

**United States Department of Energy
Office of Hearings and Appeals**

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| In the Matter of: | Julie A. Reddick |) | |
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| Filing Dates: | September 26, 2013 |) | Case Nos.: FIA-13-0063 |
| | October 25, 2013 |) | FIA-13-0067 |
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Issued: December 3, 2013

Decision and Order

This Decision and Order concerns two Appeals filed by Julie A. Reddick, the Appellant, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. On September 26, 2013, Ms. Reddick filed an Appeal challenging the determination that she received from the DOE's National Nuclear Security Administration (NNSA), in response to her September 12, 2013, FOIA request, as well as the response that she received from the DOE's Environmental Management Consolidated Business Center (EMCBC) regarding an identical FOIA request. In its September 23, 2013, response to the Appellant, EMCBC determined that it did not have jurisdiction over any potentially responsive records and, therefore, did not perform a search of EMCBC records. Instead, EMCBC transferred Ms. Reddick's request to DOE Headquarters for a search. In a September 24, 2013, determination, NNSA informed Ms. Reddick, that its search for records did not yield any documents responsive to her request. Consequently, in her September 26, 2013, Appeal, Ms. Reddick challenged the adequacy of the agency's search for responsive documents, maintaining that NNSA and EMCBC are the two offices at which the specific documents she seeks are located.

During the pendency of Ms. Reddick's first Appeal, NNSA withdrew its September 24, 2013, determination. On October 22, 2013, following a new search for responsive documents, NNSA issued a second final determination in response to Ms. Reddick's September 12, 2013, FOIA request. In the second determination, NNSA identified two responsive documents, one of which it released to Ms. Reddick in its entirety. However, NNSA withheld the second document in its entirety pursuant to FOIA Exemption 5. On October 25, 2013, Ms. Reddick filed a second Appeal, challenging NNSA's withholding of information under Exemption 5.

I. Background

The documents at issue in this proceeding pertain to an October 2012 employee concern which was filed with the DOE Headquarters Employee Concerns Program (ECP) regarding nuclear safety culture at a DOE facility. Two individuals – one from the NNSA Sandia Field Office (SFO) and one from EMCBC – were assigned to investigate the concern and submit a draft report to the Headquarters ECP Manager for review. Upon completion of the investigation, the ECP Manager was to issue a final report upon completion of the investigation. *See* Memorandum of Telephone Conversation between Karen Laney, Information Programs Specialist, NNSA, and Diane DeMoura, Attorney-Advisor, OHA (September 26, 2013). The two investigators submitted their draft report in June 2013. To date, the investigation is ongoing, and the ECP Manager has not yet issued the final report of investigation. *Id.*

In September 2013, Ms. Reddick filed a FOIA request with NNSA and EMCBC in which she sought the “employee concern investigation report and cover letter” that the two investigators prepared and submitted to the ECP Manager in June 2013. *See* Letter from Elizabeth J. Osheim, Deputy General Counsel, NNSA, to Julie A. Reddick (September 24, 2013) (September NNSA Determination); Letter from David J. Ford, Government Information Specialist, EMCBC, to Julie A. Reddick (September 23, 2013) (EMCBC Response). In a September 2013 determination, NNSA informed Ms. Reddick that, upon receipt of her FOIA request, it contacted SFO in order for that office to coordinate a search for responsive documents. SFO reported that its search did not yield any responsive records, and that “any responsive documents would be located with [DOE Headquarters].” Therefore, NNSA transferred Ms. Reddick’s request to DOE Headquarters for a search. September NNSA Determination at 1. In its September 2013 response to Ms. Reddick’s FOIA request, EMCBC similarly informed Ms. Reddick that because “any records responsive to the request that may exist are under the jurisdiction of DOE Headquarters,” it had also transferred the request. EMCBC Response. EMCBC did not perform a search of its records at that time.

Upon her receipt of the responses from NNSA and EMCBC, Ms. Reddick filed the instant Appeal, designated as OHA Case No. FIA-13-0063.¹ In her Appeal, Ms. Reddick challenged the adequacy of the agency’s search for responsive documents. Specifically, Ms. Reddick questioned the need for NNSA and EMCBC to transfer her request to DOE Headquarters. She maintained that “the records materially responsive to [her] request exist at Sandia, at [EMCBC], and at DOE [Headquarters]. There is no reason that the [requested documents] could not have been sent to [her] promptly.” September 24 Appeal. Ms. Reddick further argued that “both Sandia and [EMCBC] have responsibility and custody of the records that they produced” and, therefore, referring her request to DOE Headquarters for a response is “not consistent” with the FOIA. September 26 Appeal.

