UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF INSPECTOR GENERAL

Washington D.C. 20250

MAY 18 2012

Mr. Jeff Ruch
Public Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036

Subject: FOIA Appeal 12-00043 (FOIA Request No. 12-00025)

Dear Mr. Ruch:

This letter responds to your January 5, 2012, Freedom of Information Act (FOIA), 5 U.S.C. § 552, appeal (Appeal) of the December 29, 2011, decision of Ms. Alison Decker, Assistant Counsel to the Inspector General, Office of the Inspector General (OIG), Department of Agriculture (USDA), regarding your above-referenced FOIA request. As set forth below, I am denying your FOIA appeal on modified grounds.

As background, on November 21, 2011, you sent a facsimile letter to OIG's FOIA Office, requesting a copy of "the report of investigation or other report by the OIG concerning . . . Joe E. Hardy II . . . ." On December 29, 2011, Ms. Decker sent you her decision letter. Pursuant to the Privacy Act (PA), 5 U.S.C. § 552a(b), Ms. Decker stated that the Privacy Act prohibits the release of information without a court order or prior written consent from the person to whom the records pertain. Further, Ms. Decker stated that OIG was prohibited from releasing the information you requested without the consent of Mr. Hardy, the person who is the subject of your request, and she denied your request.

FOIA requires the release of agency records, except where one or more of the nine enumerated exemptions apply. See 5 U.S.C. § 552(b). After carefully considering your appeal, I am affirming, on modified grounds, Ms. Decker's decision to deny your request. See 5 U.S.C. §§ 552(b)(6), (7)(C), 552a(b).

The requested file is contained in a system of records governed by the PA. The PA states that "[n]o 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 a written request by, or with the prior written consent of, the individual to whom the record pertains," or if one or more exceptions apply. 5 U.S.C. § 552a(b). You have not produced evidence that the person to whom the records relate has given written consent to their disclosure. We have also reviewed each of the 12 enumerated exceptions to the general prohibition on disclosure to see if one or more of them apply, and determined that they do not. We paid specific attention to exception (2), which authorizes release of PA-protected records if "disclosure would be . . . required under [FOIA, 5 U.S.C. § 552] . . . ." Id. § 552a(b)(2). As set forth below, the FOIA does not require that these records be disclosed; therefore, I am upholding Ms. Decker's decision to withhold the records in full in accordance with the PA.

To the extent that responsive records exist, without consent, proof of death, official acknowledgement of an investigation, or an overriding public interest, disclosure of law enforcement records concerning an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) protects from disclosure of law enforcement information, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Under Exemption 7(C), it has been held

> as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

U.S. Dep't of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 780 (1989), cited in Thomas v. Dep't of Justice, 260 F. App'x 677, 679 (5th Cir. 2007).

Additionally, Exemption 6 permits the Government to withhold information about individuals in "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). To warrant protection under Exemption 6, information must first meet a threshold requirement by falling within the category of personnel and medical files and similar files. Id. Information fits into a "similar file" if it contains information regarding a particular individual. See United States Dep't of State v. Washington Post Co., 456 U.S. 595, 601-02 (1982). The threshold is met in this case, as OIG reports of investigation (ROI) contain information regarding particular named individuals, including but not limited to targets and persons of interest, witnesses and informants, and investigative agents.

Once it is determined that a privacy interest exists, Exemptions 6 and 7(C) of FOIA require a balancing of interests between the public interest served by disclosure and an individual's right to privacy. See, e.g., Senate of Puerto Rico, 823 F.2d at 587; Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Determination of whether disclosure is warranted turns not upon the particular purpose for which the document is requested, but upon the nature of the requested document and its relationship to the central purpose of FOIA, which is to "open agency action to the light of public scrutiny." Reporters Comm. for Freedom of the Press, 489 U.S. at 772-73 (quoting Rose, 425 U.S. at 372).

You argued that Mr. Hardy's privacy interests in withholding his name from any ROI in OIG's possession are outweighed by the public interest in learning whether the U.S. Forest Service acted appropriately to protect the safety of its personnel or members of the public. See Appeal at 3. OIG's investigations of Mr. Hardy focused on allegations relating specifically to Mr. Hardy, not the actions of the U.S. Forest Service. Even if there is a public interest in the U.S. Forest Service's actions, which we do not concede, it is unlikely that releasing information

relating to OIG's investigations of Mr. Hardy would advance such an interest. Furthermore, I have determined that the public interest served by disclosing the requested records, which contain the names, identifying information, and other personal information relating to investigative agents, witnesses, and targets, in the ROIs, does not outweigh the privacy interests.

You also argued that OIG did not segregate non-exempt portions of the requested ROI and "claiming protection of personal privacy interests is not grounds for wholesale exclusion of a document where names may be redacted and factual information properly disclosed." Appeal at 2-3. Pursuant to 5 U.S.C. § 552(b), "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." However, when nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible. See Mead Data Cent., Inc. v. U.S. Dep't of Air Force., 566 F.2d 242, 260 (D.C. Cir. 1977). Attempting to segregate the files (i.e., by redacting names, dates, locations, and other information that might lead to the identification of individuals named in the reports) would not be reasonable as the final product would constitute an "essentially meaningless set of words and phrases," such as "disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Id. at 261 & n.55.

In your appeal, you also state that your organization "is entitled to an index of the documents and portions of the documents that have been withheld by OIG," in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974). However, the Vaughn index that you seek is only applicable in the context of litigation involving FOIA appeals. See Ruotolo v. United States Dep't of Justice, 53 F.3d 4, 6 (2d Cir. 1995); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court."). Your request for a Vaughn index is thus denied. See Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985).

For these reasons, I am denying your FOIA appeal of Ms. Decker's December 29, 2011, decision. This is the final agency decision. You may seek judicial review of this decision in the United States district court for the judicial district in which you reside or have your principal place of business or in the District of Columbia, pursuant to 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Phyllis K. Fong
Inspector General