

April 27, 2011

Ms. Leigh Anne Terry
Senior Administrator
Callahan & Associates
1001 Connecticut Avenue, NW
Suite 1001
Washington, D.C. 20036

Re: 2011 – APP – 0005; FOIA Appeal dated March 29, 2011

Dear Ms. Terry:

On February 9, 2011, we received your Freedom of Information Act (FOIA) request. You requested the salaries, bonus/commission/incentive payments, and total benefit costs, including the agency-paid portion of insurance premiums and 401(k) matches, for the twenty-five highest paid NCUA employees for the years 2008 to 2011. On March 18, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request and indicated that your request was granted in part and denied in part. Attached to her response was information concerning salaries paid to the top twenty-five highest paid agency employees for the specified years, along with information concerning incentive payments received by those employees. The incentive payment information was not linked by name to the individual recipient. Ms. Dent's letter indicated that information concerning insurance premiums and retirement plan contributions was being withheld pursuant to exemption 6 of the FOIA, 12 U.S.C. §552(b)(6). This exemption provides that agencies are permitted to withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy.

You appealed Ms. Dent's determination by letter dated March 29, 2011. In your appeal, you indicate that the insurance and retirement information must be disclosed because that information comprises an integral component for understanding the scope of the entire compensation package for the identified employees. Your appeal goes on to assert that, if necessary to address privacy concerns, the information could be provided in a separate document and not linked to the employees by name, in the same manner that the incentive information was provided.

Your appeal is denied. As more fully established below, none of the points you have asserted in support of your appeal is sufficient to overcome the noted exemption's applicability in this case.

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Exemption 6 of the FOIA is designed to protect personal privacy interests of individuals against unwarranted invasion. The exemption protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have given the language "similar files" a broad interpretation. See, for example, United States Department of State v. Washington Post Co., 456 U.S. 595 (1982), in which the court held that all information that "applies to a particular individual" meets the threshold requirement for privacy protection. A federal judge in another case, in which the requester had sought information concerning a disciplinary action involving a named individual, concluded that the information would likely be located in that individual's personnel file. The judge went on to note that, even where a matter relating to the discipline of an employee is insufficient in and of itself to be constituted as "part of a personnel file," there seems little doubt it could readily be characterized as a "similar file" within the purview of Exemption 6. Shonberger v. NTSB, 508 F. Supp 941 (D.D.C. 1981). We conclude that information concerning an individual employee's health insurance selection and his or her retirement contribution qualify as "similar files" within the meaning of Exemption 6.

There is, to some extent, a diminished expectation of privacy associated with federal employment, particularly for those at the higher end of the compensation scale. For example, regulations of the U.S. Office of Personnel Management (OPM) specify that certain information, including an employee's name, present and past positions, present and past grades, present and past annual salary rates, and present and past duty stations, are all subject to disclosure under FOIA. 5 C.F.R. §293.311. At the same time, courts have recognized that federal employees do not, by virtue of their employment as public servants, forfeit their legitimate expectations of privacy. Mueller v. U.S. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999).

Resolution of the issues presented in this appeal requires, first, a determination of whether the affected employees have a legitimate expectation of privacy in the information you seek. We note, initially, that neither retirement contributions nor health care coverage selections are identified in the U.S. OPM rule cited above as matters subject to disclosure. Indeed, it would appear that matters involving individual and family health care coverage are, almost by definition, intensely personal. Few issues affecting an individual involve more intimate consideration than his or her choice of health care coverage and health care providers, both for the individual and his or her family. The amount, if any, an individual elects to contribute from his current salary toward his own retirement is likewise an intensely personal decision.

Even though your request is limited to the agency portion of the health care and retirement contributions, we think the release of even this limited information could result in an invasion of personal privacy. First, the amount of each agency's share of health care premiums for federal employees is uniform across the government. It is, moreover, a matter of public record: every health care option available to government employees is listed on the OPM website and can be found at

www.opm.gov/insure/health/rates/index/asp. From this site you can access the information for the current year as well as for several prior years. The amount of the government contribution varies among the plans; no two plans call for identical amounts. Accordingly, knowing the amount of the government contribution with respect to a particular employee could enable someone to determine that employee's choice of health care plan, including whether he chose individual or family coverage.

Second, with respect to thrift plan contributions, agency policy is to match the employee's contribution, up to five percent of the individual's salary (except for employees under the CSRS system, which has no matching contribution). This policy is public knowledge and is, for example, disclosed in all job postings and vacancy announcements. Knowing the individual's salary and the amount of the agency contribution would, therefore, provide some very specific insight into the amount the individual has elected to contribute. We conclude, accordingly, that even release of the agency portion of the insurance and the thrift plan contributions would affect a privacy interest of the individual employees.

Having identified a legitimate expectation of privacy in the type of documents you have described, the process described in the FOIA calls for the balancing of that privacy expectation against the legitimate public interest in the release of the files. The standard for determining the public interest to be balanced against the competing privacy interest is specifically limited to the FOIA's core purpose: shedding light on an agency's performance of its statutory duties. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989). Only the interest of the general public, and not that of the private litigant, is relevant to this inquiry. See Kiraly v. FBI, 728 F.2d 273, 276 (6th Cir. 1984).

Viewed in this light, there is minimal, if any, public interest in materials that disclose the agency contribution to the insurance or retirement benefits of specific employees. The fact that the agency, like many employers, does so is already public knowledge. Documents that specify amounts contributed on behalf of specific employees shed essentially no light on how the agency performs its functions. Information that reveals little or nothing about an agency's own conduct does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. Beck v. Department of Justice, 997 F. 2d 1489, 1493 (D.C. Cir. 1993).

Accordingly, because the privacy interest of the federal employees at issue in this case in the nondisclosure of their health care elections and their retirement contributions outweighs the minimal FOIA-related public interest in disclosure, we conclude that disclosure would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). See Center for Public Integrity v. U.S. Office of Personnel Management, 2006 U.S. Dist. LEXIS 87367 (D.D.C. 2006) (upholding OPM's determination to withhold from disclosure certain personal information involving federal employees deemed to be in "sensitive" positions). You should note, in this respect, that we considered the option you proposed of disclosing the dollar amounts without tying

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them to the names of the employees. We have elected not to accept your proposal because we do not believe doing so would be consistent with protection of the employee's privacy interest, as is mandated by Exemption 6.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

As documented above, the FOIA does not require that we provide the information you have requested. Nevertheless, in an effort to provide you with some information that may be useful to you, we have provided on Appendix A aggregate data showing the agency's share of employee benefit costs for its most highly compensated individuals. For the years 2008 through 2010, Appendix A reflects the aggregate amount paid by the agency for health insurance premiums and employer §401(k) matches for the twenty-five most highly compensated employees. You should note that the agency has no way of accessing data for individuals who are not currently employed by us. Accordingly, the data on Appendix A does not include information for any individual who is not currently on the NCUA payroll.

Sincerely,

Robert M. Fenner
General Counsel

Attachment

GC/RPK:bhs
11-FOI-0078; 2011-APP-00005

11-0385