IN THE MATTER OF HAWAIIAN INDEPENDENT REFINERY, INC.

RCRA (3008) Appeal No. 92–2

ORDER ON INTERLOCUTORY APPEAL

Decided November 6, 1992

Syllabus

Region IX filed an administrative complaint against Respondent Hawaiian Independent Refinery, Inc. under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6938(a). The penalty proposed in the complaint is based on penalty calculations performed by a former EPA employee. Respondent wants to cross-examine the employee about the Agency's penalty calculations, and has requested in discovery the former employee's last known address so that it may subpoena the former employee to testify at the hearing. The Agency has refused to disclose the address from its records, arguing inter alia that such disclosure would violate the Privacy Protection Act, 5 U.S.C. § 552a. Administrative Law Judge Frank W. Vanderheyden ("the Presiding Officer") rejected this argument, concluding that disclosure of the former employee's address would fall within an exception to the Privacy Act. The exception covers disclosures that would be required under the Freedom of Information Act. The Presiding Officer, therefore, issued an order directing the Agency to comply with Respondent's discovery request. The Region then filed a motion asking the Presiding Officer to certify his ruling on the issue for interlocutory appeal under 40 CFR § 22.28, and the Presiding Officer did so.

Held: Disclosure of a former EPA employee's last known address would not, under the circumstances of this case, violate the Privacy Act, provided EPA received a FOIA request for the address. The Privacy Act exception for disclosures that would be required under the Freedom of Information Act only applies to a particular disclosure if the Agency has received an actual FOIA request for the desired information. In this case, there is nothing in the record to suggest that the Agency has received a FOIA request for the former employee's address. Accordingly, the Presiding Officer's order, to the extent it requires disclosure of the address, is vacated.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

On May 24, 1991, EPA Region IX filed an administrative complaint against Respondent Hawaiian Independent Refinery, Inc.

under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6938(a). The $621,200 penalty proposed in the complaint is based on penalty calculations performed primarily by Peggy Garties, a former EPA employee. Respondent wants to cross-examine Garties about her penalty calculations, and has requested in discovery her last known address so that it may subpoena her to testify at the hearing. The Agency has refused to disclose her last known address from its records, arguing *inter alia* that such disclosure would violate the Privacy Protection Act, 5 U.S.C. § 552a. Administrative Law Judge Frank W. Vanderheyden ("the Presiding Officer") rejected this argument and issued an order directing the Agency to comply with Respondent's discovery request for Garties' last known address. The Region then filed a motion asking the Presiding Officer to certify his ruling on the issue for interlocutory appeal under 40 CFR § 22.28, and the Presiding Officer did so. On September 18, 1992, the Environmental Appeals Board accepted the Presiding Officer's certification for interlocutory review. For the reasons set forth below, we conclude that disclosure of Garties' last known address would not, under the circumstances of this case, violate the Privacy Act, provided EPA has received a FOIA request for the address. There is nothing in the record to suggest, however, that the Agency has received a FOIA request for Garties' address. Accordingly, the Presiding Officer's order, to the extent it requires disclosure of the address, is vacated.

I. *DISCUSSION*

Coverage Under the Privacy Act: The Privacy Act provides in pertinent part as follows:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to written request by, or with the prior written consent of, the individual to whom the record pertains, unless [one of 12 exceptions applies].

5 U.S.C. § 552a(b). As a threshold matter, it is beyond serious question that an agency's personnel file containing the last known address of a former employee is a "record which is contained in a system of records" pertaining to an "individual." *See* 5 U.S.C. 552a(a)(4)(definition of "record").[1] Thus, the prohibition quoted above

[1] The Privacy Act defines the term "record" as follows:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and

will apply to Garties' last known address unless one of the Privacy Act's 12 exceptions applies. The Presiding Officer concluded that Exception (2) applies. Under Exception (2) of the Privacy Act, disclosure is required when disclosure would be "required under section 552 of this section." Section 552 is the Freedom of Information Act ("FOIA"). (Both the Privacy Act and FOIA are parts of the Administrative Procedure Act.) Under FOIA, an Agency must disclose all records requested by "any person," unless the information requested falls within a specific statutory exemption. 5 U.S.C. 552(d). The FOIA exemption that arguably precludes disclosure of the information at issue here is exemption (6), which applies to "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). Application of exemption (6) requires a balancing of the privacy interest that will be invaded by disclosure against the public interest that will be served by disclosure. *Department of the Air Force* v. *Rose,* 425 U.S. 352, 372 (1976). In undertaking this balance, courts generally look first to the privacy interest at stake and then to the public interest in disclosure. *Federal Labor Relations Authority* v. *Department of the Treasury, Financial Management Service,* 884 F.2d 1446, 1452 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1055 (1990)(hereinafter "*Treasury*").