¹ Ms. Reddick submitted a letter to OHA, dated September 24, 2013, in which she appealed the September NNSA determination. Letter from Julie A. Reddick to OHA (September 24, 2013) (September 24 Appeal). She subsequently appealed EMCBC’s response in a separate letter dated September 26, 2013. Letter from Julie A. Reddick to OHA (September 26, 2013) (September 26 Appeal). OHA received both letters on September 26, 2013. While reviewing this matter, we considered those the letters together to be one Appeal, which we designated as OHA Case No. FIA-13-0063.

In October 2013, NNSA withdrew the September determination, and issued a new determination regarding Ms. Reddick's FOIA request. Letter from Elizabeth J. Osheim, Deputy General Counsel, NNSA, to Julie A. Reddick (October 22, 2013) (October NNSA Determination). According to the October determination, following a new search for responsive documents, SFO located two documents responsive to the request – the June 2013 draft employee concerns investigation report that the two investigators prepared and the email transmitting the report to the DOE Headquarters ECP Manager. NNSA released the email to Ms. Reddick in its entirety. However, NNSA withheld the report in its entirety pursuant to FOIA Exemption 5. On October 25, 2013, Ms. Reddick filed a second Appeal, challenging NNSA's withholding of information under Exemption 5. Letter from Julie A. Reddick to OHA (received October 25, 2013) (October Appeal). We have designated the second appeal as OHA Case No. FIA-13-0067.

II. Analysis

As indicated above, there were two specific documents at issue in this proceeding – an employee concerns investigation report and the accompanying transmittal email. The agency's initial searches in response to the FOIA request did not yield those documents.² Therefore, the issue initially before us for review on appeal in Case No. FIA-13-0063 was the adequacy of the agency's search. However, NNSA has since located the two requested documents, rendering moot the issue of the adequacy of the agency's search. *See* October NNSA Determination. Consequently, the only remaining issue pertains to the applicability of FOIA Exemption 5 to the withheld document, which Ms. Reddick raised in her October Appeal, Case No. FIA-13-0067.

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 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, *inter alia*, 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). In order to be shielded

² As noted above, EMCBC did not perform a search of its records upon receipt of the FOIA request prior to transferring the matter to DOE Headquarters. However, in response to our inquiry regarding this matter, the office conducted a search of the appropriate records. The search ultimately did not yield the requested documents. However, this issue is immaterial because another office, NNSA, located the requested documents.

by this privilege – generally referred to as the “deliberative process 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. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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*, 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).

In this case, we have reviewed the document that NNSA withheld in its entirety pursuant to Exemption 5. The document, which is the report that the two investigators prepared and submitted to the DOE Headquarters ECP Manager in June 2013, is clearly a draft report, and is so marked. Moreover, the document contains, *inter alia*, opinions, observations, and conclusions generated by the two investigators while they were at the relevant DOE site investigating the employee concerns at issue. However, the investigation itself is ongoing, and the agency has not yet issued its final report on the matter. *See* Email from Karen Laney, Information Programs Specialist, NNSA, to Diane DeMoura, Attorney-Advisor, OHA (October 29, 2013). Consequently, after thoroughly reviewing the document at issue, we find that the information that NNSA withheld under Exemption 5 is pre-decisional and contains material that reflects DOE’s deliberative process. Therefore, the information is exempt from mandatory disclosure under Exemption 5.

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 that disclosure 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 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) (March 19, 2009) at 2. In this case, NNSA concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the agency’s ongoing

decision-making process. Therefore, 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). According to NNSA, it reviewed the withheld document and made an attempt to segregate “releasable factual material from the non-releasable material,” but determined that the factual information was “inextricably intertwined” with the non-releasable, deliberative information. October NNSA Determination at 2. After reviewing the withheld document, we find that it contains no reasonably segregable information, particularly given that it pertains to an ongoing investigation.

III. Conclusion

As discussed above, NNSA located the documents that were the subject of the instant FOIA request. Therefore, we will dismiss as moot Ms. Reddick’s Appeal regarding the adequacy of the agency’s search. With respect to the remaining Appeal regarding the withholding of the investigators’ report in its entirety pursuant to FOIA Exemption 5, we conclude for the reasons set forth above that the document was properly withheld.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 26, 2013, by Julie A. Reddick, OHA Case No. FIA-13-0063, is hereby dismissed.
- (2) The Appeal filed on October 25, 2013, by Julie A. Reddick, OHA Case No. FIA-13-0067, is hereby denied.
- (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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Director
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Date: December 3, 2013