April 30, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Bryan Cave
Date of Filing:	March 18, 2003
Case Number:	TFA-0026

On August 18, 2003, the law firm of Bryan Cave LLP (Bryan Cave), on behalf of itself and four of its clients, filed Appeals from a determination that the Office of the Inspector General (OIG) of the Department of Energy (DOE) issued to them. 1/ The determinations responded to essentially identical requests 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. In the determinations, OIG released redacted versions of three documents to Bryan Cave and its clients. This Appeal, if granted, would require the DOE to release the remainder of 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 in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request, Bryan Cave wrote the Department of Energy and requested "a copy of the Inspector General report I02-IG001 dated September 13, 2002, regarding the Couriers." *See* Letter from Herbert Richardson, Principal Inspector General, to Daniel C. Schwartz, Bryan Cave LLP (February 12, 2003) (Determination Letter). In its Determination Letter, OIG identified four responsive documents relevant to Bryan Cave's request. One document (Document 3) was forwarded to the National Nuclear Security Agency (NNSA) in order that it issue a determination to Bryan Cave

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1/ Because the FOIA requests and determinations were essentially the same for Bryan Cave, FOIA Request No. FY2002-00511, and its clients, Thomas Worthington, FOIA Request No. FY2003-00063, Steven Gray, FOIA Request No. FY2003-00062, Marvin Middlestat, FOIA Request No. FY2003-00048, and John Watts, FOIA Request No. FY2003-00003, we have consolidated the Appeals into one Appeal for consideration.

concerning that document. 2/ OIG released redacted versions of the other documents: A three-page September 13, 2002 Memorandum from Gregory H. Freidman, DOE Inspector General, to the Deputy Administrator for Defense Programs, NNSA (Document 1); a 20-page Special Inquiry Report, No. 102IG001 (Document 2); and a one page document entitled "List of Key Personnel" (Document 4). 3/ OIG withheld portions of Document 1 pursuant to Exemption 2 of the FOIA. Portions of Documents 2 and 4 were withheld pursuant to Exemptions 2, 6 and 7(C). Bryan Cave appeals the OIG's withholding of portions of Documents 1 and 2. 4/

II. Analysis

A. Document 1

Document 1 is a memorandum from the DOE Inspector General to the Deputy Administrator for Defense Programs, NNSA, transmitting OIG's Special Inquiry Report No. 102IG001 (Document 2). This three page memo generally describes Document 2. Document 2 is an OIG inquiry concerning certain alleged supervisory actions taken against DOE employees who raised issues and concerns regarding a DOE security function. All of the redacted information in Document 1 was withheld pursuant to Exemption 2, although the determination does not contain an explanation of how Exemption 2 applies to the withheld material.

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*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (*en banc*) (*Crooker*).

The issue before us regarding Document 1 is whether the "high two" exemption applies. We have been informed by OIG that Documents 1 and 2 were created for DOE internal use only. *See* Memorandum of Conversation between Jacqueline Becker, OIG, and Richard Cronin, OHA (March

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2/ This document is Appendix A to Document 2.

3/ This document is Appendix B to Document 2.

4/ Bryan Cave does not seek to appeal the OIG determination regarding Document 4 nor does it seek the specific names of individuals listed in Documents 1 and 2.

17, 2003). Additionally, Document 1 references the fact that Document 2 was created so that NNSA officials could consider the need for administrative action concerning the incident described in Document 2. *See* Document 1 at 2. Consequently we find that the first prong of the *Crooker* test for "high two" protection has been met. With regard to the second prong, it appears the portion of information that specifically details potential issues raised by DOE employees concerning security functions is of a type that, if released, could materially assist an adversary who sought to obtain special nuclear materials. We find that release of this information would significantly risk circumvention of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, which restricts the possession of special nuclear materials. A second category of information that was withheld consists mainly of general DOE job position titles, generic DOE security functions, and DOE organizations that are connected with certain DOE protective functions. It is unclear to us how release of this information would *significantly risk* circumvention of an agency regulation or statute. We will therefore remand this matter to OIG. On remand, OIG should issue another determination letter that (i) explains in more detail how release of the second category of information would significantly risk circumvention of an agency regulation or statute, (ii) withholds the information pursuant to another FOIA exemption, or (iii) releases the information.

B. Document 2

Document 2 is the OIG's Special Inquiry Report No. 102IG001. Portions of Document 2 were withheld pursuant to Exemptions, 2, 6 and 7(C).

With regard to the material in Document 2 that was withheld pursuant to Exemption 2, this material consists essentially of the same material that was withheld in Document 1. For the reasons stated above we find that some of the information, which describes the DOE employees' issues and concerns, was properly withheld pursuant to Exemption 2. The remainder of the material withheld (almost identical to the second category of material described above) does not appear to be of a type that, if released, would significantly risk circumvention of an agency regulation or statute. On remand, OIG shall explain in more detail how release of the remaining information would significantly risk circumvention of an agency regulation or statute, withhold the information pursuant to another FOIA exemption, or release the information.

The remainder of the information, such as names of individuals, specific job titles and the DOE organizations where the employees were employed, was withheld pursuant to Exemptions 6 and 7(C). 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). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976) (for Exemption 6 purposes threat to privacy must be real and not speculative); *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 2-3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3; *Stone v. FBI*, 727 F. Supp. 662, 663-64 (D.D.C. 1990) .

