

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

In the Matter of Donna Deedy )  
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Filing Date: February 6, 2014 ) Case No.: FIA-14-0011  
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Issued: February 26, 2014

**Decision and Order**

On February 6, 2014, Ms. Donna Deedy (“Appellant”) filed an Appeal from a determination issued to her on January 30, 2014, by the Department of Energy’s Office of Health, Safety, and Security (DOE-HSS) (FOIA Request No. HQ-2013-01779-F). In its determination, the DOE-HSS responded to a request for documents submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE-HSS to release the information it withheld pursuant to Exemption 5 of the FOIA.

**I. BACKGROUND**

On December 6, 2013, the Appellant submitted a FOIA Request<sup>1</sup> (Request) seeking:

1. A copy of the last Memorandum of Understanding submitted to the Department of Health and Human Services signed by Secretary of Energy Samuel Bodman;
2. A copy of the April 1, 2005 letter sent to Michael Leavitt from Secretary of Energy Samuel Bodman sent with that Memorandum of Understanding;
3. A copy of the Memorandum of Understanding signed by both the Department of Health and Human Services and the Department of Energy.

December 6, 2013 Request E-mail at 1.

On January 30, 2014, DOE-HSS issued a determination letter (January 30 Determination Letter) regarding the Appellant’s December 6, 2013 FOIA Request. In the January 30 Determination Letter, DOE-HSS identified one document (Document) consisting of an April 1, 2005, letter (Letter) from John S. Shaw, Assistant Secretary for the DOE’s Office of Environment, Safety

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<sup>1</sup> The Individual sent the December 6 Request to the Centers for Disease Control and Prevention, a part of the Department of Health and Human Services (HHS). Memorandum of Telephone Conversation between Robyne Johnston, DOE-HSS, and Richard A. Cronin, Jr., Attorney-Advisor, OHA (February 14, 2014). Upon receiving the request, HHS referred the Request to DOE for processing since the responsive material originated with DOE.

and Health to Michael O. Leavitt, Secretary of Health and Human Services with an enclosed Memorandum of Understanding (MOU) signed by Secretary of Energy Samuel Bodman. DOE-HSS, in the January 30 Determination Letter, asserted that the Document was protected by Exemption 5. DOE-HSS noted that the Appellant had made an identical FOIA request to DOE on August 19, 2013, and that DOE-HSS had responded to that request on September 30, 2013 (September 30 Determination Letter). DOE-HSS enclosed a copy of its September 30 Determination Letter where it cited Exemption 5's deliberative process privilege to justify withholding the Document from the Appellant.<sup>2</sup> In its September 30 Determination Letter, DOE-HSS noted that the release of frank and independent recommendations, such as contained in the document, would harm the quality of agency decision making by discouraging officials from making frank and independent recommendations.

On February 6, 2014, the Appellant appealed DOE-HSS's determination, claiming that the Document represents a final decision by the DOE and as such may not be protected from disclosure pursuant to the deliberative process privilege of Exemption 5.

## II. ANALYSIS

The FOIA requires generally that federal agencies release documents to the public upon request. However, the FOIA contains 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). In the present case, DOE-HSS relied on the deliberative process privilege to justify its withholding of the Document under Exemption 5. For the purposes of reviewing DOE-HSS' January 30 determination, we will consider the Document as consisting of two separate documents, the Letter (page 1 of the Document) and the MOU (the remainder of the Document).

### A. The Letter

Our review of the Letter indicates that it is a one-page cover letter seeking to transmit a copy of the MOU to Secretary Leavitt's office. The Letter describes the general subject matter of the MOU and states that the MOU is being provided for HHS' review and Secretary Leavitt's signature. None of the information seems to contain deliberative material and thus, DOE-HSS

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<sup>2</sup> From the context of the January 30 Determination Letter, it appears that DOE-HSS sought to incorporate the September 30 Determination Letter's rationale for withholding the Document into its January 30 Determination Letter.

inappropriately applied Exemption 5 to withhold the Letter. Consequently, we will remand this matter to DOE-HSS. On remand, DOE-HSS should release the Letter or issue another determination justifying its withholding of the Letter pursuant to the FOIA.

### **B. The MOU**

The copy of the MOU at issue in this case was signed by Secretary Bodman. However, it appears that DOE and HHS failed to finalize this copy of the MOU since Secretary Leavitt did not sign the MOU. Further, an official at DOE-HSS informed us that DOE and HHS never came to agreement regarding the MOU. Memorandum of Telephone Conversation between Robyne Johnston, DOE-HSS, and Richard A. Cronin, Jr., Attorney-Advisor, OHA (February 14, 2014). Consequently, this copy of the MOU is not a final decision between DOE and HHS and, as such, represents only a draft of the contemplated MOU. This conclusion is further supported by the Letter, which states that the enclosed MOU was being provided to Secretary Leavitt for HHS review and his signature. Because the MOU is a predecisional, deliberative document, DOE-HSS properly applied Exemption 5 protection to the MOU pursuant to the deliberative process privilege.

### **C. 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, DOE-HSS 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 by discouraging frank and candid recommendations by agency officials. Therefore, discretionary release of the MOU would not be in the public interest.

### **D. 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). In the September 30 Determination Letter that DOE-HSS enclosed with its January 30 Determination Letter, DOE-HSS stated that, with regard to segregability, it reviewed the document and found that the nonexempt factual information is so intertwined with exempt deliberative information that reasonable segregation is not possible. September 30 Determination Letter at 2. Our review of the MOU indicates that the relatively small amount of factual information is so thoroughly integrated with the deliberative material that segregability is not practical. *See Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (holding that information is not reasonably segregable "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that

separation by the agency and policing . . . by the courts would impose an inordinate burden”). Consequently, we find that the MOU should be withheld in its entirety.

It Is Therefore Ordered That:

- (1) The Appeal filed on February 6, 2014, by Donna Deedy, OHA Case No. FIA-14-0011, is denied in part and granted in part, as described in the above Decision.
- (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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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: February 26, 2014