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Associate General Counsel (General Law)
U.S. Department of Homeland Security
Washington DC, 20528

RE: **FOIA Appeal**

Dear Associate General Counsel,

I am writing to appeal your agency's determination related to Freedom of Information Act (FOIA) request DHS/OS/PRIV 11-0842. I am seeking administrative review pursuant to your agency's rules regarding appeals outlined in the DHS FOIA regulations at 6 C.F.R. § 5.9.

Last month, your agency produced seven pages of documents in response to a FOIA request that I had submitted on May 3rd, 2011. Of the seven pages that were produced, one page contained redacted information. I am filing this administrative appeal to contest the basis for the withholding of that information. What follows is a procedural history of my request.

Pre-request procedural history - U.S. Coast Guard request of July 24, 2010

Prior to filing FOIA request DHS/OS/PRIV 11-0842, several events transpired which influenced that particular request.

On June 24, 2010, I filed a FOIA request with the United States Coast Guard (USCG), a component of your agency. That request sought:

“Any and all contracts that your agency has signed with Talon Security – or any company with a substantially similar name – between April 20, 2010, and June 24, 2010.”

On July 22, 2010, the USCG FOIA office sent a letter confirming receipt of the June 24 request. They assigned the request number 2010-2748.

Over twenty days then passed, during which time the USCG FOIA office did not produce documents responsive to my request. As you are aware, 5 U.S.C. § 552 (a)(6)(A) requires an agency to “determine within twenty days ... after the receipt of any such request whether to comply with such request” and to “immediately notify the person

making such request of such determination and the reasons therefor.” If an agency requires more time to make said determination, it can obtain a ten day extension by providing written notification as provided by 5 U.S.C. § 551 (a)(6)(B)(i).

The USCG did not contact me to notify me of a ten day extension, either during or after the ten day period following the expiration of the twenty day statutory response time. As of the date of this writing, the USCG has not produced responsive documents, nor provided a determination related to request 2010-2748.

Pre-request procedural history - DHS request of March 28, 2011

On March 28, 2011, the Associated Press ran an article that described a “vetting” process within your agency that purportedly subjected FOIA requests to additional levels of scrutiny by political appointees. Such scrutiny, according to the article, possibly caused delays in FOIA response times, and possibly resulted in responsive materials being withheld from requesters. The referenced article is attached.

Given the Coast Guard’s delay in responding to request 2010-2748, I became curious as to whether my request had been subjected to the scrutiny described by the Associated Press.

On March 28, 2011, I submitted a FOIA request to your agency for:

1. Correspondence within your agency relating to U.S. Coast Guard FOIA request number 2010-2784;
2. Correspondence within your agency relating to FOIA requests about any contracts between the Department of Homeland Security (or any of its components) and Talon Security, or any company with a substantially similar name;
3. Correspondence within your agency relating to FOIA requester Matt Ehling;
4. Correspondence within your agency relating to FOIA requester Matt Ehling’s organization, Public Record Media;
5. Any intra-agency correspondence between any staff member of the Department of Homeland Security and any staff member of the U.S. Coast Guard that relates to items 1-4, above.

On April 22, 2011, Sabrina Burroughs from the DHS Privacy Office responded to my request. Her response letter indicated that your agency had no records responsive to categories 2, 3, and 4 (above). She also noted that records pertaining to the other request categories may have been maintained by the USCG. In her letter, Ms. Burroughs noted that she would forward my March 28th request (now numbered DHS/OS/PRIV 11-0674) to the USCG FOIA office for direct response.

Request of May 3, 2011

On May 3rd, I submitted a FOIA request to your agency for:

1. Any correspondence between any staff member of the Department of Homeland Security (DHS) Privacy Office, and any staff member of the U.S. Coast Guard (USCG) that relates to USCG FOIA request 2010-2784;
2. Any correspondence between any staff member of the DHS Privacy Office, and any staff member of the White House and/or Executive Office of the President that relates to USCG FOIA request 2010-2784;
3. Any correspondence between any staff member of the DHS Privacy Office, and any staff member of the USCG that relates to FOIA requests regarding the private security firm Talon Security – or any company with a substantially similar name – undertaken between April 20, 2010, and May 3, 2011.
4. Any correspondence between any staff member of the DHS Privacy Office, and any staff member of the White House and/or Executive Office of the President that relates to FOIA requests regarding the private security firm Talon Security – or any company with a substantially similar name – undertaken between April 20, 2010, and May 3, 2011.

This request contained new categories of records sought (categories 2, 3, and 4 above). It also sought to clarify one area of my previous request (category 1 above). This was intended to clarify that I was seeking records held by DHS broadly, but also records held specifically by its Privacy Office.

Phone call of May 17, 2011

On May 17, 2011, Mia Day from your agency called to inquire about the scope of my May 3rd request. In regards to category 1 (above), Ms. Day asked whether I was seeking records pertaining to particular individuals within DHS. I said that I was not, but rather was interested in a broad selection of records.

Ms. Day said that DHS did not have records responsive to my request. Since my request sought records that might be under the purview of the USCG (categories 1 and 3, above), she suggested that the USCG FOIA office might need to get involved.

I observed that the Privacy Office must have some records related to my March 28th request, since they responded to it and must have generated a paper trail. Ms. Day said that she would search the Privacy Office for responsive records.

Response of May 19, 2011

On May 19th, Ms. Day sent a response letter to my May 3rd FOIA request, now numbered DHS/OS/PRIV 11-0842. In her letter, Ms. Day noted that a search of DHS and Privacy Office records had been conducted, and that no records could be found that corresponded to categories 2, 3, or 4 of that request. Ms. Day did produce seven pages of documents responsive to category 1, however. Of these seven pages, one page contained redactions.

Claimed basis for withholding

Your agency has redacted the names of individuals contained in e-mail routing information from one of seven pages of documents produced in response to FOIA request DHS/OS/PRIV 11-0842. In the May 19th letter that accompanied the disclosed documents, your agency claimed that the redacted names were withheld pursuant to FOIA Exemption 6. As described by your office:

“Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public’s right to disclosure against the individual’s right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in the disclosure of the information.”

No additional rationale is articulated. The full letter is attached.

Basis for appeal

By seeking administrative review, I am seeking to contest the application of Exemption 6 to information in the records that your agency has produced. In particular, I am seeking to dispute the “balancing test” determination that your agency has made in the application of Exemption 6. I believe that the Exemption 6 balancing test has been misapplied, and that the information it has been used to redact has been withheld in an inappropriate fashion.

Applying FOIA Exemption 6

The text of FOIA’s Exemption 6 provides that the government may withhold personal information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

As with all FOIA exemptions, there are limits as to how Exemption 6 can be employed to withhold government information. Courts have long recognized that “FOIA should be construed broadly, and its exemptions should be construed narrowly.” *U.S. Dept. of Justice v. Sullivan*, 486 U.S. 1, 8 (1988).

Courts have also indicated that any personal privacy interest claimed under Exemption 6 must be balanced against competing public interests. This balancing test is at the heart of the application of Exemption 6.

Applying Exemption 6 requires a “balancing of the individual’s right of privacy against the preservation of the basic purposes of FOIA to ‘open agency action to the light of public scrutiny.’” *Dept. of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (quoting *Dept. of the Air Force v. Rose*, 495 F.2d 261, 263 (2d Cir. 1974)). The “preliminary question” in that balancing is whether the Government has demonstrated that the release of the requested information would implicate “the sort of ‘personal privacy’ interest that

