

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>WANDA LEWIS</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 06-2660</b>
	:	
<b>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY</b>	:	
	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**November 3 , 2006**

Plaintiff Wanda Lewis (“Plaintiff”) brings this pro se action seeking disclosure of information requested from Defendant United States Environmental Protection Agency (“Defendant” or “EPA”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Now before the Court are cross-motions for summary judgment. For the reasons that follow, Defendant’s Motion will be granted.

**I. Background**

The following facts are undisputed. On September 13, 2005, Plaintiff submitted a request to the EPA’s FOIA Coordinator seeking information concerning two successful candidates for the positions of Lead Paralegal Specialist in the Office of Regional Counsel. See Plaintiff’s Motion for Summary Judgment (hereinafter, “Pl.’s Motion”), at 4; EPA’s Motion for Summary Judgment (hereinafter, “Def.’s Motion”), at 2. Specifically, Plaintiff requested “any and all documentation or information provided by the successful candidates ... for this position ... Also, please provide salary amounts, any and all monetary amounts of awards, within grade increases, training records, and approved promotions and awards for these two successful candidates.” See

September 13, 2005 letter, attached to Declaration of James W. Newsom (hereinafter, “Newsom Declaration”).<sup>1</sup> On October 31, 2005, Steven E. Johnson, Deputy Human Resources Officer at the EPA, sent Plaintiff a set of documents responsive to her request. A letter that accompanied the documents stated “partial information included. If there is remaining information, it will be provided.” The letter also enclosed an invoice in the amount of \$204.25. See October 31, 2005 letter, attached to Newsom Declaration.

By letter dated November 3, 2005, Plaintiff contested the amount she was charged and inquired whether additional documents would be forthcoming. Plaintiff further noted that the documents should have been provided on October 17, 2005, but were not received until November 1, 2005. See November 3, 2005 letter, attached to Newsom Declaration. On November 30, 2005, Plaintiff sent another letter inquiring about her request and noting that the response time had passed without a request for an extension. See November 30, 2005 letter, attached to Newsom Declaration. On December 7, 2005, Donald Welsh, Regional Administrator, sent her a letter explaining the bases for the EPA’s withholding of certain documents and information. See December 7, 2005 letter, attached to Newsom Declaration. By letter dated December 21, 2005, Plaintiff was advised that she would not be charged a fee for processing her request. See December 21, 2005 letter, attached to Newsom Declaration.

On January 5, 2006, Plaintiff filed an Administrative Appeal. By letter dated May 15, 2006, Plaintiff was advised that her appeal was granted in part and denied in part. See May 15, 2006 letter, attached to Newsom Declaration. The Office of the General Counsel, which

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<sup>1</sup> The Declaration of James W. Newsom, Assistant Regional Administrator for Policy and Management, Region 3, of the EPA, was submitted in support of Defendant’s Motion for Summary Judgment.

reviewed Plaintiff's appeal, concluded that "certain information about the successful job applicants ... may be released..." while other documents and information are exempt from disclosure pursuant to Exemptions 5 and 6 of FOIA, 5 U.S.C. §§ 552(b)(5), (b)(6). The May 15, 2006 letter further advised Plaintiff of her right to seek judicial review. See id.

## **II. Legal Standard**

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)).

Summary judgment is the primary avenue for resolving a FOIA dispute. See Lee v. U.S. Department of Justice, 235 F.R.D. 274, 282 (W.D. Pa. 2006); see also Sakamoto v. U.S. Env. Protec. Agency, 443 F. Supp. 2d 1182, 1188 (N.D. Cal. 2006). "A district court must conduct a de novo review of a government agency's decision to withhold information under FOIA." Pipko v. C.I.A., 312 F. Supp.2d 669, 675 (D.N.J. 2004). The Government bears the ultimate burden of demonstrating that the withheld information is exempt from disclosure under one or more of the nine statutory exceptions. See Davin v. U.S. Department of Justice, 60 F.3d 1043, 1049 (3d Cir. 1995).

