

July 11, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: BPA Watch
Date of Filing: June 13, 2008
Case Number: TFA-0260

This Decision concerns the BPA Watch's Appeal from a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to it on May 20, 2008, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In that determination, the BPA disclosed some information and withheld other information under FOIA Exemption 6. This Appeal, if granted, would require the BPA to reconsider its Exemption 6 withholding under the analysis set forth below and either (i) justify its withholding or (ii) not withhold the information pursuant to Exemption 6.

I. Background

The BPA Watch filed a FOIA request with the BPA for "a copy of the manifest for the BPA plane(s) for [the] calendar year 2007 showing the date, destination, passengers and purpose of trip." Request Letter. The BPA issued a determination, disclosing 255 responsive documents that show the date, destination, and purpose of each BPA airplane trip in 2007. Determination Letter.

However, the BPA invoked FOIA Exemption 6 to withhold the names of the crew and passengers, aside from BPA Administrator and Chief Executive Officer Stephen J. Wright. The BPA stated that, "Exemption 6 is intended to protect individuals from the injury and harassment that could result from unnecessary disclosure of personal information." The BPA further stated that disclosing the withheld names "would not further the public interest" because "[t]he identity of the passengers and crew does not . . . shed a light on the agency's performance of its statutory duties." Finally, the BPA stated that the remaining information in the disclosed documents "can all be used to monitor the proper use of the BPA planes." *Id.*

The BPA Watch then filed the present Appeal. The BPA Watch asks the Office of Hearings and Appeals (OHA) to order the release of all passenger names, but not crew names. Appeal Letter. It argues that, (i) "There is no privacy interest in a BPA employee (or anyone else) riding a BPA

plane;” and (ii) “Even if there is a privacy interest, the public interest in verifying that [the] BPA is properly managing federal assets far outweighs a privacy interest.” *Id.*

The BPA Watch argues that, “[T]he name of the passengers is vital to a determination of whether [the] BPA is complying with federal regulations . . . regarding government aircraft.” *Id.* To prove its point, the BPA Watch listed seventeen questions, asking who rode on a BPA plane to a variety of events. Lastly, the BPA Watch notes that the Department of Energy’s Inspector General has “indicat[ed] a need for increased DOE management oversight of aviation activities” and that the BPA manifests contain approximately a dozen blank entries for “purpose.” *Id.*

II. Analysis

Congress designed the FOIA “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citation and quotations omitted). Therefore, the FOIA has a strong presumption in favor of disclosure. *Id.*

FOIA Exemption 6 protects 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); 10 C.F.R. § 1004.10(b)(6). An agency should construe “similar files” broadly, “[T]o cover detailed Government records on an individual which can be identified as applying to that individual.” *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982) (citation and quotations omitted). The purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Id.* at 599.

The agency has the burden to show that requested material falls within an exemption. *Ray*, 502 U.S. at 173 (citation omitted); *see also News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) (describing the agency’s burden as “onerous”). The agency must “narrowly construe[]” Exemption 6. *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citation and quotations omitted).

We must apply a three-step analysis to determine whether the DOE properly invoked Exemption 6 to withhold the passenger names. First, we must determine whether disclosing the information compromises a substantial privacy interest. If disclosure does not compromise a substantial privacy interest, the DOE may not withhold the information. Second, we must determine whether disclosing the information is in the public interest. Third, we must balance the substantial privacy interest against the public interest in order to determine whether disclosing the information would constitute a clearly unwarranted invasion of personal privacy. *Ripskis v. Dep’t of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

We contacted the BPA to gather information to evaluate its withholding of the passenger names under Exemption 6. *See* Memorandum of Telephone Conversation between Christina Brannon, FOIA/ Privacy Act Office, BPA, and David M. Petrush, Attorney-Examiner, OHA, July 2, 2008. The BPA stated that BPA employees are entitled to privacy regarding their official activities. The BPA did not consider whether a privacy threat exists for any passenger, whether a federal

employee or non-federal employee. Instead, the BPA focused on whether releasing the names is in the public interest. The BPA concluded that releasing the names will not further the public interest. That is, according to the BPA, the BPA Watch made its FOIA request to determine if the BPA is committing fraud, waste, or abuse. The BPA stated that the BPA Watch will be able to make that determination without the passenger names and that knowing who went on a particular trip will not expose whether the plane was improperly used. Moreover, the BPA stated that it released the purpose of each trip, which it considers to be the piece of information of the greatest interest to the public. *Id.*

We find that Exemption 6 applies to the BPA plane manifests because, following *Wash. Post Co.*, they may be “identified as applying” to the passengers whose names appear on them.