In this case, with respect to the privacy interest side of the balance, the Presiding Officer found only that "the name of the witness is known already, and respondent merely seeks Garties' last known address reflected in the EPA personnel files." The Presiding Officer then focused on the public interest to be served by disclosure of Garties' address, noting that the Respondent's ability to defend itself against the imposition of a $621,200 penalty would be enhanced by allowing it to examine Garties, who was primarily responsible for the penalty calculations. The Presiding Officer found, therefore, that "[n]ot only the public interest, but also the ends of justice, will be served by [Garties'] appearance as a witness in this proceeding * * *." The Presiding Officer ruled that the disclosure of Garties' last known address is not subject to the Privacy Act because it "comes within the exception of 5 U.S.C. 552a(b)(2)." Order Denying in Part and Granting in Part Motion for Discovery, at 14. For the following reasons, we vacate the Presiding Officer's decision.

> criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to an individual, such as a finger or voice print or a photograph[.]

5 U.S.C. 552a(a)(4).

Privacy Interest: The term "privacy" in FOIA exemption (6) encompasses a wide range of interests involving "the individual's control of information concerning his or her person." *Hopkins* v. *Department of Housing and Urban Development,* 929 F.2d 81, 86–87 (2nd Cir. 1991) (quoting *Department of Justice* v. *Reporters Committee for Freedom of the Press,* 489 U.S. 749, 763 (1989)). By using the term "privacy" in the exemption, "Congress intended to afford broad protection against the release of information about individual citizens." *Hopkins,* 929 F.2d at 86. In analyzing the privacy question, it is necessary to consider the extent of the privacy invasions that would flow from disclosure and the likelihood that such invasions would occur. *See Treasury,* 884 F.2d at 1452 (in determining privacy interest courts must consider "the nature and scope of the privacy invasions that would flow from disclosure"). It is not necessary that such consequences follow directly from disclosure as long as there is a substantial likelihood that they would follow. *See National Association of Retired Federal Employees* v. *Horner,* 879 F.2d 873, 878 (D.C. Cir. 1989), *cert. denied,* 110 S.Ct. 1805 (1990) (hereinafter *"NARFE"*) ("Where 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."). In addition, unless the privacy interest is "substantial," no protections will apply. In some cases, the privacy interest is so de minimis that the privacy interest is not protectible. *Id.* at 874.[2]

The issue of whether a person has a protectible privacy interest in his or her address has arisen on numerous occasions in the context of requests for agency-compiled lists of both private citizens' and government employees' names and addresses. In these cases, courts have generally recognized that all persons have a protectible privacy interest in their names and addresses.[3] The Supreme Court recently

[2] For example, in *Ditlow* v. *Shultz,* 517 F.2d 166, 170 n.15 (D.C. Cir. 1975), the U.S. Court of Appeals for the D.C. Circuit found no protectible privacy interest where the only likely consequence of disclosing a list of names and addresses of persons who were passengers on certain airline flights was that they would receive a letter from a lawyer telling them they might be entitled to damages.

[3] *See, e.g., Painting and Drywall Work Preservation Fund* v. *HUD,* 936 F.2d 1300 (D.C. Cir. 1991)(construction workers at government-assisted project have privacy interest in their names and addresses because names would be associated with hourly wages, hours worked, deductions and net pay and would be disseminated to creditors, salesmen, and union organizers); *Treasury,* 884 F.2d at 1453 ("federal employees' [sic] have privacy interests in their names and home addresses that must be protected" because disclosure would subject such employees to business solicitations); *NARFE,* 879 F.Ed at 877 (retired federal employees have privacy interest in their names, addresses and annuitant status, since likely consequence of disclosure was business solicitations); *Federal Labor Relations Authority* v. *Department of Navy, Naval Commu-*

observed, however, that whether disclosure of a list of names and addresses constitutes a sufficiently significant threat to privacy depends upon the characteristics associated with being on the list and the likely consequences of disclosure. *Department of State* v. *Ray,* 502 U.S., 116 L.Ed. 2d 526, 542 (1991).[4] In *Ray,* the U.S. Supreme Court found that disclosure of names and addresses of Haitian refugees who had been returned to Haiti and who had been interviewed by the State Department concerning their treatment by the Haitian government when they returned to Haiti would invade a substantial privacy interest, because disclosure would identify them as people who cooperated with the State Department investigation, thereby exposing them to possible embarrassment and retaliation. In finding a protectible privacy interest, the Court also noted the likelihood that the refugees would be contacted by private citizens seeking to interview them concerning their treatment by the Haitian Government. *Id.*