Typically, when a government agency claims a FOIA exemption, it should submit what is known as a Vaughn index<sup>2</sup> describing the undisclosed information. See Vaughn v. Rosen, 484

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<sup>2</sup> The "Vaughn index" is derived from Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The index is a comprehensive and detailed listing of documents withheld by governmental agencies pursuant to FOIA's statutory exemptions. See McClain v. U.S. Dept. of Justice, 17 Fed. Appx. 471, 473 (7th Cir. 2001).

F.2d 820, 826-828 (D.C. Cir. 1973); Davin, 60 F.3d at 1049-1050. However, in instances where the government agency's affidavit is sufficient to establish that the requested information is exempt from disclosure, a Vaughn index is not required. See Pipko, 312 F. Supp. 2d at 680; Fiduccia v. U.S. Dept. of Justice, 185 F.3d 1035, 1042 (9th Cir. 1999). “An agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption, and are not controverted either by contrary evidence in the record nor by evidence of agency bad faith.” Baez v. Federal Bureau of Investigation, 443 F. Supp. 2d 717, 723-24 (E.D. Pa. 2006) (citing Am. Friends Serv. Comm. V. Dept. of Def. Through Def. Logistics Agency, 831 F.2d 441, 444 (3d Cir. 1987)).

### **III. Discussion**

#### **A. Admissibility of Declaration of James W. Newsom**

In support of its Motion for Summary Judgment, the EPA has submitted the Declaration of James W. Newsom, Assistant Regional Administrator for Policy Management, Region 3, of the EPA, setting forth the statutory bases for withholding limited responsive information. Plaintiff challenges the admissibility of the Declaration pursuant to Fed. R. Civ. P. 56(e) on the basis that Newsom lacks personal knowledge. Pl.’s Motion, at 16.

Plaintiff’s objection is without merit. While Rule 56(e) requires that “supporting and opposing affidavits shall be made on personal knowledge,” an agency need not submit an affidavit or declaration from the employee who actually conducted the search. “An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to

satisfy Rule 56(e).” Carney v. U.S. Dept. of Justice, 19 F.3d 807, 814 (2d Cir. 1994); SafeCard Services, Inc. v. S.E.C., 926 F.2d 1197, 1201 (D.C. Cir. 1991) (“reliance upon affidavit of agency employee responsible for supervising search [is appropriate], although he necessarily relied upon information provided by staff members who actually performed search” (citations omitted)); see also Maynard v. C.I.A., 986 F.2d 547, 560 (1st Cir. 1993) (“an agency need not submit an affidavit from the employee who actually conducted the search ... an agency may rely on an affidavit of an agency employee responsible for supervising the search.”); Com. of Pa., Dept. of Public Welfare v. U.S. Dept. of Health and Human Services, 623 F. Supp. 301, 304 (M.D. Pa. 1985) (in the context of a FOIA dispute, the adequacy of an affidavit is not measured by the personal knowledge of the affiant).

In his Declaration, Newsom represents that his statements are based either on “personal examination” of the responsive documents or on information provided to him by employees under his supervision. See Newsom Declaration at ¶4. The Declaration provides the names and titles of employees under Newsom’s supervision who were assigned to conduct the searches, and states that each responsive document “was evaluated for the segregability of non-exempt material.” Id. Thus, Newsom supervised the processing of Plaintiff’s FOIA request and the employees who conducted the searches. Accordingly, the Newsom Declaration is admissible.

## **B. Propriety of Withholding**

The following responsive documents continue to be withheld by the EPA:

- (1) Applicant Resume Details (EPA-1 and EPA-2);
- (2) All Core Questions/Answers Sheets (EPA-3 and EPA-4);
- (3) Staging Area Applicant Listings (EPA 5 through EPA-8);

- (4) Memorandum and Evaluation of Applications for Announcement (EPA-9);
- (5) Notifications of Personnel Action (EPA-10 through EPA-92);
- (6) Pay Adjustment Records (EPA-93 through EPA-95);
- (7) Award Documents (EPA-96 through EPA-117).

Plaintiff argues that the EPA is improperly withholding documents responsive to her FOIA request, and that Defendant has acted in bad faith in hindering her efforts to obtain information to which she is entitled. The EPA responds that each of the withheld documents is exempt from production under FOIA Exemptions 5 and 6, and that all segregable factual information contained in the documents has been released to Plaintiff.

