

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Hanford Atomic Metals Trades Council)

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Filing Date: September 13, 2013)

Case No.: FIA-13-0059

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Issued: November 25, 2013

Decision and Order

On September 13, 2013, Hanford Atomic Metals Trades Council (“Appellant”) filed an Appeal from a determination issued to it on August 14, 2013 (August 14 determination), by the Richland Operations Office (ROO) of the United States Department of Energy (DOE) (FOIA Request Number 2012-00585). ROO issued the August 14 determination as a final determination regarding the Appellant’s request for information (Request) filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004.¹ In its August 14 determination, ROO withheld material pursuant to Exemptions 4 and 5 of the FOIA. This Appeal, if granted, would require ROO to release the information withheld pursuant to those Exemptions.

I. Background

On February 22, 2013, the Appellant, a union organization comprised of 15 different unions working at the DOE’s Hanford, Washington, facility (Hanford Site), submitted a FOIA Request to DOE seeking copies of communications between DOE employees and DOE-contractor (Hanford contractor) employees at the DOE’s Hanford Site² regarding collective bargaining,

¹ The complete history of the processing of the Appellant’s Request is detailed in *Hanford Atomic Metals Trade Council*, Case No. FIA-13-0061, (2013) (*HAMTC*).

² The Hanford Site is an area of approximately 586 square miles which was previously used to produce weapon-grade nuclear material. DOE is now working to remediate environmental damage from this area. ROO and the DOE’s Office of River Protection (ORP) are the DOE offices charged with supervising this effort. DOE supervises the Hanford contractors that are employed to perform the environmental remediation work. In their supervision, ROO and ORP must ensure that the work is performed in compliance with applicable laws and within the funding appropriated by Congress. October 10, 2013, Memorandum from Dorothy Riehle, FOIA Officer, to Richard Cronin, Attorney-Examiner, OHA (Response) at 1.

desired changes in wages, terms and conditions of employment, potential strikes, or closures.³ See Appeal, Attachment 1.

In its August 14 determination, ROO released 622 pages of various documents and E-mails to the Appellant. However, ROO withheld information from some documents pursuant to Exemptions 4 and 5. ROO asserted in this determination that the withheld material was confidential commercial information that is protected from disclosure pursuant to Exemption 4. Additionally, ROO asserted that some of the withheld information would also be protected by the deliberative process privilege since the “redacted information consists primarily of contractor briefings to DOE-RL (ROO), or briefings and discussions between DOE employees with the purpose of facilitating DOE-RL's decisions regarding budget and programmatic policies.” August 14, 2013, Determination Letter at 3. With regard to the fact that some of the recipients of the documents at issue were not governmental officials, ROO stated that these documents, nevertheless, are protected under Exemption 5 pursuant to the “common interest” doctrine because the interests of the government (ROO) and the contractors with whom the documents were shared are virtually the same. *Id.* ROO also found that discretionary release of the information withheld pursuant to Exemption 5 would not be in the public interest. *Id.* at 3.

In the present Appeal, the Appellant argues that ROO inappropriately withheld the redacted information under Exemption 4 since most if not all the financial information came from ROO, which is not a person, as required under Exemption 4. Further, the Appellant alleges that because ROO submitted the financial information, there cannot be economic harm to another party nor would release of the information discourage other third parties from providing the government financial information. September 13, 2013, Appeal Letter at 3-5. The Appellant argues that the Exemption 5 withheld material cannot be deliberative since ROO has stated that it has no involvement in formulating or directing negotiation strategy. *Id.* at 2.

II. Applicable Law

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 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.

At issue in the present Appeal are withholdings made on a number of documents labeled as Attachments 3-18 by the Appellant. We have obtained unredacted copies of these documents and have asked ROO for its response (Response) to the arguments made in this Appeal.

³ The Appellant is conducting negotiations with five Hanford Site prime contractors (Hanford contractors) for a labor agreement.

A. Exemption 4

Exemption 4 shields from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is “commercial” or “financial,” “obtained from a person,” and “privileged or confidential.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a “trade secret,” a different analysis applies. The agency must determine whether the information in question is “commercial or financial,” “obtained from a person” and “privileged or confidential.”