In this case, the likely consequence of disclosure is that Garties might receive a subpoena to testify in the proceedings below. There can be no doubt that receiving a subpoena to testify at an administrative hearing is a significant consequence and constitutes an invasion of one's privacy interest. Accordingly, we hold that Garties has a protectible privacy interest that would be invaded by the disclosure of her last known address. Having identified a protectible privacy interest, we must now consider whether there is any public interest to be served by disclosure of Garties' address and, if so, whether that public interest outweighs Garties' privacy interest in non-disclosure.

nications Unit Cutler, 941 F.2d 49, 55–56 (1st Cir. 1991)(recognizing modest but nevertheless protectible interest in "the ability to retreat to the seclusion of one's home and to avoid enforced disclosure of one's address."); *Hopkins* v. *Department of Housing and Urban Development,* 929 F.2d 81, 87 (2nd Cir. 1991)(individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses, particularly where the names and addresses are coupled with personal financial information); *Department of Navy* v. *Federal Labor Relations Board,* 840 F.2d 1131, 1136 (3rd Cir. 1988), *cert. dis.,* 488 U.S. 881 (1988)(federal employees have a cognizable privacy interest in their home addresses); *American Federation of Government Employees* v. *United States,* 712 F.2d 931, 932–33 (4th Cir. 1983), *vacated on other grounds and remanded,* 488 U.S. 1025, *dismissed as moot,* 876 F.2d 50 (4th Cir. 1989)(federal employees have privacy interest in lists with their names and home address because disclosure would subject them to an "unchecked barrage of mailings and perhaps personal solicitations"); *Department of Agriculture* v. *Federal Labor Relations Authority,* 836 F.2d 1130, 1136 (8th Cir. 1988)("[I]ndividuals generally have a meaningful interest in the privacy of information concerning their homes which merits some protection.").

[4] *See also NARFE,* 879 F.2d at 878 (privacy interest exists "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy").

Public Interest: Any discussion of the public interest to be served by disclosure of Garties' address must begin with the U.S. Supreme Court decision in *Department of Justice* v. *Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989). In *Reporters,* the Court identified the types of disclosures that would be considered in the public interest for purposes of FOIA. *Id.* at 771–775.[5] The Court held that to be considered in the public interest, a disclosure must serve the "core" purpose of FOIA, which is to provide the public with a "broad right of access to 'official information.'" *Id.* at 772 (quoting *E.P.A.* v. *Mink,* 410 U.S. 73, 80 (1973)). In particular, the Supreme Court held that:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. at 773. Thus, in *Reporters*, the Supreme Court rejected an effort to obtain information about a private citizen that had nothing to do with government actions. We therefore read *Reporters* to mean that where the information sought concerns or could lead to information concerning official agency action, a significant public interest is at stake.

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[5] The discussion in *Reporters* concerning what constitutes the public interest for purposes of FOIA appears in the part of the decision dealing with FOIA exemption (7)(C), not FOIA exemption (6). Exemption (7)(C) applies to:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

5 U.S.C. §552(b)(7)(C). Nevertheless, the discussion has been held to apply in the context of exemption (6) as well. As the Court of Appeals for the District of Columbia Circuit observed:

> Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the *character* of the disclosure interest should be different under exemption 6. While exemption 6 precludes only "a *clearly* unwarranted invasion of personal privacy" (emphasis added), the difference between it and exemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure.

Treasury, 884 F.2d at 1451.

In this case, Garties' address, by itself, says nothing about the functioning of the Agency. Nevertheless, courts have recognized a valid public interest where the disclosure of someone's address might lead to information that sheds light on the workings of the government agency.[6] Here disclosure of Garties' address might lead to her testimony at the hearing. Under the test described in the *Reporters* decision, there can be no doubt that Garties' testimony would shed some additional light on the "agency's performance of its statutory duties." Without question, the interest in Garties' testimony stems from her performance of her statutory duties under Section 3008(a)(3) of RCRA, 42 U.S.C. 6928(a)(3). Her testimony would likely reveal assumptions she made, the factors she considered and those she did not, and the weight given to each factor considered. All of this information would shed light on the way the Agency calculated the penalty. In these circumstances, we conclude that the disclosure of Garties' address and thus her possible testimony, while not necessary to the subject case,[7] would serve the "public interest" as that term is applied in the *Reporters* decision.