#### **I. FOIA Exemption 5**

FOIA Exemption 5, sometimes referred to as the “deliberative process privilege,” provides for non-disclosure of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” 5 U.S.C. § 552(b)(5). It “affords an agency an ‘executive privilege’ with respect to intra-agency documents which reflect deliberative and decision-making processes and advisory opinions and recommendations of government.” Cuccaro v. Secretary of Labor, 770 F.2d 355, 357 (3d Cir. 1985).

The EPA is withholding three documents pursuant to Exemption 5: EPA-6, EPA-8, and EPA-9.<sup>3</sup> Newsom Declaration at ¶24. The EPA argues that these documents are exempt because they are intra-agency documents that reveal the EPA’s internal applicant ranking system and

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<sup>3</sup> Documents EPA-6 and EPA-8 were also withheld under FOIA Exemption 6, which will be discussed below.

contain “internal discussions, opinions, recommendations and analyses among EPA employees concerning the selection of the Lead Paralegal Specialists.” Id.; see also Def.’s Motion, at 10.<sup>4</sup>

Document EPA-9, a three-page memorandum titled “Evaluation of Applications for Announcement No. Reg-3-MP-2005-0052,” was likewise withheld on the basis of the deliberative process privilege. According to the Newsom Declaration, the memorandum, dated May 19, 2005, was drafted by the “Subject Matter Expert” and addressed to Beatrice Kelleher, Human Resources Specialist, and consists of “the Subject Matter Expert’s opinions, evaluation, and score-adjusted recommendations on the applicants’ qualifications and self-assigned scores.” Newsom Declaration at ¶35. Plaintiff challenges the withholding of the memorandum, arguing, *inter alia*, that she was unaware that the document was withheld until she read the Newsom Declaration because the document was omitted from the index of withheld documents previously provided to her. Plaintiff further challenges the EPA’s assertion that the identity of the Subject Matter Expert is confidential.

“To fall within the deliberative process privilege, a document must be both predecisional and deliberative.” Carter v. U.S. Dept. of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (internal quotations omitted). The exemption applies to “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” and is designed to permit government

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<sup>4</sup> The EPA asserts that all segregable information which could be released to Plaintiff without compromising exempt material has been released. See Newsom Declaration at ¶¶ 29, 37, 43. See also Def.’s Motion, at 12. Accordingly, many of the documents produced to Plaintiff were redacted to exclude exempt information. See Newsom Declaration at ¶ 17; See also Exhibit 1 of Pl.’s Motion.

officials to communicate candidly without fearing that “each remark is a potential item of discovery and front page news...” Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal citations omitted). Moreover, information created to assist an agency in evaluating potential employees has been held exempt from disclosure. See National Treasury Employees Union v. U.S. Customs Service, 802 F.2d 525, 529 (D.C. Cir. 1986) (holding that crediting plans, which were used by the Government to evaluate qualifications of applicants for certain positions, are exempt from disclosure); Robinett v. U.S. Postal Service, 2002 WL 1728582, at \*5 (E.D. La. July 24, 2002) (holding that release of evaluative information “could compromise testing and evaluation by enabling recipients of the information to tailor their applications to the procedures and comments of the evaluators”).<sup>5</sup>

Documents EPA-6, EPA-8, and EPA-9, as described in the Newsom Affidavit, were drafted internally by the EPA and were designed to assist in its employee selection process. Each was created prior to July 21, 2005, the date a final hiring decision was rendered. Accordingly, the documents were both predecisional and deliberative. Because the EPA provided a sufficiently detailed description of the withheld information and the justification for withholding and further demonstrated a “logical connection” between the information and the relevant exemption, the Court finds that the EPA has satisfied its burden and is entitled to summary judgment with respect to documents EPA-6, EPA-8, and EPA-9. See Davin, 60 F.3d at 1065.

