United States Department of Energy
Office of Hearings and Appeals

In the matter of Chadbourne & Parke LLP.	)		
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Filing Date: October 22, 2012	)	Case No.:	FIA-12-0066
	)		
	)		

Issued: November 8, 2012

Decision and Order

On October 22, 2012, Chadbourne & Parke LLP ("Appellant") filed an Appeal from a determination issued to it on September 12, 2012, by the Loan Programs Office (LPO) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2012-00264-F). In its determination, the LPO partially[1] responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In response to Part 1 of the Appellant's request, the LPO located and produced documents, but withheld portions of those documents pursuant to FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) & (6). The Appellant appeals the applicability of Exemption 5 to the withheld material. This Appeal, if granted, would require the LPO to produce the information that it withheld pursuant to Exemption 5.

I. Background

In Part 1 of its FOIA request, the Appellant requested:

> All correspondence, letters, emails, and other documents or information received by the U.S. Department of Energy ("DOE"), including by its officers, employees, and personnel at its headquarters in Washington, D.C. and other offices, from the U.S. Department of Treasury ("Treasury"), including its officers, employees, and personnel at its headquarters in Washington, D.C. and other offices which describe or otherwise reference SolarCity Corporation [SolarCity], its Chief

[1] In its Determination Letter, the LPO stated that it was still processing Part 2 of the Appellant's FOIA request. Hence, we will not consider the Appellant's arguments concerning the LPO's response to Part 2 as it is not yet ripe for review. Once a determination is made on Part 2 of the FOIA request, the Appellant may file an appeal of that determination with the Office of Hearings and Appeals.

> Executive Officer, Lyndon Rive, or its counsel, Chadbourne & Parke and Keith Martin.

See Letter from David Frantz, Acting Executive Director, LPO, to Seth Weissman, SolarCity, (Sept. 12, 2012) (Determination Letter).

In its determination letter, issued on September 12, 2012, the LPO stated that, while it found documents responsive to Part 1 of the Appellant's FOIA request, it withheld certain information contained in those documents pursuant to Exemptions 5 and 6.[2] *Id.* The LPO provided the Appellant with 48 pages of email correspondence and attachments, with information in two documents redacted. *Id.* One of those documents, which contained email correspondence between two government employees discussing SolarCity's loan application, was partially redacted pursuant to Exemption 5. *Id.* The LPO explained that the withheld information concerned the Government's deliberations over proposed actions and that release of such information is not in the public interest because "[t]he quality of governmental decisions would be adversely affected if frank, written discussions of policy matters were inhibited by the knowledge that the content of such discussions might be made public." *Id.*

The Appellant only challenges the LPO's withholding of information pursuant to Exemption 5.[3] Specifically, the Appellant argues that the withheld information should not be exempt from disclosure because no agency decision was made on SolarCity's loan application to DOE, which was the subject of the requested documents, and accordingly, the documents do not fall within the scope of Exemption 5. *See* Appeal Letter. It further challenges the LPO's failure to reasonably segregate information that does not fall within Exemption 5. *Id.*

II. Analysis

A. Exemption 5

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532

[2] While the Appellant asserts that responsive documents are being withheld in their entirety, in its Appeal, the Appellant quotes the LPO's Determination Letter, expressly stating that "The LPO found documents responsive to part 1 of your request. These documents are being withheld *in part* pursuant to Exemptions 5 and 6 . . . ." Appeal Letter (emphasis added). Indeed, the LPO has confirmed that no responsive documents were withheld entirely, and accordingly, the Appellant's argument that responsive documents were withheld in its entirety is not supported by the record. *See* Email from Matthew Schwarz, FOIA Analyst, to Shiwali Patel, Attorney-Examiner, OHA, Nov. 1, 2012 ("Second, no documents responsive to this FOIA request were withheld in full.").

[3] The Appellant appears to raise additional arguments that do not concern Exemption 5, specifically, whether additional responsive documents exist and should have been produced. However, as the Appeal only explicitly challenges the LPO's application of Exemption 5, we will only review whether the deliberative process privilege was properly invoked to partially redact information in the 48 pages of provided documents, and not the adequacy of the LPO's search.

U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemption 5 protects from disclosure "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); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1974).

The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of the email correspondence, the LPO relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears, Roebuck & Co.*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears, Roebuck & Co.*, 421 U.S. at 151. In order to be shielded by this privilege, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*. The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866. The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

Here, the Appellant claims that as SolarCity voluntarily withdrew its loan application before the agency made a final decision, the withheld information was not part of a predecisional

deliberative process, and therefore not exempt under Exemption 5. However, the predecisional nature of the redacted material does not turn on whether or not the agency subsequently made a final decision on the Appellant's loan application. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) ("Any requirement of a specific decision *after* the creation of the document would defeat the purpose of the exemption. At the time of writing the author could not know whether the decisionmaking process would lead to a clear decision, establishing the privilege, or fizzle, defeating it."). Accordingly, we will review whether the LPO properly invoked the deliberative process privilege in withholding certain information from one of the documents responsive to the Appellant's request.

In reviewing the information that the LPO withheld, we find that the deliberative process privilege was properly invoked. The information that the LPO withheld pursuant to Exemption 5 was part of an email exchange between individuals at the U.S. Department of Treasury's Office of Environment and Energy and the DOE who were reviewing SolarCity's loan application. Hence, it is without doubt that the withheld information concerns inter-agency communications. *See* 5 U.S.C. § 552(b)(5). Furthermore, the nature of the communications is predecisional as it concerns SolarCity's loan application before an agency decision was made, and deliberative, as it reflects opinions, ruminations and recommendations of the agencies regarding the loan application. *See Coastal States Gas Corp.*, 617 F.2d at 866; *see also* Email from Matthew Schwarz, FOIA Analyst, to Shiwali Patel, Attorney-Examiner, OHA, Nov. 1, 2012 ("the email correspondence that I provided concerned DOE's decision-making process on whether to extend a loan to SolarCity."). Thus, we conclude that the deliberative process privilege was properly invoked in this instance.

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend against the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (Mar. 19, 2009) at 2. The LPO states that disclosure of the information would harm the public because the "quality of governmental decisions would be adversely affected if frank, written discussions of policy matters were inhibited by the knowledge that the content of such discussions might be made public." *See* Sept. 12, 2012 Determination Letter. We agree, and conclude that discretionary release of the withheld information would not be in the public interest.

C. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Here, the LPO provided the Appellant with 48 pages of documents, with information redacted pursuant to Exemption 5 on

only two pages of those documents. As explained above, we reviewed the redacted information and did not find any additional non-exempt, segregabale information that should have been provided to the Appellant. Accordingly, we disagree with the Appellant that the LPO failed to reasonably segregate information that did not fall under Exemption 5.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 22, 2012, OHA Case Number FIA-12-0066, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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