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are “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 an agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts “those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” or “pre-decisional” privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In the present case, only the deliberative process privilege was cited by ROO to justify Exemption 5 withholdings.

1. Intra-Agency Status

As referenced above, the first requirement for a document to be eligible for Exemption 5 protection is that it be an “inter-agency or intra-agency” document. Nonetheless, a communication between an agency and a private party can be considered an intra-agency communication when the “common interest” doctrine applies. *Hunton & Williams v. Dep’t of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. Agency for Int’l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord Klamath*, 532 U.S. at 10; *Carter & Burgess, Inc.*, Case No. FIA-12-0008 (2012). The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-83. “[I]n a limited sense,” the private party “becomes a part of the enterprise that the agency is carrying out.” *Id.* at 280. Therefore, the communications “can be understood as ‘intra-agency’ for the purposes of Exemption 5.” *Id.* Further, documents and communications may qualify as “intra-agency” materials when they “ha[ve] been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency- e.g., in a capacity as an employee or consultant to the agency.” *Citizens for Responsibility and Ethics in Washington v. DHS*, 514 F. Supp.2d 36,

44 (D.D.C 2007) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9-10 (2001)).

In the present case, DOE's ROO is a federal agency that shares a common interest with a private party, the Hanford contractors. As in *Hunton & Williams*, ROO and the Hanford contractors share a mutual interest in the outcome of the negotiations since, by contractual provision, DOE contracting officers must make determinations regarding the allowability of costs associated with any agreed-to collective bargaining agreement. Response at 12. Further, under the DOE's contracts with the Hanford contractors, DOE is required to reimburse allowable litigation costs the Hanford contractors may incur performing the contract. Consequently, these communications assist ROO to perform its duty to monitor Hanford Site costs and insure that the Hanford contractors are complying with applicable labor laws. Response at 12. For these reasons, we find that all of documents at issue involving communication with Hanford contractors employees regarding the labor negotiations satisfy Exemption 5's first condition – that the communication be an “intra-agency” document.

2. Deliberative Process Privilege

Exemption 5's second condition is that the withheld material must be protected by one of the “civil discovery privileges,” such as the attorney-client privilege, the attorney work-product privilege, or the deliberative process privilege. ROO invoked the deliberative process privilege to withhold the information in the documents at issue in this appeal. Exemption 5's deliberative process privilege 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. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). 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.

With regard to the communications between an agency and its contractors, reports or other documents that summarize issues and advise superiors--either generally or in preparation for an event or a decision yet to be made (briefing materials)--may be protected under the deliberative process privilege. *See e.g., Citizens for Responsibility and Ethics in Washington v. DHS*, 514 F. Supp.2d 36, 44 (D.D.C 2007) (*Citizens*) (protecting briefing materials concerning ongoing

response to Hurricane Katrina, which included proposed "solutions and approaches . . ."); *Klunzinger v. IRS*, 27 F. Supp. 2d 1016, 1026 (W.D. Mich. 1998) (holding paper prepared to brief commissioner for public meeting protectable); *Judicial Watch v. DOJ*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2007) (protecting e-mail created to prepare FERC Chairman for upcoming congressional testimony); *See also, Electronic Privacy Information Center v. DHS*, 892 F. Supp. 2d 28, 33 (D.D.C. 2012) (protecting contractor's advice to agency regarding ongoing product development). While factual material is usually not withholdable under Exemption 5, such material may be withheld if it is "inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Citizens*, 514 F. Supp. 2d. at 46. Such factual material may also be withheld if the disclosure of the factual material would "expose the deliberative process within an agency." *Id.*

III. Analysis

A. Attachment 3

Attachment 3 is a two-page E-mail between DOE officials which provides recommended guidance regarding the treatment of negotiating committee employees as they resume work at the Hanford Site. ROO has withheld the recommendations pursuant to Exemptions 4 and 5.⁴ The recommendations are deliberative and predecisional and as such are properly protected pursuant to the deliberative process privilege and Exemption 5.⁵

B. Attachment 4

Attachment 4 is a one-page E-mail transmitting a copy of another E-mail where Hanford Site contractor personnel are reporting on potential payroll issues related to the negotiations. As described above, because of the relationship between the Hanford contractors and the ROO regarding supervision of operations at the Hanford Site, we find that Attachment 4 is an "intra-agency" document. Further, the withheld material contains a proposal for action regarding the issue. We find that the withheld material is predecisional and deliberative and is consequently protected from release pursuant to the deliberative process privilege and Exemption 5.

