United States Department of Energy
Office of Hearings and Appeals

In the matter of Hanford Atomic Metals Trades Council	)	
Filing Date: May 21, 2013	)	Case No.: FIA-13-0030

Issued: June 18, 2013

Decision and Order

On May 21, 2013, Hanford Atomic Metals Trade Council ("Appellant") filed an Appeal from a determination issued to it on April 23, 2013, by the Richland Operations Office (ROO) of the United States Department of Energy (DOE) (FOIA Request Number 2012-00585). In its determination, ROO 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 the Appellant's request, ROO 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 documents released.

I. Background

On February 21, 2013, the Appellant, a union, submitted a FOIA Request to ROO seeking copies of communications to and from DOE and its contractors, from July 1, 2011, to the present, related to collective bargaining agreements with the Appellant. *See* Appeal, Ex. J. Specifically, the Appellant requested documents regarding three types of communications that include references to lockouts, strikes, closures, and terms and conditions of employment of the Appellant's bargaining unit members. *Id.* ROO issued its response to the Appellant's FOIA Request on April 23, 2013, stating that it provided documents responsive to Items 1 and 3[*] of the

* Item 1 requests communications "referencing or related to any and all Successor Agreement(s) and/or collective bargaining." Item 2 requests communications "referencing any and all Successor Agreement(s) and/or collective bargaining related to lockout(s), strike(s), or closure(s)." Item 3 requests communications "referencing wages, hours, and/or other terms and conditions of employment for HAMTC bargaining unit members; or desired changes in those wages, hours and/or other terms and conditions of employment." The Appellant defined "Successor Agreement(s)" as "a collective bargaining agreement(s) between the Contractor and HAMTC," listing the following contractors: Advanced Technologies & Laboratories International, Inc. (ATL), CH2M Hill Plateau

Appellant's FOIA Request. *See id.* It withheld some information in those documents pursuant to Exemptions 5 and 6. ROO invoked the deliberative process privilege of Exemption 5 to justify its redactions. It further stated that it deleted information on pages 164, 166, 168, 171 and 173 because the information was not responsive to the Appellant's Request. ROO did not provide a response to Item 2 in its Determination Letter.

In its Appeal, the Appellant argues that information withheld pursuant to Exemption 5 in eight documents (Exhibits A to H of its Appeal) does not contain any information that reveals DOE's deliberative process. Specifically, it claims that "DOE has repeatedly asserted that it has had no involvement with directing its contractors regarding labor negotiations with their labor unions at the Hanford site in Washington state," and "it has repeatedly claimed to have not been involved with the formation or execution of any activities related to bargaining positions and strategy involving its contractors and unions." Appeal at 6. The Appellant did not raise any arguments pertaining to ROO's invocation of Exemption 6, and accordingly, we will not review the sufficiency of those redactions.

II. Analysis

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 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 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).

A. Inter-agency or Intra-agency Records

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). "In general, this definition establishes that communications between agencies and outside parties are not protected under Exemption 5." *Ctr. for Intern. Environmental Law v. Office of U.S. Trade Representative*, 237 F.Supp.2d 17, 24 (D.D.C. 2002).

Remediation Company (CH2M); Mission Support Alliance, LLC (MSA); Washington Closure Hanford, LLC (WCH); and/or Washington River Protection Services, LLC (WRPS). *See* Appeal, Ex. J.

ROO informed us that the information contained in the Exhibits involve one of the following: 1) communications between DOE employees, "wherein DOE officials in the Contractor Industrial Relations (CIR) group provided briefings to their DOE colleagues about ongoing labor negotiations being conducted by DOE contractors and a union," or 2) emails from contractors, which the CIR provide to their colleagues to brief them on the negotiations with the union. *See* Email from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (June 5, 2013).

Accordingly, we conclude that some of the disputed redactions do not contain inter-agency communications. Specifically, the emails in Exhibits C, G and H do not involve communications between DOE employees. Rather, they are emails that were either sent to or from contractors, and are not emails *between* DOE employees, thereby rendering them not inter- or intra-agency communications. Moreover, the contractors themselves cannot be considered consultants of DOE for purposes of satisfying this requirement, as ROO has not stated that they function similarly to DOE employees. *See Ctr. for Intern. Environmental Law*, 237 F.Supp.2d at 25 ("Communications with outside consultants have been deemed part of an agency's deliberative process only where the documents prepared by or communications to or from the outside consultants 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done,' or where 'the consultant functions just as an [agency] employee would be expected to do.'") (citations omitted). Rather, ROO explained that the "contractors at Hanford routinely brief DOE CIR employees about labor negotiations because contractors are required by their contract to do so." Email from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (June 5, 2013). DOE's intent with respect to the contract is "to minimize surprises and receive accurate information with regard to its contractors' collective bargaining agreements." *Id.* Accordingly, in sending emails to DOE regarding its labor negotiation process with the union, the contractors are not acting as consultants to assist DOE in its deliberative process; instead, they are contractually required to the provide updates on their negotiations to DOE. Thus, the emails in Exhibits C, G and H fail to meet the threshold requirement of Exemption 5 as they do not contain "inter-agency or intra-agency memorandums or letters."

