

November 18, 2003

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

**Appeal**

Name of Appellant: Heart of America Northwest

Date of Filing: October 24, 2003

Case Number: TFA-0044

On October 24, 2003, Heart of America Northwest (the Appellant) filed an Appeal from a final determination issued on September 26, 2003, by the Department of Energy's (DOE) Ohio Field Office (OFO). In that determination, OFO responded to a Request for Information filed on November 21, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OFO's determination released several responsive documents to the Appellant. However, OFO redacted information from these documents under FOIA Exemptions 2 and 6. This Appeal, if granted, would require OFO to release that information withheld under Exemption 2 to the Appellant.

**I. BACKGROUND**

On November 21, 2002, the Appellant filed a twelve-part request for information with OFO. FOIA Request No. OH 03-015 at 1. On November 26, 2003, OFO issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant. OFO withheld some information under FOIA Exemption 6 from several of these documents. The Appeal does not contest these withholdings under Exemption 6. OFO did, however, withhold a portion of one document, entitled "Battelle Columbus Laboratory (BCL) Remote-Handled Transuranic Waste Shipments to Hanford Site" under Exemption 2. Specifically, OFO withheld, under Exemption 2, that portion of the document (the "Routing Section") which describes the route to be used to transport nuclear materials from BCL to the DOE's Hanford Site. On October 24, 2003, the Appellant submitted the present Appeal which challenges OFO's withholding determinations under Exemption 2.

**II. ANALYSIS**

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). It is well settled that the

agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 2 is at issue in the present case. Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that: (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Routing Section is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The Routing Section neither regulates activities among members of the public nor sets standards to be followed by agency personnel.

The Routing Section meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7<sup>th</sup> Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9<sup>th</sup> Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Disclosure of the Routing Section risks allowing terrorists to circumvent DOE's efforts to comply with its mandate to provide secure and safe transportation for nuclear materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public that requested it. Accordingly, we find that the Routing Section can be properly withheld under the "high two" prong of Exemption 2.

It Is Therefore Ordered That:

(1) The Appeal filed by Heart of America Northwest, Case No. TFA-0044, 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.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: November 18, 2003