Weighing the Interests: Taking all the above-noted factors together, we conclude that the privacy interest that would be invaded by disclosure of Garties' address does not outweigh the public interest that would be served by disclosure. Although the balance is close,

[6] *See, e.g., Ray,* 116 L. Ed. 2d at 543 (recognizing public interest in releasing names and addresses of Haitian refugees because such information could lead to interviews of returned Haitians which, in turn, could yield information on whether State Department has adequately monitored Haiti's compliance with its promise not to prosecute returned refugees); *Treasury*, 884 F.2d at 1452 (recognizing modest public interest in disclosure of names and addresses of agency employees, because such disclosure might "provide leads for an investigative reporter seeking to ferret out what 'government is up to.'").

[7] We note that while Garties' testimony, if available, might be helpful, it certainly is not critical to Respondent's defense. The Region has the burden of proving that its penalty calculation is appropriate. 40 CFR §22.24. If the Region demonstrates that the penalty is appropriate based upon the statutory factors the Agency must consider, the thoughts of one additional EPA employee concerning the penalty calculations would not make it less appropriate. This is particularly true where, as here, much information about the penalty calculations has been made available or will be made available to the Respondent. Matthew Hagemann and Ms. Rajagopalan who apparently both have first hand knowledge of the penalty calculation will be available for cross-examination at the hearing. In addition, in its prehearing exchange, the Region provided Respondent with a document explaining in detail how it calculated its proposed penalty. Region's Opposition to Motion to Compel Responses to Respondent's Interrogatories and Document Requests (Attachment 2). This information will be supplemented with more information concerning the calculation of the economic benefit of non-compliance, pursuant to a ruling by the Presiding Officer in the same order as the ruling now being reviewed. Order Denying in Part and Granting in Part Motion for Discovery (July 14, 1992).

the Supreme Court has repeatedly recognized a strong presumption in favor of disclosure in cases seeking information about official agency action. *See, e.g., Ray,* 116 L.Ed. 2d at 540; *Reporters,* 489 U.S. at 771. Where, as here, the information sought may lead to information relating to official agency action, the privacy interest one has in one's address does not outweigh the public interest in having a fuller explanation of how EPA calculates its RCRA penalties.[8]

The Need for a FOIA Request: Although for the above stated reasons, we are prepared to hold that the Privacy Act would not bar disclosure of Garties' address in this case, we cannot affirm the Presiding Officer's ruling. Rather, we must vacate the Privacy Act portion of that ruling on the grounds that the Agency has not received a formal FOIA request for Garties' address. More specifically, the United States Court of Appeals for the District of Columbia has ruled that the Privacy Act exception for disclosures that would be required under FOIA only comes into play when the Agency is faced with an actual FOIA request for the desired information. *Bartel* v. *F.A.A.,* 725 F.2d 1403, 1412 (D.C. Cir. 1984). In *Bartel*, the Court states:

> Although the language of section 552a(b)(2) standing alone may be subject to different interpretations, we think that, in light of the differing thrusts of the FOIA and the Privacy Act, it must be read generally to preclude nonconsensual disclosure of Privacy Act material unless the agency acts pursuant to a FOIA request. * * * Only when the agency is faced with a FOIA request for information that is not within a FOIA exemption, and therefore has no discretion but to disclose the information, does the FOIA exception to the Privacy Act come into play.

Id.

[8] In his order, the Presiding Officer suggests in dicta that exception (11) of the Privacy Act would apply to the disclosure of Garties' address. That exception covers disclosures that are made "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). Because we have held that disclosure of Garties' address is covered by the Privacy Act's FOIA exception (provided the Agency receives a FOIA request for Garties' address), we need not decide whether the Presiding Officer in this case is a "court of competent jurisdiction" within the meaning of Section 552a(b)(11).

In this case, there is nothing in the record to suggest that the Agency has received a FOIA request for Garties' last known address. Accordingly, under *Bartel*, we are compelled to vacate the Presiding Officer's order to the extent it requires such disclosure.[9] Should the Agency receive such a request, however, the Privacy Act would not bar disclosure of Garties' address.

II. *CONCLUSION*

For all the foregoing reasons, we conclude that the information sought by Respondent does not fall within Exemption (6) of FOIA and that the Agency would therefore be required under FOIA to disclose Garties' last known address, provided the Agency first received a FOIA request for the address. Because the Agency has not received such a request, however, the Presiding Officer may not compel disclosure of the address, and to the extent the Presiding Officer's order does compel disclosure of the address, it is hereby vacated.

So ordered.

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[9] The decisions of the District of Columbia Circuit are entitled to special consideration because that circuit is the jurisdiction of universal venue under the Privacy Act. *See* 5 U.S.C. § 552a(g)(5).