Moreover, while Exhibit E is marked as a "Business Sensitive" document, the source of that document, specifically whether the source is DOE, is not apparent. Thus, we cannot make a determination as to whether or not that document involves "inter-agency or intra-agency" communications. Nonetheless, as explained below, we conclude that the information in that document was also not properly withheld pursuant to Exemption 5's "deliberative process privilege." Below is our analysis as to whether or not ROO properly invoked Exemption 5 for the withholdings in the remaining Exhibits – A, B, D, E and F.

B. Deliberative Process Privilege

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 support its redactions, ROO 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). 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. It 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).

ROO acknowledged that it is not a party to the labor negotiations at Hanford between the Appellant and DOE's contractors and that it "does not interfere with [their] bargaining process." Memorandum from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (May 30, 2013). Nonetheless, ROO maintains that the outcome of the negotiations have "a bearing on other decisions that DOE is responsible for regarding its programs and the administration of its contracts." Email from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (June 5, 2013). ROO asserts that these communications pertain to DOE's decisions regarding the "reasonableness, allocability and allowability of contract costs," "which in turn impact programmatic decisions and decisions about the administration of the contracts." *Id.* In addition, ROO claims that "briefings about the status of the contractors' labor negotiations are critical to DOE's process of responding to media requests and congressional inquiries." *Id.*

However, while the outcome of collective bargaining negotiations may, in fact, ultimately affect subsequent DOE decisions, the information withheld from the documents at issue do not pertain to or discuss any agency deliberative process related to such decisions. In fact, ROO admits that it is not a party to the labor negotiations, which are the subject of the released emails and documents, and ROO suggested that if any deliberative process would be revealed, it would be the contractors', not the agency's. Memorandum from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (May 30, 2013) (stating that the "contractors also provided DOE with the status of the union negotiations and information contained in the status would reveal *their* internal negotiations options and/or strategies.") (emphasis added).

Based on the foregoing, we cannot conclude that if released, the withheld information would reveal intra-agency communications protected by Exemption 5's deliberative process privilege. *See Coastal States Gas Corp.*, 617 F.2d at 866. First, as explained above, Exhibits C, G and H do not involve communications within the agency, and therefore, may not be redacted pursuant to Exemption 5. Second, as to the remaining Exhibits, ROO did not identify any deliberative process within DOE and the role played by the released communications and documents in the course of that process. *See id*. at 867 ("It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process."). Instead, ROO acknowledges that the released documents concern communications "about ongoing labor negotiations being conducted by DOE contractors and a union." Email from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (June 5, 2013). Hence, we cannot conclude that the withheld information reflects advisory opinions, recommendations, and deliberations comprising part of the process by which DOE decisions and policies are formulated. *See Sears, Roebuck & Co.*, 421 U.S. at 150. In consideration of the FOIA's goal of broad disclosure, we will remand this Appeal for ROO to issue a new determination to either release the requested information or adequately explain why the information should be withheld pursuant to Exemption 5 or pursuant to another exemption. *See Klamath Water Users Prot. Ass'n*, 532 U.S. at 8. In order for the information to be withheld under Exemption 5's predecisonal, deliberative process privilege, it is essential that ROO identify the specific deliberative process within DOE, and the specific role played by the information in the course of that deliberative process within DOE.

Finally, 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). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester. ROO bears the burden of showing that the invoked exemption applies to all the information it withholds under that exemption. On remand, ROO must consider whether any of the information it intends to withhold under Exemption 5 through a claim of privilege, or any other exemption, can be segregated and released. After determining what if anything can be withheld, ROO should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if it determines that federal law permits disclosure and it is in the public interest. *See* 10 C.F.R. § 1004.1.

It Is Therefore Ordered That:

(1) The Freedom of Information Action Appeal filed by the Appellant on May 21, 2013, OHA Case Number FIA-13-0030, is hereby remanded as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Richland Operations Office, which shall issue a new determination as to the documents that are the subject of the instant FOIA Appeal.

(3) 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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