



As to Part 2b, wherein the Appellant requested the “notice of the date on which the Credit Subsidy Cost was sent to OMB,” LPO stated that it noted the dates and that it was printed on the released documents. *See id.*

On January 16, 2014, the Appellant appealed LPO’s determination, claiming that it did not adequately justify why Exemption 5 applied to the withheld information. *See Appeal.* Specifically, the Appellant argues that LPO did not explain how the redacted credit subsidy costs are related to any policy decision and further claims that the credit subsidy costs represent DOE’s final decision on those amounts and should be released, even though OMB still needed to approve them. *See id.* The Appellant further avers that release of the withheld information is in the public interest. *See id.* Finally, the Appellant claims that LPO’s search for documents was inadequate and that it should have released a credit subsidy matrix for the Municipal Electric Authority of Georgia (MEAG), instead of only for the Georgia Power Company (GPC) and Oglethorpe Power Corporation (OPC), as the Vogtle Loan Guarantees concern all three applicants. *See id.*

## II. ANALYSIS

### A. Exemption 5

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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. 5 U.S.C. § 552(a)(4)(B).

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). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” or “predecisional” privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). Here, it is uncontested that the credit subsidy summary matrices are inter-agency documents, as they were prepared by DOE for review by OMB.

In withholding portions of GPC and OPC’s credit subsidy matrices, LPO relied upon the “deliberative process” privilege of Exemption 5. 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).

As a preliminary issue, while the Appellant avers that the withheld information does not concern any policy, Exemption 5 protects information revealing the process by which government *decisions*, not just policies, are made. *See Sears, Roebuck & Co.*, 421 U.S. at 149. Thus, the type of information contained in the credit subsidy summary matrices may be withheld under Exemption 5 provided that it is predecisional and deliberative. In response to our inquiries, LPO explained further why the withheld information was subject to the deliberative process privilege. It stated that the methodology used for calculating the credit subsidy costs is “strictly internal to the government and a highly sensitive part of the decision making process.” *See* Email from Benjamin Rashbaum, Contractor, LPO, to Shiwali Patel, Attorney-Examiner, OHA (Jan. 23, 2014) (“Jan. 23, 2014 Email”). While LPO provides its determination on the credit subsidy costs to OMB, OMB still has to approve the amount before it is then turned over to the LPO to notify the company, or in this matter, GPC and OPC, of that amount. *See* Memorandum of Telephone Conversation between Ben Rashbaum and Shiwali Patel (Jan. 28, 2014). LPO explained that the “borrower companies not only do not see the methodology, but do not have any input into the credit subsidy process whatsoever,” and they only “receive[] the final number (the actual Credit Subsidy Cost it is required to pay to receive the loan guarantee) after inter-agency review is complete.” Jan. 23, 2014 Email. Thus, LPO avers that as OMB still needs to review and approve the costs submitted by LPO, the released documents do not contain the final credit subsidy costs and are therefore predecisional. *Id.*

LPO also consulted with OMB before releasing the credit subsidy matrices to the Appellant. OMB requested that the subheadings on the matrices between “Credit Rating” and “Total Subsidy,” be redacted, stating that “[t]hese are factors in determining the subsidy, that, if released, could allow for potential stakeholders (such as future loan applicants) to exert undue influence on the rate of a pending application.” *Id.* LPO agreed, and redacted those headings. Thus, upon consideration of aforementioned, we conclude that LPO properly withheld the information in the released documents pursuant to Exemption 5.

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 it is in the public interest. 10 C.F.R. § 1004.1. Here, we conclude that the redacted information should remain withheld as discretionary disclosure of that information is not in the public interest. LPO explained that “[a]s the decision is not yet finalized, this does not represent the agency’s final decision and releasing these documents in full could be misleading.” *See* Determination Letter. We agree, and conclude that the information shall remain withheld as there is no public interest in prematurely releasing information on the credit subsidy costs, particularly as they are not finalized.

## B. Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). “[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Project on Government Oversight*, Case No. TFA-0489 (2011).\*

In response to our inquiries, LPO explained its search methodology and why it could not provide the credit subsidy matrix for MEAG. *See* Jan. 23, 2014 Email. LPO stated that each proposed loan guarantee for GPC, OPC and MEAG was being negotiated separately. *See id.* Hence, all three companies are at different points in the loan guarantee process and accordingly, only the credit subsidy matrices for GPC and OPC were submitted to OMB. *See Id.* Based on the information provided by LPO, we are satisfied that LPO has conducted an adequate search for documents, and that it released the documents requested by the Appellant in its narrowed Request – “the credit subsidy cost that DOE sends to the Office of Management and Budget for its approval.” *See id.* As only the credit subsidy matrices for GPC and OPC were sent to OMB, we conclude that LPO conducted an adequate search for responsive documents.

It Is Therefore Ordered That:

- (1) The Appeal filed on January 16, 2014, by the Southern Alliance for Clean Energy, OHA Case No. FIA-14-0006, 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. § 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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