unwarranted invasion of personal privacy, we must balance the public interest in disclosure against any privacy interest. *Citizens for Environmental Quality v. Department of Agriculture*, 602 F. Supp. 534, 538 (D.D.C. 1984) (*Citizens*).

In order to determine whether information 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) (*Ripskis*). 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 Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. See generally *Ripskis*, 746 F.2d at 3.

DOE/RL determined that “[i]f the information . . . were released, it could lead to an invasion of privacy by subjecting the individuals to unwanted communications, or other substantial privacy invasions by interested parties.” Determination at 1. DOE/RL further stated that “the public interest in the documents does not outweigh the individual’s privacy interests.” *Id.* DOE/RL made no attempt to redact any identifying information. Instead, it withheld the documents in their entirety, alleging that (1) the material, if released, could be linked to a particular individual; (2) the non-exempt material in the documents is

inextricably intertwined with the exempt material; and (3) disclosure of the responsive material would have a negative impact on the operations of the government because of the large volume of potentially responsive material. Determination Letter; Electronic Mail Message from Dorothy Riehle, DOE/RL, to Valerie Vance Adeyeye, OHA (April 1, 2003).

## **B. Privacy Interest**

In order to establish the existence of an invasion of privacy caused by the disclosure of the withheld material, DOE/RL must demonstrate that the public could link the medical records requested to specific individuals. In order to support its arguments, DOE/RL alleges that “not many” employees have reported medical problems due to vapor exposures. Electronic Mail Message from Dorothy Riehle, DOE/RL to Valerie Vance Adeyeye, OHA (April 22, 2003). This statement implies that because of the limited number of employees who have reported medical conditions resulting from vapor exposure, the general public can accurately associate the identity of an individual with a particular medical record.

We find that DOE/RL’s argument falls short of the standard of proof needed to establish an invasion of privacy. “An increased likelihood of speculation as to the subject . . . is insufficient to invoke the exception. Only the likelihood of *actual identification* justifies withholding the requested documents under exemption 6.” *Citizens*, 602 F. Supp. at 538 (citing *Arieff v. Department of the Navy*, 712, F.2d 1462, 1468 (D.C. Cir. 1983) (*Arieff*)) (*emphasis added*). *Accord Cruscino v. Federal Bureau of Prisons*, 1995 WL 444406 (D.D.C.) (stating that the information requested must be identifiable to a specific individual); *Janice Curry*, 27 DOE ¶ 80,116 (1998) (stating that information that identifies a specific individual can be protected under Exemption 6). In *Citizens*, the agency withheld the medical records of one Forest Service employee who had been sprayed with herbicide, explaining that some residents of the surrounding small town “could logically deduce the individual’s identity.” *Citizens*, 602 F. Supp. at 539. However the Court rejected this argument, even though only one employee (out of a small workforce) had been tested. *Id.* at 536. The Court found that the responsive material was not exempt under Exemption 6 because the agency was unable to prove that the public could link the responsive material to a particular individual. *Id.* at 538. *See also Arieff*, 712 F.2d at 1468. DOE/RL has not demonstrated how, if it were to redact all identifying information, the public could match an employee to his or her medical record. As a result, we find that the release of the responsive material, *with all identifying information removed*, does not constitute a clearly unwarranted invasion of personal privacy under Exemption 6. 3/

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3/ We will not address the issue of the public interest in disclosure (the second and third steps of the three-step analysis) because we have determined that a significant privacy interest would not be invaded by the disclosure of the properly redacted responsive material (i.e., after removal of all identifying information).

### C. Segregable Information

We have previously stated that “the fact that some material in a record meets the criteria for withholding . . . does not necessarily mean that the record may be withheld in its entirety.” *Mitchell G. Brodsk*, 28 DOE ¶ 80,217 (2002). The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). This office reviewed a sample of the responsive material, and we conclude that the records contain non-exempt information that can be segregated. We further find that this material is not so inextricably intertwined with the non-exempt material as to make a redacted document meaningless. Accordingly, we find that DOE/RL should release the segregable, non-exempt portions of the responsive material to GAP.

It Is Therefore Ordered That:

- (1) The Appeal filed by Government Accountability Project on March 18, 2003, OHA Case No. TFA-0024, is hereby granted as stated in Paragraph (2) and denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy’s Richland Operations Office, which shall issue a new determination in accordance with the guidance set forth above in the Decision and Order.
- (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.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 9, 2003