C. Attachment 5

Attachment 5 consists of a one-page E-mail. The withheld portion of the E-mail references a factual event regarding the negotiations. Thus, the withheld material does not appear to be predecisional or deliberative in nature and thus does not qualify for protection under Exemption 5. With regard to Exemption 4, we find that the withheld material is not commercial or financial in nature and as such may not be withheld pursuant to Exemption 4.

⁴ ROO cited Exemption 4 and 5 as justifying all of its withholdings in the documents at issue with the exception of several segments it withheld because they were nonresponsive to the Appellants' Request.

⁵ Because we find that Exemption 5 was properly applied to the withheld material in Attachment 3, we need not decide on the appropriateness of Exemption 4. With regard to our analysis concerning the other attachments at issue, upon a finding that information was properly withheld under one Exemption, we will not consider alternate grounds for withholding that ROO may have cited.

On remand, ROO should release the withheld portion of Attachment 5 or issue another determination justifying its withholding under the FOIA.

D. Attachment 6

Attachment 6 is a one-page E-mail from a DOE official to other DOE personnel with a one-page attachment. The withheld material is located in the attachment and consists of assessments on the status of the Hanford negotiations and the Hanford contractors' goals for the negotiations. This material is deliberative and predecisional and was properly withheld pursuant to the deliberative process privilege and Exemption 5.

E. Attachment 7

Several segments of Attachment 7 were removed because they were nonresponsive to the Appellant's request. Upon our review of these segments, we find that ROO appropriately withheld these segments because they did not contain material responsive to the subject matter asked for in the Appellant's request.

F. Attachment 8

Attachment 8 is a two-page E-mail between DOE officials discussing an issue relating to the Hanford negotiations. The withheld material consists of opinions between the DOE officials regarding the issue. We find that the withheld material is predecisional and deliberative. Consequently, we find that this material was properly withheld pursuant to the deliberative process privilege and Exemption 5.

G. Attachment 9

The withheld portions of Attachment 9 consist of a table containing data for each of the Hanford contractors relating to their estimated costs regarding a proposed collective bargaining agreement. After reviewing the withheld material, we find that ROO properly withheld the information pursuant to Exemption 4.

The withheld material in Attachment 9 consists of financial information. Further, we find that the withheld information was obtained from a person for Exemption 4 purposes. It is well-established that "person" refers to a wide-range of entities, including corporations, such as the Hanford contractors. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000).

The final requirement for Exemption 4 protection is that the financial information must be "confidential." ROO has informed us that the Hanford contractors were required to submit the withheld information. With regard to involuntarily submitted information, such information is considered confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. 498 F.2d at 770. *See National Parks*, 498 F.2d at 770. In making this determination, "[c]ourts generally defer to an agency's predictions concerning the repercussions

of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof.” *SACE v. Dep’t of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012).

We find that release of the withheld information would cause substantial harm to the competitive position of the current Hanford contractors. In a labor negotiation, such as the one the Hanford contractors are now conducting, release of this information would severely weaken the Hanford contractor’s bargaining position. Further, competitors for future work on the Hanford site would have a significant advantage in future bidding for work at the site because of their knowledge of the Hanford contractor’s cost assessments to perform work at the Hanford site. Consequently, ROO properly withheld the information in Attachment 9.

H. Attachment 10

Attachment 10 is a one-page E-mail from a DOE official to other DOE employees forwarding an included E-mail which reports on the status of labor negotiations regarding the Hanford contractors. The withheld portion consists of the DOE official’s recommendations on an issue relating to the negotiations. The withheld portion of Attachment 10 is a deliberative and predecisional recommendation which falls under the deliberative process privilege and Exemption 5. Consequently, ROO properly withheld this information.

I. Attachment 11

Attachment 11 is a one-page E-mail from a DOE official to other DOE officials forwarding another E-mail which generally summarizes a meeting that the DOE official had with Congressional staff. The withheld material consists of the subject matter of the meetings. The withheld material is not deliberative or predecisional in nature and is mostly factual in nature. Further, the withheld factual material does not reveal anything about the nature of the discussions. As such, the information withheld in Attachment 11 is not protectable under Exemption 5. Neither can this information be withheld under Exemption 4, as it does not specifically refer to information that is commercial or financial and is therefore not withheld under Exemption 4.