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<sup>5</sup> Cases upholding the exclusion of evaluative material often rely also on FOIA Exemption 2, which covers materials “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2).

ii. **FOIA Exemption 6**

Exemption 6 provides that the FOIA disclosure requirements exclude “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). In ascertaining the proper scope of this exemption, the Court is required to conduct a balancing test, weighing the interest in protecting individuals from unnecessary public scrutiny against the interest of preserving the public's right to disclosure. Department of Air Force v. Rose, 425 U.S. 352, 372 (1976). See also Wine Hobby USA, Inc. v. U.S. Internal Rev. Serv., 502 F.2d 133, 136 (3d Cir. 1974) (“on its face, the statute, by the use of term ‘unwarranted,’ compels a balancing of interests”). Whether the information in question should be released will depend both on the nature of the document and whether its disclosure would ultimately serve FOIA's purpose of subjecting agency action to public scrutiny. Tomscha v. General Services Admin., 158 Fed. Appx. 329, 330 (2d Cir. 2005) (citations omitted); see also U.S. Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 495 (1994) (“the only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government” (internal quotations omitted)).

On the basis of Exemption 6, the EPA withholds information contained in documents EPA-1 through EPA-8, and EPA-10 through EPA-117, found either in personnel files or “similar” files, including Employee Performance Files and Merit Promotion Case Files. See Newsom Declaration at ¶¶7-10 Plaintiff challenges the withholding, stating that her request is “reasonable in that it seeks documents pertaining to successful candidates for federal

employment” and disclosure would cause “no unwarranted invasion of privacy.” Pl.’s Motion, at 13-14. The Newsom Declaration describes the information withheld in each relevant document with respect to both successful and unsuccessful applicants: (1) social security numbers; (2) home addresses; (3) home telephone numbers; (4) dates of birth; (5) educational information not directly pertaining to professional qualification for the job; (6) veteran status; (7) welfare status; (8) disability status; (9) self-assigned scores in response to questions posed in Applicant Assessment Reports; (10) total number of points awarded by the agency based on answers to questions posed in the Applicant Assessment Reports and subsequent ranking; (11) life insurance information; (12) retirement plan information. Of these, certain categories of information (such as EPA ranking and points awarded) were also withheld on the basis of the deliberative process privilege discussed above.

Courts have consistently held the types of information listed above to be immune from disclosure pursuant to Exemption 6. See Appleton v. Food and Drug Admin., 2006 WL 2604567, at \*10 (D.D.C. Aug. 21, 2006) (holding that names, biographical information related to employment, education, medical history, and specific duties or titles held fall within Exemption 6). Information such as names, home addresses, home telephone numbers, and social security numbers has repeatedly been held private and exempt from the disclosure requirements of FOIA. See Wine Hobby USA, 502 F.2d at 137-138; Barvick v. Cisneros, 941 F.Supp. 1015, 1020-1021 (D. Kan. 1996); see also Hecht v. U.S. Agency for Intern. Dev’t, 1996 WL 33502232, at \*11 (D. Del. Dec. 18, 1996) (“there can be little dispute that the resumes would fall under the category of “similar files”). Indeed, information found in personnel, medical and “similar” files has received relatively broad protection. See, e.g., U. S. Dept. of State v. Washington Post Co., 456 U.S. 595

(1982):

Under the plain language of [Exemption 6], nonintimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy... we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, [t]he exemption [was] *intended to cover detailed Government records on an individual which can be identified as applying to that individual.*

Id. at 601-602 (internal quotations omitted) (emphasis added).

In addition, information such as employee or candidate ranking and evaluation has been held exempt from disclosure. See Federal Labor Relations Authority v. U.S. Dept. of Commerce, 962 F.2d 1055, 1059 (D.C. Cir. 1992) (“employees who received outstanding or commendable ratings have a substantial interest in maintaining the privacy of their evaluations”); Barvick, 941 F.Supp. at 1020 (“The defendant balanced the private and public interests at issue and determined there was no overriding public interest in the information redacted or withheld pertaining to the successful candidates. The court agrees.”)

There is no evidence that the public interest in disclosure of personal information regarding two successful candidates for paralegal positions is greater than the privacy interests at stake, or that disclosure of the withheld information would be instrumental in shedding light on the operations of government. See Sheet Metal Workers Intern. Ass'n, Local Union No. 19 v. U.S. Dept. of Veterans Affairs, 135 F.3d 891, 903 (3d Cir. 1998). Having weighed the public interest to be served by disclosure against the privacy interests involved, the Court concludes that disclosure would not lead to a heightened understanding of governmental activity and therefore would not advance the purpose for which FOIA was enacted.

