

Legal Opinion: GMP-0122

Index: 7.265, 7.360, 7.562
Subject: FOIA Appeal: Withhold EPPES--Disclose ETRS Form

October 26, 1992

Dorothy T. Pleasant, President
AFGE Local 3475
P.O. Box 56445
New Orleans, Louisiana 70156-6445

Dear Ms. Pleasant:

This is in response to your Freedom of Information Act (FOIA) appeal dated September 10, 1992. You appeal the August 14, 1992 denial by Robert J. Vasquez, Manager, New Orleans Office. Mr. Vasquez withheld the EPPES and the Employee Time Reporting System (ETRS) forms for certain named employees under Exemption 6 of the FOIA, 5 U.S.C. Section 552(b)(6), and the Privacy Act, 5 U.S.C. Section 552a.

I have determined to affirm the initial denial under Exemption 6 and the Privacy Act with respect to the employees' EPPES. I am reversing the initial denial withholding the ETRS forms for the employees and am instructing the New Orleans Office to immediately make this information available to you.

Exemption 6 protects information in medical and personnel files and "similar files," the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. A determination to withhold or release information under Exemption 6 requires balancing the public interest purpose for disclosure against the potential invasion of personal privacy. *Wine Hobby, USA, Inc., v. U.S. Internal Revenue Service*, 502 F.2d 133 (3rd Cir. 1974). *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), provides a new public interest test under Exemptions 6 and 7(C) by establishing that only the furtherance of FOIA's core purpose of informing citizens about government operations can warrant the release of information implicating individual privacy interests. *Reporters Committee*, 489 U.S. at 772-73.

I have determined that federal employees have a substantial privacy interest in their job performance evaluations and that disclosure of such information would not shed light on any public interest in government operations. Courts have recognized the sensitive nature of the details of an employee's performance evaluation and have accorded protection of this information under Exemption 6. See, *Ripskis v. HUD*, 746 F.2d 1, 3-4 (D.C. Cir. 1984), withholding under Exemption 6 the names and identifying data on evaluation forms of HUD employees who received outstanding performance ratings; accord, *FLRA v. U.S. Department of Commerce*, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992); *Gilbey v. U.S. Department of the Interior*, No. 89-0801, slip op. at 3-4

(D.D.C. Oct. 22, 1990).

HUD maintains under the Privacy Act System of Records a system entitled "Employee Performance File System Records," OPM/GOVT.-2, which includes Federal employees' performance appraisal records. See 55 Fed. Reg. 3842 (February 5, 1990). The information you seek is part of the OPM's Privacy Act System of Records maintained by HUD and can be withheld under Exemption 6 of the FOIA. Therefore, under the Department's regulations at 24 C.F.R. Section 16.1(e)(3), the Privacy Act governs the public interest determination and compels the withholding of the information.

I am reversing the decision to withhold the employees' ETRS forms under Exemption 6. I find no invasion of privacy from disclosure of employees' cumulative work hours in their assigned activities. Further, the ETRS forms are filed by the month of the reporting year and not by the employees' names. Thus, the ETRS forms are not contained in a Privacy Act system of records and the Privacy Act is not applicable to these records.

Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, or in the judicial district where the records you seek are located.

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder
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