

Before SMITH, WIENER, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Appellant Avondale Industries, Inc. appeals from a final order and judgment of the National Labor Relations Board (NLRB) on its cross-motion for summary judgment, holding that documents sought by Avondale

#### **FACTS AND PROCEDURAL HISTORY**

In June 1993, the National Labor Relations Board ("NLRB") held an election to determine the representative of the employees (the Union) as their collective bargaining representative. The election, which was held pursuant to a collective bargaining agreement, the employees were instructed to vote at one of five assigned polling places.

Each of the five voting zones had two voting lists: one "zone list" of voters and one "master list" of voters. Under the procedures, when individual voters presented themselves to vote at their assigned polling place, they were placed on the zone list. A count after the election showed 1,804 votes in favor of union representation.

After the election, Avondale invoked the Freedom of Information Act ("FOIA") to request the NLRB to disclose the master voting lists and zone voting lists for each polling place; and (3) each

Halloran, 874 F.2d at 323. Within this framework, the court must balance t

*Exemption 6*

To specifically prevail under Exemption 6, the government must establish that the disclosure is necessary to prevent a clearly unwarranted invasion of personal privacy, but only those disclosures which constitute clearly unwarranted invasions of privacy are necessary to prevent a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(D) is not segregable and the overall privacy interests of the individual clearly outweigh the public interest in disclosure.

We must, therefore, ask whether the NLRB has discharged its burden of demonstrating that the disclosure is necessary to prevent a clearly unwarranted invasion of the voters' personal privacy. Ray, 112 S. Ct. 1000, 1007 (2001) (holding that the NLRB's disclosure of the voters' names was a clearly unwarranted invasion of the voters' privacy).

Ruling from the bench, the district court held that the unredacted voters' names were not protected by Exemption 6.

While this court considers this to be a very close call, I'm inclined to defer to the agency's decision with respect to the agency.

It is questionable as to how much information is going to be disclosed.

I have problems with 7 because of its broadness, and I certainly don't think it's a good idea.

So, I believe that the analysis under Exemption 6 would apply.

The district court did not enter a written order.

Given the brevity of the district court's ruling, it is uncertain what standard the district court applied. The district court did not apply the correct standard.

Federal regulations state that, "[t]he formal documents constituting the personnel files, medical files, and similar files need not be disclosed if the disclosure would constitute a clearly unwarranted invasion of personal privacy, Exemption 6 cases require a balance of the public interest in disclosure against the individual's privacy interest." 1604-1605; United States Department of Defense, Et Al., v. Federal Labor Relations Authority, 503 F.2d 1106, 1111 (D.C. 1974) at 546.

The district court was correct in asserting that it was required to balance the public interest in disclosure against the individual's privacy interest, and that the burden is on the government to establish that the invasion of privacy is clearly unwarranted. The NLRB has not met its burden.

The NLRB correctly asserts that, to determine whether disclosure of the voters' names is a viable privacy interest. The NLRB argues that they do. Specifically, the NLRB argues that the disclosure of the voters' names is necessary to prevent a clearly unwarranted invasion of the voters' privacy, indicating who voted and who did not vote in the representation election." The NLRB argues that the disclosure of the voters' names is necessary to prevent a clearly unwarranted invasion of the voters' privacy from marketers or others, creating an atmosphere of surveillance over employees.

As stated earlier, Exemptions 7(A) and 7(C) exempt from disclosure, records or information compiled for law enforcement purposes, but could reasonably be expected to constitute an unwarranted invasion of privacy under 5 U.S.C. § 552(b). In finding Exemption 7 inapplicable, the district court agrees that Exemption 7 does not apply.

The threshold inquiry is whether the marked voting lists were compiled for law enforcement purposes. See *Id.*, S. Ct. 471, 475 (1989). In this case, there is no summary judgment evidence that the records of union representation proceedings are considered compiled for law enforcement purposes. Therefore, on this issue.

#### **CONCLUSION**

For the foregoing reasons, the order of the district court granting the

**REVERSED** and **REMANDED**.