



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO:
5720
Ser 14/002
October 10, 2019

Ms. Teri Caserta

[REDACTED]
E-mail to [REDACTED]

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY-2019-005700; FOIA APPEAL DON-NAVY-2019-009000

This letter responds to your FOIA appeal received by my office on August 16, 2019 and supplemented on September 30, 2019. Before addressing your appeal, please accept my sincere and heartfelt condolences for the loss of your son.

In your underlying FOIA request DON-NAVY-2019-005700, you requested unredacted copies of all Helicopter Sea Combat Squadron TWO EIGHT (HSC-28) command climate surveys from 2017. In a response dated April 26, 2019, Commander, Naval Air Force Atlantic (COMNAVAIRLANT), the initial denial authority (IDA), responded by releasing redacted copies of the 2017 command climate survey reports.

In your appeal you demand release of the statements and comments submitted by the survey participants, which are the portions of the surveys that were redacted by COMNAVAIRLANT pursuant to FOIA Exemptions (b)(5) and (b)(6). You argue that the participants' comments will prove bullying, hazing, harassment, and other abuse by HSC-28 leadership and that, because the comments were submitted anonymously, there would be no way for you to tell who wrote them.

For the following reasons, your appeal is denied, in part, and granted, in part. Specifically, I find that the questions, but not the responses, in the command climate survey should be released.

Exemption (b)(5)

FOIA Exemption (b)(5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 also incorporates certain civil discovery privileges into the FOIA, one of which is relevant to this case: the deliberative process privilege. The deliberative process privilege seeks to encourage open, frank discussion; protect against premature disclosure of proposed policies; and guard against public

confusion from release of reasons and rationales that were not ultimately the basis for agency decisions. *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (opining that the “quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”). In short, it protects the integrity of agency’s decision-making processes where release of responsive documents would harm the decision-making process.

For the deliberative process privilege to apply, the information in question must be predecisional and deliberative. A document is “predecisional” if it is “generated before the adoption of an agency policy.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Courts have found information to be “deliberative” where it reflects “the give-and-take of the consultative process,” either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 867 (D.C. Cir. 1980); *Brennan Ctr. For Justice at New York Univ. Scho. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (deliberative records are those that are related to the process by which policies are formulated). Courts have further protected under the deliberative process privilege material that would expose the opinions, advice, or recommendations offered in the course of agency decisionmaking. *Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 95, 102 (D.D.C. 2012) (protecting material that “constitutes advice used by decision-makers at the FBI...in the context of their efforts to ensure that any [FBI] information-gathering procedures fully comply with the law”) (internal quotations omitted), *aff'd*, 739 F.3d 1 (D.C. Cir. 2014). Examples of deliberative documents include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); see also *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (upholding use of privilege where withheld documents had been shown to contribute to agency’s decisionmaking process).

Exemption (b)(6)

FOIA Exemption (b)(6) allows the Government to withhold information about individuals when the disclosure of such information would constitute “a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). This requires a balancing of personal privacy interests against the public interest served by disclosure – whether the release of the information will shed light on the agency’s performance of its statutory duties. An unwarranted invasion of personal privacy is one where disclosure would compromise a substantial privacy interest. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). A substantial privacy interest is anything more than a de minimus one. *Multi AG Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008). If the Court finds a substantial privacy interest exists, it then analyzes the public interest in that record’s release. *Id.* Courts have recognized that this concept of privacy “includes the prosaic (e.g., place of birth and date of marriage) as

well as the intimate and potentially embarrassing” and that the privacy interest inherent in Exemption (b)(6) “belongs to the individual, not the agency holding the information.” *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989). Further, both the “author” and the “subject” of a file may possess cognizable privacy interests under Exemption (b)(6). *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1007-08 (D.C. Cir. 1990) (en banc). Finally, an invasion of privacy need not occur immediately upon disclosure in order to be considered “clearly unwarranted.” *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). That is, “[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.” *Id.*

Application of FOIA Exemptions (b)(5) and (b)(6)

Here, after careful review, I concur with COMNAV AIRLANT’s decision to redact the comments made by individual sailors in the command climate surveys of HSC-28. After receiving your appeal my office contacted the IDA in order to review unredacted copies of the records you received. I have reviewed the unredacted command climate survey and I find the comments contained in the surveys fit within the deliberative process privilege of (b)(5) because they are suggestions, opinions, and recommendations to command leadership to improve organizational effectiveness. I also find that FOIA exemption (b)(6) applies because the responses contain information from which the identity of individuals can be derived.

As to the material redacted pursuant to FOIA exemption (b)(5), the Department of Defense’s Chief FOIA Policy Officer Memorandum regarding command climate surveys states in relevant part [I have attached the DoD Memo]:

A climate survey is a commander’s management tool that allows military and civilian leaders to proactively assess critical organizational climate dimensions that can have positive or negative impacts on an organization’s effectiveness. The climate survey anonymously assesses perceptions of organizational effectiveness, equal opportunity, equal employment opportunity, fair treatment, and sexual assault prevention and response. In order to be effective, it is crucial that identities of climate survey participants be kept anonymous...[T]he release of these comments could have a serious chilling effect on the entire survey process within the DoD because future respondents to similar surveys, knowing that such comments become public, would not provide such open and frank comments. This, in turn, would seriously inhibit commanders in making future organizational-related decisions because they would not be receiving all the information needed. Additionally, it’s quite possible that responses contain enough personally identifying information that some members of the survey community could identify responses that came from someone they know.

Thus, I find the results of command climate surveys were properly redacted by COMNAV AIRLANT pursuant to FOIA exemption (b)(5). Release of such information would have a high probability of chilling the candid and frank exchange of information

and opinions in future surveys were it to become common practice for this information to be made public after the fact.

Additionally, the information redacted pursuant to FOIA exemption (b)(6) is information that could serve to identify the personnel who took part in the survey. Regardless of whether you may or may not personally know any of the personnel assigned to HSC-28 who participated in the command climate surveys, release of the comments still poses significant risk that survey participants can be identified, especially by those within the command.

Lastly, your original appeal and supplement argue that release of the redacted material would shed light on the circumstances behind your son's death. Unlike an investigation that seeks to find the facts and determine accountability for misconduct or an accident, a command climate survey gains perceptions of organizational effectiveness, equal opportunity, equal employment opportunity, fair treatment, and sexual assault prevention and response, that, per the Department of Defense Equal Opportunity Management Institute, allows commands to "develop a plan of action to correct validated issues." Also, please note that even though you lost your son and understandably you want to know everything about the command climate, whatever is released to you under FOIA must also be released to any other FOIA requester.

For these reasons, your appeal is hereby denied as to the responses in the command climate survey.

However, I find the questions asked within the survey are releasable and am granting your appeal as to that material.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for its denial. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. government and is therefore unable to assist you in this process.

You have the right to seek dispute resolution services by contacting the Navy FOIA/PA public liaison, [REDACTED] or at [REDACTED].

You may also seek dispute resolution services from the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, at [REDACTED] or [REDACTED].

You may also contact [REDACTED] or

[REDACTED] with any questions or concerns you may have for my office.

Sincerely,

[REDACTED]

[REDACTED]

General Litigation Division

Encl:
DoD FOIA Memo re Command Surveys

Copy to:
COMNAVAIRLANT
DNS-36
DON OCIO