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., K.D. Moseley*, 22 DOE ¶ 80,124 (1992). A document compiled for law enforcement purposes may be protected from disclosure if it satisfies Exemption 7(C)'s "reasonableness" standard. Conversely, a document not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that release constitute a clearly unwarranted invasion of personal privacy. 5/

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. *See, e.g., Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 80 (D.C. Cir. 1974) (*Rural Housing Alliance*). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Housing Alliance*, 498 F.2d at 81 & n.46 (D.C. Cir. 1974). We have consistently found that the OIG compiles information for law enforcement purposes within the meaning of Exemption 7. *See Richard Levernier*, 26 DOE ¶ 80,182 (1997). The OIG informed us that it accumulated the information contained in Document 2 as part of an investigation as to whether potential criminal activity had occurred concerning an incident involving the supervision of a DOE national security function. Bryan Cave argues that Document 2 itself was not written until after the Department of Justice declined to conduct criminal proceedings. Thus, it maintains Document 2 could not have been created for law enforcement purposes. We must however reject Bryan Cave's argument. Assuming arguendo that the *document* was not created for law enforcement purposes it is clear from Document 1 that the *information* contained in Document 2 was compiled to determine if criminal violations had occurred. Consequently, the information meets the threshold law enforcement test for

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5/ Because we will analyze OIG's withholdings pursuant to Exemption 7(C), we need not consider Bryan Cave's specific Exemption 6 arguments.

application of Exemption 7(C). *See* Document 1 at 1; Memorandum of telephone conversation between Jacqueline Becker, OIG, and Richard Cronin, OHA (April 7, 2003). *See Abramson v. FBI*, 456 U.S. 615, 631-32 (1982) ("[w]e hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirement for Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law enforcement purpose.")

Next we must determine if the release of the information withheld under Exemption 7(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is widely recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990). Thus, there is a very strong privacy interest with regard to the identity of individuals named in Document 2. This privacy interest must be balanced with the public interest in release of the information. Bryan Cave argues that Documents 1 and 2 are of great public interest given the subject matter concerning an important DOE security function. Further, Bryan Cave contends that release of the identifying information referenced in Documents 1 and 2 is vital to evaluate DOE's response to issues raised by its employees and to substantiate allegations of wrongdoing. Despite these arguments, we believe that there is only a limited public interest in releasing information concerning identities of the individuals concerned. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (public interest to be considered is that which "shed[s] light on an agency's performance of its statutory duty"). Given the strong privacy interest present here, balanced against a limited public interest, we find that release of almost all the information withheld pursuant to Exemption 7(C) would reasonably be expected to constitute an unwarranted invasion of personal privacy.

While we find that the vast majority of information in Document 2 was properly withheld pursuant to Exemptions 6 and 7(C), some of the material can be segregated and released. The FOIA requires that "[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) (1982). Several portions of material withheld from Document 2 pursuant to Exemptions 2, 6 and 7(C) contain segregable material. Specifically, on page 10, the second sentence of the first full paragraph should be released except for the portions of the sentence that identifies the identity of the author of certain written notes. The text block below this paragraph (a portion of the notes that were originally withheld in its entirety) should also be released except for the portions that identify specific names and the portion of the second sentence of the first paragraph of the text block that identifies specific potential issues that were raised by DOE employees. On page 12 of Document 2 the text of the two emails should be segregated and released except for the names of individuals. Footnote 5 should also be released except for the types of information described above. In addition, throughout the document, some of the withheld material consists of pronouns. These pronouns are located on pages 4, 5, 8-12, 14-16. These do not appear to be withholdable under Exceptions 2, 6 and 7(C). On remand OIG should release this segregable material or withhold it pursuant to another exemption.

Bryan Cave argues that, Exemption 7(C) notwithstanding, all material referring to its clients must be released. We believe that Bryan Cave is partially correct in that Exemption 7(C)'s focus is to

protect third parties from an invasion of their privacy. There does not appear to be an invasion of privacy if the requester is provided the portion of an identified document that references the name of the requestor. Consequently, to the extent that any of the appellants' names (listed in footnote 1) are contained in Document 1 or 2, the name should be released but only to that particular requester. This may entail providing separate redacted versions of Documents 1 and 2 to each of the appellants.

Bryan Cave's other arguments concerning the inapplicability of Exemption 2, 6 and 7(C) are unavailing. With regard to the material withheld pursuant to Exemption 2, Bryan Cave argues that the material is not classified and alleges that it has already been made public. Neither allegation, if true, would be sufficient to defeat OIG's Exemption 2 claim for Documents 1 and 2. There is no requirement that information be classified for an agency to protect that information under Exemption 2. Further, Bryan Cave's generalized claim that the withheld information has been made "public" is insufficient to conclude that OIG has waived its privilege to assert Exemption 2. *See Steinberg v. United States Department of Justice*, 179 F.R.D. 357, 361 (D.D.C. 1998) (finding no waiver where requester did not produce evidence that specific withheld material is public, even though general subject matter appeared to be in public domain).

III. Conclusion

We find that OIG properly withheld a significant portion of the redacted information in Documents 1 and 2. However, we will remand this matter to OIG so that it can issue another determination or release the information described in the previous section above. Consequently, Bryan Cave's appeal should be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Bryan Cave LLP on March 18, 2003, OHA Case No. TFA-0026, is hereby granted in part as set forth in paragraph (2) and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy of 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: April 30, 2003