On remand, ROO should release the withheld portion of Attachment 11 or issue another determination justifying its withholding under the FOIA.

J. Attachments 12-16

Attachments 12 through 16 are a series of letters where various DOE Contracting Officers are giving DOE approval to various Hanford contractors’ proposed economic parameters for the Hanford Site labor negotiations. The withheld portion of the letters generally describes the economic parameters. We find that this information is not protected under Exemption 5. This letter itself is a final decision regarding the proposed economic parameters and as such is neither deliberative nor predecisional. Additionally, we find that the withheld information in these letters is not protected under Exemption 4. The withheld portion itself does not reveal anything specific about the economic parameters and does not consist of financial or commercial information.

Thus, release of the withheld information would not cause commercial harm to the Hanford contractors.

On remand, ROO should release the withheld portion of Attachments 12 through 16 or issue another determination justifying its withholding under the FOIA.

K. Attachment 17

Attachment 17 is a two-page letter from a Hanford contractor formally requesting that ROO confirm the contractor's interpretation as to the allowability of costs under its DOE contract along with a number of documents detailing the Hanford contractors' proposed economic parameters for a 2012 Collective Bargaining Agreement (EP Documents).

The withheld segment in first paragraph of the Letter contains information detailing the exact cost item for which the contractor seeks a determination as to whether it is an allowed cost under its DOE contract. The remainder of the withheld information in the letter consists of arguments supporting the contractor's position regarding the allowability of the cost item. We find that this material is predecisional and deliberative in nature. As such, this material would be protected under the deliberative process privilege and Exemption 5 and was thus properly withheld by ROO.

With regard to the EP Documents, the withheld information consists of the contractor's bargaining objectives along with estimated cost savings. We find that ROO properly protected this information pursuant to Exemption 4. The withheld information consists of financial data regarding provisions it sought during labor negotiations in 2012 and was submitted by the Hanford contractors, which are considered persons for Exemption 4 purposes. We further find that the information is "confidential" under Exemption 4 because the release of the information would cause substantial harm to the competitive position of Hanford contractors. Release of this information would cause substantial harm to the Hanford contractors by providing insight into their goals and economic concerns while they are negotiating a new labor agreement with the Appellant. Further, other competitor firms who might seek future contracts at the Hanford site would gain insight as to the Hanford contractors' costs in their operations at the Hanford site. Consequently, we find that ROO properly withheld the EP Documents pursuant to Exemption 4.

L. Attachment 18

Attachment 18 consists of a document entitled "Hanford Site's Work Stoppage Access Control Plan." ROO has informed us that this document was a draft document and that the plan was never officially adopted in final form. *See* Memorandum of Telephone Conversation between Dorothy Riehle, FOIA Officer, ROO, and Richard Cronin, OHA Staff Attorney ((November 13, 2013); Determination Letter at 3-4. Given this information, we find that the withheld information in the draft plan reflects the opinions and recommendations of the author and is thus deliberative and predecisional. Consequently, the withheld information would be protected by the deliberative process privilege. Given this finding, ROO properly withheld the material pursuant to Exemption 5.

M. Public Interest Determination

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

Upon our review of the documents at issue, we conclude that discretionary release of the information withheld under the deliberative process privilege would not be in the public interest, because it would inhibit DOE officials and other contractor employees from freely exchanging advice and comments during DOE's deliberative processes. *See Judicial Watch*, Case No. FIA-13-0002 (2013).

III. Conclusion

We find that ROO appropriately applied either Exemption 4 or 5 to the vast majority of the documents at issue in this Appeal. We also find that ROO's determination regarding material that was non-responsive to the Appellant's Request was proper. However, as to our findings that Exemptions 4 or 5 did not apply to portions of Attachments 5 and 11-16, ROO should either release that information to the Appellant or issue another determination justifying the withholding of the material in these documents.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on September 13, 2013, OHA Case Number FIA-13-0059, is hereby remanded as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Richland Operations Office, which shall issue a new determination in accordance with the above Decision.

(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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Date: November 25, 2013