Regarding the first step of the *Ripkis* balancing test, “[T]he privacy threat depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue.” *Norton*, 309 F.3d at 36. The privacy threat must be “real rather than speculative.” *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 116 (D.D.C. 2005) (citing *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 381 n.19 (1976)); *see, e.g., Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (withholding a list of names and addresses when disclosing the list would have invited a “fusillade” of mailings from businesses and charities because the list indicated whether each individual was retired, disabled, or received a monthly annuity check). Further, releasing a list of names “does not inherently and always constitute a ‘clearly unwarranted’ invasion of personal privacy.” *News-Press*, 489 F.3d at 1199; *see also Baez v. U.S. Dep’t of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980) (stating, Exemption 7(C) “do[es] not . . . imply a blanket exemption for the names of all [government employees] in all documents”); *Elec. Privacy Info. Ctr.*, 384 F. Supp. 2d at 116 (citing *Baez* in the Exemption 6 context).

We find that the BPA has not met its burden to show that disclosing the passenger names compromises a substantial privacy interest. The BPA did not identify a real privacy threat with likely consequences for the passengers, as *Norton* and *Elec. Privacy Info Ctr.* require. Also, following *News-Press* and *Baez*, the BPA may not withhold the names of federal employees merely because they are federal employees. Therefore, we will remand this case to the BPA to determine disclosing the passenger names compromises a substantial privacy interest that outweighs the public interest in disclosure.

On remand, if the BPA finds that disclosing the passenger names compromises a substantial privacy interest, the BPA must consider the second step of the *Ripkis* test – whether disclosing the names is in the public interest. We disagree with the BPA’s conclusion that the public does not have an interest in disclosure of the passenger names. Disclosing information is in the public interest if it “shed[s] light on agency’s performance of its statutory duties.” *Norton*, 309 F.3d at 35 (citation and quotations omitted); *see also Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005) (“The focus of the public interest analysis is the citizens’ right to know what their government is up to.”) (citation and quotations omitted). Relevant here, the BPA may only use an aircraft for an official purpose. *See* 31 U.S.C. § 1344(a). An official purpose includes carrying only passengers authorized to travel on government aircraft, according to the requirements of Office of Management and Budget (OMB) Circular No. A-126. 41 C.F.R.

§§ 102-33.20, 102-33.25(c)-(d). OMB Circular No. A-126 requires the BPA to document the names of all passengers. It also requires passengers to reimburse the government for certain travel, including a wholly personal or political trip. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIR. NO. A-126, IMPROVING THE MANAGEMENT AND USE OF GOVERNMENT AIRCRAFT (May 22, 1992) (Revised).

We find that releasing the passenger names is in the public interest because it will shed light on whether the BPA operated its planes in accordance with its statutory duties, as specified in OMB Circular No. A-126. In particular, releasing the passenger names will allow the BPA Watch to determine if the BPA documented passenger names on the plane manifests. The BPA may have left the spaces in the manifests for passenger names blank, as it reportedly did under one or more spaces for “purpose,” or listed “John Doe” instead of actual passengers. Reviewing the passenger lists may also indicate if the BPA used its planes for wholly personal or political trips. For example, a passenger list consisting of names from a single family may indicate a wholly personal trip. Similarly, a passenger list consisting of the names of public officials and/or registered lobbyists may indicate a wholly political trip. Without reviewing the passenger lists, the BPA Watch would never have the opportunity to find out.

It Is Therefore Ordered That:

- (1) The Appeal that the BPA Watch filed on June 13, 2008, OHA Case No. TFA-0260, is granted, as set forth below.
- (2) The BPA Watch’s Appeal is remanded to the BPA. The BPA shall reconsider the BPA Watch’s FOIA request for the passenger names under the analysis set forth above and issue a new determination. If it wishes to withhold the passenger names under Exemption 6, the BPA must identify the privacy threat and describe how that interest outweighs the public interest in disclosure. Otherwise, the BPA may not withhold the passenger names under Exemption 6.
- (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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 11, 2008