# United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

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Memorandum

To: Alexandra Mallus
Departmental FOIA Officer

Through: Robin Friedman, Acting Assistant Solicitor, Branch of General Legal Services
Division of General Law

From: Cindy Cafaro, Attorney-Advisor, Branch of General Legal Services
Division of General Law

Subject: Handling FOIA Requests for the Personal Information of Commenters

A longstanding sensitive issue for Freedom of Information Act (FOIA) practitioners has been how to treat requests for the names, home addresses, and other personal information of people who submit comments or opinions (solicited or unsolicited) to a bureau or office (hereinafter referred to in this memorandum as commenters). On the one hand, this information often is not terribly sensitive and redacting it is extremely labor intensive. On the other hand, in particular instances there may be legitimate privacy interests attached to this information. A balance between these competing concerns must be attained because members of the public are frequently interested in—and submit FOIA requests for—the personal information of commenters.[1]

On October 24, 1996, the Division of General Law (DGL) issued guidance on how attorneys should advise bureaus and offices that receive FOIA requests seeking commenters' personal information. On July 17, 2003, DGL issued supplemental guidance, which noted that "if an individual is . . . responding to a government solicitation for formal comments, his/her privacy interest concerning his/her identity in connection with his/her communication will not outweigh the public's interest in disclosure." It has come to our attention that the 2003 memorandum has not been widely disseminated and, in light of new case law in this area, additional guidance would be helpful. This memorandum therefore supersedes the 1996 and 2003 memoranda.

FOIA mandates the disclosure of records held by a federal agency upon the submission of a proper request unless they fall within one of nine statutory exemptions. 5 U.S.C. § 552. FOIA's exemption (6) allows a federal agency to withhold "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). The term "similar files" has been defined broadly to include all information

[1] Throughout this memorandum, we presume that the requested information is not contained within a "system of records," as the Privacy Act defines that term. In the rare cases where the information in question is contained within a Privacy Act system of records, attorneys' obligations to advise their clients of the implications of their actions under the Privacy Act remain unchanged.

that "applies to a particular individual." If a file contains information about a particular individual, the inquiry turns to whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." In order to make this determination, FOIA and case law impose a balancing test of the privacy interests of the person(s) to whom the information in question pertains against the public interest in the disclosure of this information.

In the context of requests for the personal information of commenters, courts have increasingly declined to find this information raises sufficient privacy concerns to trigger exemption (6). *See, e.g.*, *Lardner v. United States Dep't of Justice*, 2005 U.S. Dist. LEXIS 5465, *65-68 (D.D.C. 2005) (holding that the government cannot use exemption (6) to protect the identities of individuals who voluntarily supported applications for presidential pardons), *Alliance for the Wild Rockies v. Dep't of the Interior*, 53 F. Supp. 2d 32, 34 (D.D.C. 1992) (holding that the government cannot use exemption (6) to protect the identities of individuals who voluntarily submitted comments in response to an agency's solicitation of comments in a notice of proposed rulemaking).

Simultaneously, courts are balancing this diminished privacy interest against an increasing interest in the "considerable public interest in identifying the actors who are able to exert influence on [a public] process." *Lardner* at *66; *see also Judicial Watch v. United States Dep't of Justice*, 102 F. Supp. 2d 6, 18 (D.D.C. 2000) ("Depriving the public of knowledge of the writer's identity would deprive the public of a fact which could suggest that their Justice Department had been steered by political pressure rather than by the relevant facts and law."); *Alliance for the Wild Rockies* at 36 ("In this instance, the public has much to learn about defendants' rulemaking process from the disclosure of commenters' names and addresses."). Therefore, FOIA officers and designated FOIA attorneys should not permit their clients to rely on mere generalized statements of privacy concerns to establish a privacy interest in the personal information of public commenters.

This determination does not mean that personal information of commenters can never be protected. The disclosure of this information will not be required if it can be properly withheld under a different FOIA exemption. Additionally, protection of the personal information of commenters under exemption (6) is not entirely precluded. There will be some instances where disclosure of the identity of the author of a comment or letter might raise privacy concerns, particularly if it contains sensitive personal information. There are also situations in which it may be in the public interest for the identity of an author to be protected (for example, in a case involving whistleblowers). But bureaus and offices will not be able to routinely protect the personal information of commenters. Instead, their default position should be that the personal information of commenters will be released absent exceptional, documentable circumstances.

In light of this default position, FOIA officers and designated FOIA attorneys advising the bureaus and offices in this area must be mindful of the requirements that there be objective evidence of either a threat to the privacy interests of the commenters or the lack of public interest in disclosure before advising that bureaus and offices may strike the balance in favor of withholding commenters' personal identifying information. For example, an unsupported, conclusory assertion that the release of their personal information would subject the commenter

to harassment would be insufficient grounds for withholding this information under exemption (6). On the other hand, the same assertion of harassment, if supported by credible evidence of threats of physical harm, would be sufficient grounds to withhold this information. Finally, FOIA officers and designated FOIA attorneys should be sure to convey this information to the bureaus and offices that they advise so the bureaus and offices do not make promises to potential commenters that the Department will not be able to keep.

If you have questions regarding this issue, please call us at 202-208-5216.

cc: Darrell Strayhorn, FOIA and Privacy Act Appeals Officer
Designated FOIA Attorneys