

EXHIBIT C

JONES DAY

1420 PEACHTREE STREET, N.E. • SUITE 800 • ATLANTA, GEORGIA 30309.3053
TELEPHONE: +1.404.581.3939 • FACSIMILE: +1.404.581.8330

Direct Number: (404) 581-8956
pcanfield@jonesday.com

September 21, 2015

FREEDOM OF INFORMATION ACT APPEAL

OCAO/Records Management Division (FOIA Appeals)
Federal Emergency Management Agency
500 C Street SW, Seventh Floor,
Mail Stop 3172
Washington, DC 20472-3172

Re: Appeal of Final Response: FEMA 2014-FEFO-00936

Dear Sir or Madam:

This is an appeal from the August 17, 2015 decision to withhold records responsive to Freedom of Information Act Request FEMA 2014-FEFO-00936.

Summary

The request was dated September 9, 2014, and filed by Robert Benincasa, Producer, Computer-Assisted Reporting, NPR News (“NPR”). By the request, NPR sought access to and copies of electronic database tables containing information associated with property acquisitions under FEMA’s Hazard Mitigation Grant Program (“HMG Program”), including the addresses of the properties acquired, the properties’ GIS coordinates, and the sellers’ names. A copy of the request is attached as Exhibit A.

By letter dated August 17, 2015, Pearlene Robinson denied NPR’s request for specific information concerning HMG Program acquired properties’ addresses, GIS coordinates, and sellers’ names on the ground that such information is purportedly exempt from disclosure under 5 U.S.C. § 552(b)(6) (“FOIA Exemption 6”). A copy of the denial letter is attached as Exhibit B.

NPR submits that FOIA requires that the information denied be made public as the information is not properly considered exempt from disclosure under FOIA Exemption 6. This is because the privacy interests implicated by disclosure are at best *de minimis* while the public interest in evaluating FEMA’s administration of the HMG Program is significant and, absent disclosure, will be almost entirely frustrated.

Under the HMG Program, each property acquired must be subject to an agreement with FEMA that the property “will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices.” 42 U.S.C.

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
FEMA 2014-FEFO-00936
September 21, 2015
Page 2

§ 5170c(b)(2)(B)(i); see <http://www.fema.gov/hazard-mitigation-grant-programs-frequently-asked-questions>. Moreover, each recipient of assistance with respect to an acquired property is barred from ever receiving federal disaster assistance with respect to the property in the future. 42 U.S.C. § 5170c(b)(2)(B)(iii).

Absent public disclosure of specific addresses, including GIS coordinates, of acquired properties and their seller's names, the significant public interest in reviewing and understanding the efforts and efficacy of FEMA's administration of these Program-essential agreements and requirements will, as a practical matter, be entirely frustrated.

For these reasons, and those more fully stated below, NPR requests that the unjustified denial be reconsidered and the requested information now provided.

1. FEMA's FOIA Exemption 6 Denial of Address, GIS Coordinate, and Seller Name Information.

By its September 9, 2014 request, NPR sought data related to property acquisitions under the HMG Program, which is administered by FEMA. FEMA has previously released a limited dataset related to property acquisition under the HMG Program, but that dataset "lack[ed] basic public information ab[ou]t the property acquisitions, such as the address of the properties acquired, the sellers' names, the amount paid for the property and the GIS coordinates of the properties." *Ex. A* at 1. As such, NPR requested complete data related to the property acquisitions under the HMG Program, as well as any documentation or metadata associated with that data.

The August 17, 2015 response directed NPR to an online dataset that lists HMG Program acquired properties and the actual amount paid for each, but that identifies the location of each property only by state, county, city, and zip code. The request for disclosure of acquired property addresses, GIS coordinates, and sellers' names was denied. *Ex. B* at 1-2. Citing FOIA Exemption 6, the response stated simply, "The privacy interests of the individuals in the records [NPR] requested outweigh any minimal public interest in disclosure of the information." *Id.* at 2.

2. FOIA Exemption 6 Permits Denial Only if Privacy Interests Outweigh the Public Interest in Disclosure.

"In enacting the FOIA . . . Congress sought to open agency action to the light of public scrutiny. . . . by requiring agencies to adhere to a general philosophy of full agency disclosure." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (citations omitted) (internal quotation marks omitted). This policy of disclosure "ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
 FEMA 2014-FEFO-00936
 September 21, 2015
 Page 3

governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Moderating this policy, Congress enumerated several exemptions in the statute, recognizing that the government and private parties may, in some instances, have legitimate interests in nondisclosure of agency information. See *U.S. Dep’t of Justice v. Julian*, 468 U.S. 1, 8 (1988). Nonetheless, the Supreme Court has held that the “exemptions are to be narrowly construed,” *id.*, and it is the agency’s burden “to justify the withholding of any requested documents,” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

