

II. Analysis

OIR withheld portions of information from the September 25, 2013, e-mails under the pre-decisional deliberative process 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 the September 25 e-mails, portions of which OIR withheld pursuant to Exemption 5. The e-mails clearly contain information which is deliberative in nature. The Appellant claims that it has "reason to believe the redacted e-mails dated September 25 have information related to Anthony Cugini being placed on administrative leave as NETL

Director. Thus those September 25 e-mails cannot be pre-decisional because the decision to remove Anthony Cugini from his post . . . has already been made on September 18.” Appeal Letter at 1. In its request, the Appellant did not specify that the responsive information only deals with the dismissal of Mr. Cugini. Our review of the e-mails in question shows that in fact they do contain information that is pre-decisional in nature regarding issues other than Mr. Cugini’s dismissal. The pre-decisional information reflects the personal opinions of the writer rather than the policy of the agency. Moreover, all the e-mails contain, *inter alia*, opinions, observations, and proposed conclusions generated by the authors of the e-mails. 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.

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). 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 portions of the September 25 e-mails under the deliberative process privilege of Exemption 5. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Exchange Monitor Publications, Case No. FIA-14-0010, 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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