

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Exchange Monitor Publications)
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Filing Date: December 4, 2013) Case No.: FIA-13-0076
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Issued: January 16, 2014

Decision and Order

On December 4, 2013, Exchange Monitor Publications (Appellant) filed an Appeal from a determination issued to it on November 14, 2013, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2013-00542-F). In that determination, OIR stated that the documents which were responsive to the request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 were being withheld in their entirety under Exemption 5 of the FOIA. This Appeal challenges that withholding.

I. Background

On February 8, 2013, the Appellant filed a request with the DOE’s Office of Information Resources (OIR) for “[a]ll reports, white papers or any other kind of deliverables prepared by the ‘S-1’ expert review team at the Hanford Waste Treatment Plant” and “[a]ll reports, white papers or any other kind of deliverables prepared by any of the eight expert teams at the DOE Office of River Protection examining technical issues at the Hanford Waste Treatment Plant and enhancements to the Hanford tank waste mission.” Request Letter dated February 8, 2013, from Mike Nartker, Appellant, to Alexander Morris, FOIA Officer, OIR, DOE (Request Letter). On July 16, 2013, the request was amended to limit its scope to certain documents identified in the Office of Environmental Management’s (EM) search. Finally, on August 21, 2013, the Appellant further limited his request to “the final and the most recent draft of non-finalized reports, white papers or deliverables identified from EM’s search, excluding WTP DCT [Waste Treatment Plant Design Completion Team] Weekly Accomplishment Reports.” Determination Letter dated November 14, 2013, from Alexander Morris to Appellant. In response to the request, OIR stated that the 21 identified documents were withheld in full under Exemption 5 of the FOIA. *Id.* The Appellant challenges OIR’s withholdings under Exemption 5.

II. Analysis

There were 21 documents found to be responsive to the Appellant's amended request. OIR withheld all the documents in full under the pre-decisional deliberative process privilege and the attorney work-product privilege of Exemption 5 of the FOIA.

A. Deliberative Process Privilege

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 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 all the documents that OIR withheld pursuant to Exemption 5. The documents, fourteen of which are "deliverables" and two of which are "decision papers," are

clearly drafts, and are marked as “Draft,” “Pre-Decisional/Deliberative Process Information,” or both. The other five documents are marked “meeting minutes.” These are clearly internal documents which contain recommendations, proposals, suggestions, and other subjective matter. Moreover, all the documents contain, *inter alia*, opinions, observations, and proposed conclusions generated by the WTP DCT. Consequently, after thoroughly reviewing the documents at issue, we find that the information that OIR withheld under the deliberative process privilege of 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.^{1/}

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, OIR 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 record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). According to OIR, it reviewed the withheld documents and made an attempt to segregate releasable factual material from the non-releasable material, but determined that the factual information was “so thoroughly integrated with the deliberative material that disclosing those facts would reveal DOE’s deliberative process;” and that “[t]he drafters’ selection of specific facts out of a larger group of facts, to support their various alternative proposals, analyses, and recommendations in these documents, was itself part of the deliberative process.” Determination Letter at 3. After reviewing the withheld documents, we agree that they contain no reasonably segregable information.

III. Conclusion

After considering the Appellant’s arguments, we agree that OIR properly withheld the documents under the deliberative process privilege of Exemption 5. Accordingly, the Appeal should be denied.

^{1/} OIR also used the attorney-work product privilege to withhold the information under Exemption 5. Because we find that the information was properly withheld under the deliberative process privilege, we do not need to consider if OIR properly utilized the attorney-work product privilege.

It Is Therefore Ordered That:

(1) The Appeal filed by Exchange Monitor Publications, Case No. FIA-13-0076, 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 the provisions of 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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