Exemption 6 makes FOIA inapplicable 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). Under Exemption 6, the question is whether “disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure.” *Nat’l Ass’n of Retired Fed. Emps. v. Horner (NARFE)*, 879 F.2d 873, 874 (D.C. Cir. 1989) (citing *Tax Analysts*, 492 U.S. at 148–55). Even if substantial privacy interests are implicated, disclosure is still required unless the privacy interests outweigh the public interest in disclosure. *News-Press v. U.S. Dep’t Homeland Sec.*, 489 F.3d 1173, 1205 (11th Cir. 2007); see *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762, 766 (1989). Because the privacy invasion must be “clearly unwarranted,” courts hold that Exemption 6 “require[s] a balance tilted emphatically in favor of disclosure.” *Stern v. Fed. Bureau of Investigation*, 737 F.2d 84, 91 (D.C. Cir. 1984).

3. Because the Public Interest in Disclosure Outweighs Any Privacy Interests, the Previously Denied Information Must be Disclosed.

Any privacy interest in HMG Program acquired property addresses, GIS coordinates, and sellers’ names is minimal or nonexistent and dwarfed by the public interest in their disclosure. The public has a significant interest in understanding and evaluating FEMA’s administration of the HMG Program. Absent disclosure of the requested acquired property addresses, GIS coordinates, and sellers’ names, any meaningful understanding and evaluation of that administration is, as a practical matter, virtually impossible.

- (a) The privacy right in HMG Program acquired property addresses, GIS coordinates, and sellers’ names is minimal or nonexistent.

FOIA Exemption 6 does not robotically bar disclosure of lists of names and addresses. See *News-Press*, 489 F.3d at 1198 (“the legislative histor[y] behind FOIA . . . show[s] that

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
FEMA 2014-FEFO-00936
September 21, 2015
Page 4

Congress did not intend either names or addresses to automatically be withheld, even when they could be linked with other information about those individuals”). The principal privacy concern implicated by FOIA Exemption 6 is the possibility of “injury and embarrassment that can result from the unnecessary disclosure of personal information.” *U. S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). “[W]hether disclosure of a list of names [or addresses] is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.” *Ray*, 502 U.S. at 176 n. 12 (internal quotation marks omitted).

In *Reporters Committee*, disclosure was held to raise substantial privacy concerns because the personal law-enforcement-history records at issue would have revealed *considerable* personal information about individuals not otherwise readily available, at least in aggregate form, including “date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations” in every jurisdiction in the country. 489 U.S. at 752. And they covered the individual’s entire life: the FBI normally preserved a rap sheet until its subject turned eighty years old. *Id.*

Here, disclosure does not raise substantial privacy concerns because the HMG Program acquired-property record information at issue will reveal *little if any* personal information about individuals not otherwise readily available, including in aggregate form. Unlike the national rap sheets at issue in *Reporters Committee*, real estate transaction records are already public records in every jurisdiction *and* nationally, *and* are electronically searchable. The only new personal information about an individual that may be revealed by disclosure of the information requested here is the individual’s association with the sale of property voluntarily relinquished in connection with a federal disaster relief program—property that FEMA was assured would be maintained in perpetuity for use compatible with open space, recreational, or wetlands management practices. There is no stigma inflicted, or substantial privacy interest implicated, by such a disclosure. Indeed, the “legislative history of [Exemption 6] disfavors privacy claims by those who receive a governmental benefit.” *News-Press*, 489 F.3d at 1202.

- (b) Any privacy right that may exist is dwarfed by the significant public interest that would be served by and, indeed, depends upon disclosure.

The relevant inquiry with regard to public interest is whether disclosure would “serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government.” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (internal quotation marks omitted). Disclosure of the information denied here would clearly do so.

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
FEMA 2014-FEFO-00936
September 21, 2015
Page 5

FEMA's administration of the HMG Program is undeniably a matter of significant public interest. FEMA plays a unique role, acting throughout the nation to help people in their time of need—a duty that requires spending incredible sums of money. “In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond to, all national incidents . . . there is a powerful public interest in learning whether, and how well, it has met this responsibility.” *News-Press*, 489 F.3d at 1178.

According to the data that was provided in the response to NPR's request, through November 21, 2014, roughly \$500,000,000 has been spent acquiring property through the HMG Program. <http://www.fema.gov/media-library/assets/documents/85455>. This is a significant sum of taxpayer money, and there can be no doubt that the public has an interest in understanding and evaluating FEMA's oversight, with respect to the selection of the properties to be acquired, the uses to be made and in fact made of the properties selected, and the ineligibility of those properties—and their owners—for future federal disaster assistance.

No such understanding or evaluation is meaningfully possible without public disclosure of the acquired properties' specific locations, including GIS coordinates, and sellers' names.

