United States Department of Energy
Office of Hearings and Appeals

In the Matter of John F. Garrity	)		
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Filing Date: December 12, 2013	)	Case No.:	FIA-13-0077
	)		

Issued: January 3, 2014

Decision and Order

On December 12, 2013, John F. Garrity ("Appellant") filed an Appeal from a determination issued to him on October 31, 2013, by the Oak Ridge Office (ORO) of the Department of Energy (DOE) (Privacy Act Request ORO-2013-00712-PA). In its determination, ORO responded to the Appellant's request for information filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require ORO to provide the information it withheld from the Appellant.

I. Background

On September 3, 2013, the Appellant submitted a Privacy Act Request for the following:

> Personnel Security file including transcripts of my personnel security interviews and any other information available under the provisions of the Privacy Act and Freedom of Information Act. Further, I request a copy of my Office of Personnel Management (OPM) background information file.

See Privacy Act Request from John F. Garrity, to Amy Rothrock, DOE FOIA Office (Sept. 3, 2013). On October 31, 2013, ORO responded to the Appellant's Request, stating that while it was releasing the Appellant's Personnel Security File, it redacted information contained in two documents entitled "Case Analysis and Review" and "Case Analysis and Review for ARP [Administrative Review Process]." *See* Determination Letter from Larry C. Kelly, Manager, to Appellant (Oct. 31, 2013). ORO withheld information from those documents pursuant to 5 U.S.C. § 552a(d)(5) and § 552a(k)(2) of the Privacy Act, and 5 U.S.C. § 552(b)(5) of the Freedom of Information Act (FOIA). It stated that the "withheld information consisted of investigatory information, opinions, and recommendations gathered during procedures followed in preparation for the issuance, denial, or continuation of a security clearance." *Id.* On December 12, 2013, the Appellant filed his Appeal of ORO's determination to withhold information in the released documents. *See* Appeal.

II. Analysis

1. Privacy Act Exemptions

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Privacy Act has several exemptions to its allowance for access to such records. Exemption (d)(5) of the Privacy Act does not "allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). Here, the redacted information contains comments and analysis pertaining to administrative review of access authorization, including 10 C.F.R. Part 710, which we have previously held may be considered a "civil proceeding" under Exemption (d)(5). *See In the Matter of William B. Ray*, OHA Case No. FIA-12-0049 (2012).[1]

Under Part 710, an individual is allowed to request a hearing before a DOE Hearing Officer "to present evidence in his own behalf, through witnesses, or by documents, or both; and . . . to be present during the entire hearing and be accompanied, represented, and advised by counsel or representative of the individual's choosing . . . ." 10 C.F.R. § 710.21(b). In a previous matter, *In the Matter of William B. Ray*, we explained that Part 710 hearings are adversarial in nature, with counsel for the DOE, on the one hand, "participating on behalf of and representing the Department of Energy," which has determined that there is "substantial doubt" regarding an individual's clearance eligibility. On the other hand, the individual is presenting "evidence in his own behalf, through witnesses, or by documents, or both," for "the purpose of affording [him] an opportunity of supporting his eligibility for access authorization; . . . ." *Id.* Moreover, in order to be protected from disclosure under Exemption (d)(5), the information at issue need not be developed by an attorney. *See Gov't Accountability Project v. Office of Special Counsel*, No. 87-0235, 1988 WL 21394, at *5 (D.D.C. Feb. 22, 1988) (subsection (d)(5) "extends to any records compiled in anticipation of civil proceedings, whether prepared by attorneys or lay investigators").

Based upon our review of the record, we find that the redacted information was created with the prospect of administrative litigation under the DOE regulations governing access authorization, including 10 C.F.R. Part 710.[2] First, the redacted information contains comments,

[1] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.energy.gov/oha.

[2] As we explained in *In the Matter of William B. Ray,* the longstanding guidelines of the Office of Management and Budget (OMB) regarding implementation of the Privacy Act state that the term "civil action or proceeding" as set forth in the Act "was intended to cover . . . quasi-judicial and preliminary judicial steps . . . ." Privacy Act Guidelines, 40 Fed. Reg. 28948, 28960 (July 9, 1975). Further, the OMB has specifically recognized the "quasi-judicial nature of hearing and review functions" under 10 C.F.R. Part 710. Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material, 59 Fed. Reg. 35178, 35179 (July 8, 1994). Moreover, the U.S. Court of Appeals for the District of Columbia has cited the OMB Privacy Act guidelines in finding that "Privacy Act Exemption (d)(5) protects documents prepared in anticipation of quasi-judicial administrative hearings." *See Martin v. Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987) ("[w]hatever Congress may have intended for other types of administrative proceedings, it must have intended quasi-judicial hearings to fall within the term 'civil proceedings.'").

