

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 25, 2013)

Case No.: FIA-13-0061

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Issued: November 14, 2013

Decision and Order

On September 25, 2013, Hanford Atomic Metals Trade 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). Pursuant to an OHA Appeal of an earlier April 23, 2013, determination (April 23 determination)¹, ROO issued the August 14 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. In its August 14 determination, ROO withheld material pursuant to Exemptions 4, 5, and 6 of the FOIA. This Appeal, if granted, would require ROO to release the information withheld pursuant to Exemptions 4 and 5.

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 employees at the DOE’s Hanford Site² regarding collective bargaining, desired changes in

¹ See *Hanford Atomic Metals Trade Council*, Case No. FIA-13-0030 (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.

wages, terms and conditions of employment, potential strikes, or closures.³ See Appeal, Attachment 1. ROO received a copy of the Request and, on April 23, 2013, ROO issued its April 23 determination to the Appellant and identified a number of documents responsive to the Request. ROO withheld material in a number of these documents pursuant to Exemptions 5 and 6.

The Appellant appealed the April 23 determination to OHA. In a decision dated June 18, 2013, OHA found that ROO's justification for invoking Exemption 5 was inadequate because a number of the documents involved communications with non-ROO officials and thus could not be considered "intra-agency" communications. *HAMTC*, slip op. at 5. Additionally, ROO failed to identify the deliberative process to which the Exemption 5 documents were related. *Id.* Consequently, OHA remanded the case to ROO so that it could either release the withheld material or issue another determination justifying the withholding of the information. *Id.*

In its August 14 determination, ROO released additional information previously withheld in its prior determination but again withheld information from the documents responsive to the Appellant's request pursuant to Exemptions 4, 5, and 6. ROO asserted in this determination that some of the withheld material was confidential commercial information that is protected from disclosure pursuant to Exemption 4. Additionally, ROO again invoked Exemption 5's deliberative process privilege to withhold some of the material and explained that the "redacted information consists primarily of contractor briefings to DOE-RL, 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. ROO also asserted that some of the confidential commercial information withheld was generated by ROO and thus was also covered by a "qualified privilege" under Exemption 5. *Id.* 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.*

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 25, 2013, Appeal Letter at 3-4. The Appellant also challenges ROO's continued withholding of information pursuant to Exemption 5 in light of OHA decision in *HAMTC*, and alleges that ROO failed to identify a specific deliberative process to which the Exemption 5 material relates. The Appellant also argues that the Exemption 5 material cannot be deliberative since ROO has stated that it has no involvement in formulating or directing negotiation strategy. *Id.* at 4. Lastly, the Appellant challenges ROO's determination regarding withheld information which was deemed to be non-responsive to the Appellant's Request since

³ At the time of the Request, the Appellant was conducting negotiations with five Hanford Site prime contractors (Hanford contractors) for a labor agreement.

ROO did not state in the August 14 determination the reason the withheld material was non-responsive.⁴ *Id.*

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 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 case are withholdings made in 11 documents (labeled as Attachments A-K and comprising 28 pages) in the current Appeal. We have obtained unredacted copies of these documents and have asked ROO for its response (Response) to the arguments made in this Appeal. Since we have found that none of the material withheld in this case concerns financial or commercial information, and thus none is protected under Exemption 4, we will review the applicability of the Exemption 5 deliberative process privilege to each document at issue.⁵

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.”

Our review of the withheld material at issue in this case reveals that none of the material can be considered commercial or financial. While the withheld material relates to issues surrounding the

⁴ The Appellant did not challenge ROO's withholdings under Exemption 6.

⁵ ROO has also asserted that the information withheld in the documents may be subject to Exemption 5's “qualified privilege” regarding sensitive commercial or financial information generated by the government. *See, Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979). As explained *infra*, we find that none of the redacted material is financial or commercial. Consequently, we reject ROO's argument regarding the application of the “qualified privilege” for the withheld materials in the documents reviewed in this Decision.

labor negotiations which may have an eventual financial impact on the Hanford contractors, none of the material *itself* is financial or commercial. Consequently, we find that Exemption 4 does not apply to the withheld information.

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).

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 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.*

C. Attachment A

Attachment A is a one-page E-mail from a contractor employee to ROO officials, dated November 28, 2011 (7:05 a.m.), regarding labor negotiations between the Appellant and the Hanford contractors. ROO has withheld a portion of this document pursuant to Exemptions 4 and 5. The withheld text of Attachment A consists of a single factual statement concerning the actions of a labor union. As such, it is not deliberative nor does it reveal anything regarding the author's opinion or recommendations. Consequently, we find that the material is not protected by the deliberative process privilege of Exemption 5.

Because we find that neither Exemption 4 nor 5 applies to the withheld material, we will remand this matter to ROO to either release this text or issue another determination justifying its continued withholding of the text.

D. Attachment B

Attachment B consists of a one-page E-mail dated February 5, 2013 (6:29 a.m.), from a contractor employee to other contractor employees with two informational segments withheld. ROO withheld both segments pursuant to Exemptions 4 and 5.