(i) *Address and GIS coordinate information must be disclosed.*

Disclosure of address and GIS coordinate data is essential to any effective scrutiny of FEMA's administration of the HMG Program. The two types of information combine to serve a complementary purpose which could not be achieved otherwise—identifying in a reasonably reliable manner the individual pieces of property acquired through the HMG Program. Knowing the individual properties that have been acquired under the program is obviously essential to understanding and evaluating FEMA's oversight of the property selection process. Such knowledge is also critical to determining a property's current use to thereby assess the adequacy of the assurance and commitment that acquired properties be devoted “in perpetuity” to a use compatible with open space, recreational, or wetlands management practices. 42 U.S.C. § 5170c(b)(2)(B)(i). Finally, knowing the specific location (and seller identity) of acquired properties is also essential to understanding and evaluating FEMA's success in ensuring that the properties acquired in the HMG Program are not responsible for future requests or grants of federal disaster assistance. *Id.* § 5170c(b)(2)(B)(iii).

Data that identifies subject properties by nothing more than state, county, city, and zip code in no way serves the legitimate and compelling public interest in understanding and evaluating FEMA's oversight of the selection of properties to be acquired, the uses to which the properties have now been put, or the ineligibility of those properties—and their owners—for future federal disaster assistance. Counties, cities, and zip codes can all be quite large, and for

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
FEMA 2014-FEFO-00936
September 21, 2015
Page 6

the purposes of permitting public scrutiny of the HMG Program, they are too indeterminate. As the Eleventh Circuit observed in *News-Press*, “[i]f it would not constitute good stewardship of taxpayer dollars simply to make decisions about disaster aid based on zip code, then neither can zip codes be seen as an altogether accurate or complete way for the public to evaluate FEMA’s distribution of aid.” 489 F.3d at 1196.

Any weighing of the privacy and public interests thus tips decisively in favor of disclosure of acquired properties’ addresses and GIS coordinates.

(ii) *Sellers’ names must also be disclosed.*

A weighing of privacy and public interests also tips decisively in favor of disclosing the names of the acquired properties’ sellers. Although courts have on occasion found FOIA Exemption 6 to protect against disclosure of names but not addresses, *see, e.g., News-Press*, 489 F.3d at 1205, Congress nonetheless did not intend that names be automatically withheld, *id.* at 1198, and there is no justification for withholding the names here.

Disclosure of the names of sellers of property acquired under the HMG Program does not implicate substantial privacy interests. In *News-Press*, identification as a FEMA disaster claimant was held to implicate personal privacy interests because the identification potentially permitted others to see itemized lists of the claimant’s property and ascertain continuing home addresses and levels of insurance. *See id.* at 1199–1203. But here, identification as the former owner of property now under the HMG Program carries no such baggage. Moreover, as noted, real estate transaction records are already public records and electronically searchable nationally; as a result, real estate sellers, unlike FEMA disaster claimants, are already publicly identifiable. Connecting those names with the HMG Program, which is all the requested disclosure will do, does not implicate a substantial privacy interest. Again, there is no stigma inflicted or substantial privacy interest implicated by such a disclosure. Indeed, the “legislative history of [Exemption 6] disfavors privacy claims by those who receive a governmental benefit.” *News-Press*, 489 F.3d at 1202.

At the same time, disclosure of the names of sellers of property acquired under the HMG Program is necessary to permit public understanding and evaluation of FEMA’s oversight of the program.

One requirement of the HMG Program is that participation of a property seller is to be completely voluntary. <http://www.fema.gov/hazard-mitigation-grant-programs-frequently-asked-questions>. Another is that recipients of aid under the HMG Program are barred from future federal aid under 42 U.S.C. § 5170c(b)(2)(B)(iii). No meaningful understanding of the

JONES DAY

OCAO/Records Management Division (FOIA Appeals)
FEMA 2014-FEFO-00936
September 21, 2015
Page 7

administration of these requirements is possible without disclosure of individual property sellers' names.

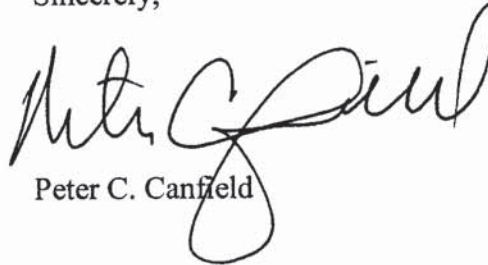
Moreover, the HMG Program generally does not permit individual applicants to apply to the program, but instead, individual applications are filtered through and obscured by several levels of state and local governmental sub-applicants. *See* <http://www.fema.gov/hazard-mitigation-grant-program>. Given this structure, disclosure of the names of individual property sellers is particularly important.

Finally, disclosure of sellers' names is warranted for the same reason transparency is important in the real estate context generally. Verifying the identities of sellers, buyers, and borrowers on various title records is often critical in mitigating fraud. *See generally* Fraud Mitigation Best Practices (http://www.freddiemac.com/singlefamily/pdf/fraudprevention_practices.pdf) at 8

* * *

For the foregoing reasons, NPR respectfully submits that this office should reconsider the previous denial and require that the withheld information now be provided.

Sincerely,



Peter C. Canfield