recommendations and analyses regarding the Appellant's access authorization, including a discussion on concerns raised in the applicable Adjudicative Guidelines. Specifically, a letter, dated May 9, 2013, which was released to the Appellant with the redacted documents, indicated that ORO was still "adjudicating his continued eligibility for an access authorization." Moreover, in his Appeal, the Appellant stated that he was seeking the redacted information because he requested that DOE restore his access authorization. *See* Appeal. Finally, one of the documents with the redactions is entitled "Case Analysis and Review for ARP," or administrative review process, indicating that it was developed in preparation for the possible future administrative litigation of the Appellant's eligibility for access authorization.

In sum, based on our holding in *In the Matter of William B. Ray*, where we relied on the OMB's Privacy Act Guidelines and the United Court of Appeals for the District of Columbia Circuit's decision in *Martin v. Office of Special Counsel*, proceedings concerning access authorization, as outlined in regulations such as Part 710, are sufficiently similar to formal civil actions that they should be considered "civil proceedings" under Privacy Act Exemption (d)(5). *See In the Matter of William B. Ray*, OHA Case No. FIA-12-0049 (2012). As we discussed above, the information at issue was prepared in anticipation of administrative review of the Appellant's access authorization under Part 710 and related regulations, and therefore we find that the redacted information was properly withheld by ORO under Exemption (d)(5).

Furthermore, ORO cites to Privacy Act Exemption (k)(2) to support the same redactions. Exemption (k)(2) provides that the following information is exempt from disclosure:

> investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, *except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government* under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(emphasis added). In its Determination, ORO cites to the Regulations pertaining to Exemption (k)(2), providing that:

> The DOE systems of records listed below have been exempted under subsection (k)(2) in order to prevent subjects of investigation from frustrating the investigatory process through access to records about themselves or as a result of learning the identities of confidential informants; to prevent disclosure of investigative techniques; to maintain the ability to obtain necessary information; and thereby to insure the proper functioning and integrity of law enforcement activities. Systems of records exempted under subsection (k)(2) are: . . . (F) Personnel Security Clearance Files (DOE–43).

10 C.F.R. § 1008.12(b)(2)(ii)(F). While ORO cited 10 C.F.R. § 1008.12(b)(2)(ii)(F) to support its withholdings under Exemption (k)(2), claiming that release of the withheld information would "frustrat[e] the investigatory process," (k)(2) is specifically limited to protecting the identity of confidential sources. Indeed, the OMB's Guidelines on the Privacy Act specify that Exemption (k)(2) is narrowly applied, requiring that the record contain information that "could have only been furnished by one individual known to the subject," and that the subject of the record may be withheld "to protect the identity of the source and then only to the extent necessary to do so." *See* Privacy Act Guidelines, 40 Fed. Reg. 28,948, 28,972-73 (July 9, 1975). Thus, ORO seeks to invoke an application of (k)(2) that is broader than the plain language of the statute itself and the guidelines outlined by OMB, and therefore, we cannot conclude that Exemption (k)(2) was applied properly. Nonetheless, as explained above, we hold that the information was properly withheld under Exemption (d)(5) of the Privacy Act.

2. Freedom of Information Act Exemption (b)(5)

ORO also considered whether it could release the requested material under the Freedom of Information Act (FOIA). ORO determined that Exemption 5 of the FOIA permitted it to withhold the same material from the Appellant that it withheld under the Privacy Act.

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 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). Here, there is no dispute that the released documents satisfy this requirement as they contain documents prepared by the DOE and the Office of Personnel Management (OPM) concerning the Appellant's access authorization. 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).

Here, ORO invoked the "deliberative process" privilege. 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. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1974). It is intended to promote frank and independent discussions 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)). 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. Moreover, this 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 assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Coastal States Gas Corp.*, 617 F.2d at 866. 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).

The information that ORO withheld falls within the deliberative process privilege. It contains the recommendations, comments and analyses of individuals who reviewed the Appellant's Personnel Security File and therefore reflects the consultative process concerning the decision to deny or grant the Appellant access authorization. If such information was released, it would make the reviewers vulnerable to criticism regarding their opinions on similar matters, thereby deterring them from providing their "uninhibited opinions" in the future on such issues.

Thus, having found that ORO properly withheld portions of the requested document under the Privacy Act and the FOIA, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by the Appellant on December 12, 2013, OHA Case No. FIA-13-0077, 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 5 U.S.C. 552a(g)(1) under the Privacy Act and 5 U.S.C. 552(a)(4)(B) under the Freedom of Information Act. 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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