With regard to the applicability of Exemption 5, we find that the first withheld segment (second sentence of message) appears to be factual in nature and does not appear to reveal anything about any deliberative process. Consequently, Exemption 5 does not protect the first withheld segment. The second withheld segment in the E-mail relates to a proposed action to be undertaken with regard to an issue related to the labor negotiation. Given ROO's supervisory role to monitor the negotiations, this segment is predecisional and deliberative. As such, it was properly withheld pursuant to the deliberative process privilege of Exemption 5.

On remand, ROO should release the first segment of this message or issue another determination justifying its withholding under the FOIA.

E. Attachment C

Attachment C consists of a one-page E-mail, dated January 31, 2013 (1:44 p.m.), sent by a contractor to other contractor officials asking if another official had been notified about a specific event relating to the negotiations. ROO withheld the two-sentence body of the E-mail citing Exemptions 4 and 5. We find that the withheld portion does not contain financial or commercial information and as such is not protected by Exemption 4. The withheld text does not appear to contain material that is deliberative in nature. Consequently, Exemption 5 is not applicable to this document.

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

F. Attachment D

Attachment D is two-page E-mail dated January 31, 2013 (12:58 p.m.), by which a DOE official is forwarding a status report on the negotiations to another DOE official. The report contains assessments by the author regarding possible future actions the parties may take and a proposed DOE response with regard to inquiries about the negotiations. The withheld portions of Attachment D contain deliberative material submitted to enable ROO to fulfill its duty to monitor the labor negotiations and respond to inquiries regarding the negotiations. Consequently, the withheld portion of Attachment D was properly withheld under Exemption 5.

G. Attachment E

Attachment E is a one-page E-mail, dated January 24, 2013 (1:11 p.m.), from a DOE official to other DOE officials reporting possible actions which might be taken by one of the parties to the labor negotiations and a factual background relating to a proposed action. The non-factual material is deliberative and was properly withheld under Exemption 5's deliberative process privilege. The factual background material is not deliberative but release of this information would reveal the nature of the deliberative material in Attachment E. As such, it was also properly withheld pursuant to Exemption 5.

H. Attachment F

Attachment F is a one-page E-mail, dated November 30, 2012 (1:19 p.m.), sent by a DOE official to another DOE official where a portion of one sentence has been withheld. The withheld material describes a proposal concerning with whom to share certain information regarding a DOE response to an inquiry about the Hanford Site negotiations. As such this material is deliberative and was properly withheld pursuant to Exemption 5's deliberative process privilege.

I. Attachments G and H

Attachments G and H consists of one-page E-mails, dated November 28, 2012 (12:40 p.m.), and November 28, 2012 (7:03 a.m.), respectively, sent from a DOE employee to other DOE employees describing the changes that had been made to a DOE desk statement concerning the Hanford Site negotiations. Most of the withheld segments in these two documents were withheld because they were non-responsive to the Appellant's FOIA Request. Our review of these withheld portions indicates that the subject matter of the segments does not concern the subject matter specified in the Appellant's FOIA Request. Consequently, these segments were properly withheld as nonresponsive.

The remaining statements were withheld pursuant to Exemptions 4 and 5. This withheld material in Attachments G and H references the authors' opinion regarding changes made (and their rationale) to a DOE Desk Statement document. As such, this material is deliberative material intended to brief other DOE officials as to revisions in the Desk Statement document. Consequently, ROO properly withheld the Exemption 5 information pursuant the deliberative privilege.

J. Attachment I

Attachment I is a one-page E-mail sent from a DOE employee to other DOE employees describing the changes that had been made to the DOE Desk Statement. Most of the withheld material was withheld pursuant to Exemptions 4 and 5. With regard to the small segments withheld because they were not responsive to the Appellant's request, our review indicates that the subject matter of this material was not responsive to the Appellant's specific FOIA Request. Consequently, this material was properly withheld by ROO. The material withheld pursuant to Exemption 5 consists of deliberative information we found properly withheld in Attachments G and H. Consequently, ROO properly withheld the redacted information in Attachment I under Exemption 5.

K. Attachment J

Attachment J consists of a one-page E-mail, dated November 14, 2012 (6:00 p.m.), where material has been withheld because it is non-responsive to the Appellant's FOIA Request. Our review of Attachment J indicates that the subject matter of this material does not consist of the subject matter asked for in the Appellant's FOIA request. Thus, we find that ROO properly withheld the redacted information in Attachment J.

L. Attachment K

Attachment K is a one-page E-mail dated January 4, 2012 (4:32 p.m.), where a contractor employee gives his opinion to a DOE official about the effect of a provision in a particular labor agreement. The information redacted in Attachment K was withheld pursuant to Exemptions 4 and 5. This material is deliberative material and thus would be protected by Exemption 5's deliberative process privilege.

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, in the present case, 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 Exemption 4 did not apply to the information withheld in the documents at issue in this Appeal. However, ROO appropriately applied Exemption 5 to the vast majority of the

withheld information at issue in this case. 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 Exemption 5 did not apply to portions of Attachments A, B, and C, ROO should either release the information to the Appellant or issue another determination justifying its 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 25, 2013, OHA Case Number FIA-13-0061, 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 14, 2013