### **C. Bad Faith**

Plaintiff alleges that the EPA “has demonstrated bad faith during this entire process” and deliberately hindered her efforts to obtain an adequate response to her FOIA request. Pl.’s Motion, at 3. In support of this contention, Plaintiff points to (1) the delay in the EPA’s response to her request, (2) the fact that the Newsom Declaration did not identify the individual who assigned the search duties or the date the search began; and (3) certain documents that appeared in the Newsom Declaration were omitted from the index of withheld documents previously provided to her. See Pl.’s Motion, at 16-20. Plaintiff’s allegations of bad faith, however, do not withstand scrutiny.

“A district court must accord affidavits submitted by an agency a presumption of good faith.” SafeCard Servs., Inc. v. Securities and Exchange Commission, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoted in Lee v. U.S. Department of Justice, 235 F.R.D. 274, 287 (W.D. Pa. 2006)). With respect to Plaintiff’s claim of delay, an examination of the record suggests that whatever delay existed was negligible: the answer to Plaintiff’s FOIA request was due on October 17, 2005, and was received by Plaintiff on November 1, 2005 – less than two weeks later. See Nov. 3, 2005 Letter, attached to Newsom Declaration. This minor delay in processing Plaintiff’s request does not give rise to an inference of bad faith. See Horsehead Industries, Inc. v. U.S. Env. Protec. Agency, 999 F. Supp. 59, 66 (D.D.C. 1998). Moreover, in response to Plaintiff’s November 3, 2005 letter in which she expressed concern that she had been overcharged for “search time,” the EPA re-evaluated the calculation of fees and determined that she would not be charged. See December 21, 2005 letter, attached to Newsom Declaration.

Plaintiff's suggestion that the Newsom Declaration's omission of the identity of the individual who assigned the search duties and the date the search began amounts to bad faith is similarly misplaced.<sup>6</sup> There is no requirement that the agency disclose such details. A declaration indicating that the agency has conducted a thorough search that provides reasonably detailed explanations why any documents withheld are exempt from disclosure is sufficient to sustain the agency's burden. See Jone-Edwards v. Appeal Bd. of Nat. Security Agency, 2006 WL 2620313, at \*1 (2d Cir. Sept. 12, 2006).

Finally, the fact that the list of withheld documents that was provided to Plaintiff in response to her FOIA request did not contain documents EPA-5 to EPA-9, which later appeared in the Newsom Declaration, is not suggestive of bad faith on the part of the EPA. The list provided to Plaintiff contained four categories of withheld documents. It did not list, nor did it purport to list, specific documents. In contrast, the Newsom Declaration did describe the withheld documents with specificity. These descriptions reveal that the withheld documents are clearly exempt from disclosure. The fact that the list Plaintiff was given did not contain a list of each withheld document is insufficient to raise an inference of bad faith.

#### **IV. Conclusion**

By providing a sufficiently detailed explanation of the bases of its withholdings and establishing a logical connection between the information and the relevant FOIA exemptions, the EPA has sustained its burden. Since there is no evidence in the record that

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<sup>6</sup> The Newsom Declaration discloses the identity of the individuals who were assigned, under Newsom's supervision, to conduct the search and also identifies the files searched. See Newsom Declaration at ¶¶ 7-10.

contradicts the EPA's assertions or raises an inference of bad faith on the part of the agency, the EPA's Motion for Summary Judgment will be granted. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
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<b>WANDA LEWIS</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 06-2660</b>
	:	
<b>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY</b>	:	
	:	

**ORDER**

**AND NOW**, this 3RD day of November, 2006, upon consideration of Defendant's Motion for Summary Judgment (docket no. 8), the Declaration of James W. Newsom, Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment (docket no. 11), Defendant's Reply Brief (docket no. 12), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that

1. Defendant's Motion is **GRANTED**
2. Plaintiff's Cross-Motion is **DENIED**.
3. This action is **DISMISSED**, and the Clerk of the Court shall mark the case **CLOSED**.

**BY THE COURT:**

\_S/ BRUCE W. KAUFFMAN\_\_\_\_\_  
**BRUCE W. KAUFFMAN, J.**