

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

In the Matter of Richard van Dijk )  
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Filing Date: May 28, 2014 ) Case No.: FIA-14-0029  
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Issued: June 5, 2014

**Decision and Order**

On May 28, 2014, Richard van Dijk (Appellant) filed an Appeal from a determination issued to him on April 28, 2014, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE) (Request No. BPA-2014-00719-F). In that determination, BPA released 101 pages of responsive documents, but withheld some information under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In addition, BPA redacted some information as non-responsive to the request. This Appeal challenges that withholding on pages 86-95 and 101.

**I. Background**

On March 17, 2014, the Appellant filed a request with BPA for “copies of all documents from the Transmission Management Committee (TMC) meetings that reference or relate to: Big Eddy-Knight, Central Ferry-Lower Monumental, 1-5 Reinforcement Transmission projects and Network Open Season” between March 2013 and March 2014. Request dated March 17, 2014, from Appellant to BPA. In response to the request, BPA released 101 responsive pages, withholding some information as non-responsive and some information under Exemption 5 of the FOIA. Determination Letter dated April 28, 2014, from Christine J. Munro, FOIA Officer, BPA, to Appellant. The Appellant challenges BPA’s withholdings on pages 86-95 under Exemption 5 and on page 101 as non-responsive.

**II. Analysis**

There were 101 pages of documents found to be responsive to the Appellant’s request. BPA withheld portions of the documents under the pre-decisional deliberative process privilege of Exemption 5 of the FOIA. In addition, BPA withheld some information on those pages as non-responsive to the request. The Appellant is challenging the withholdings under Exemption 5 on pages 86-95 and as non-responsive on page 101.

## 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 pages that BPA withheld pursuant to Exemption 5. The information withheld from pages 86-95 is clearly pre-decisional. These pages are internal documents which contain recommendations, proposals, suggestions, and other subjective matter. Moreover, all the documents contain, *inter alia*, opinions, observations, and proposed conclusions, with the exception of page 88. Consequently, after thoroughly reviewing the documents at issue, we find that the information that BPA withheld under the deliberative process privilege of Exemption 5 is pre-decisional and contains material that reflects DOE's

deliberative process. Therefore, the information, with the exception of page 88, is exempt from mandatory disclosure under Exemption 5.

Page 88 of the withheld information appears to contain only factual information. For this reason, we contacted BPA to ascertain if our conclusion was correct. BPA agreed that the page contains factual information. E-mail dated June 3, 2014, from Kim Winn, BPA, to Janet R. H. Fishman, OHA, DOE. BPA has agreed to release the document to the Appellant. *Id.* On June 4, 2014, BPA released page 88 to the Appellant. E-mail dated June 4, 2014, from Kim Winn, BPA, to Janet R. H. Fishman, OHA, DOE, attaching copy of letter dated June 4, 2014, from Christine J. Munro, FOIA Officer, BPA, to Appellant.

### **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, BPA 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). We have reviewed all of the withheld information. It is apparent that BPA was careful in its withholdings and the information withheld does not contain any factual information, with the exception of page 88. As stated above, BPA has released page 88 to the Appellant. E-mail dated June 4, 2014, from Kim Winn, BPA, to Janet R. H. Fishman, OHA, DOE, attaching copy of letter dated June 4, 2014, from Christine J. Munro, FOIA Officer, BPA, to Appellant.

### **D. Non-Responsive Information**

BPA withheld the information on page 101 as non-responsive to the request. The Appellant challenges that withholding, claiming that "any improvements on the DC intertie also affect the power flow through the grid and impact the I-5 project." Like the information withheld under Exemption 5, we have reviewed the withheld information. We agree with BPA that the information is not responsive to the Appellant's request. Therefore, BPA properly withheld the non-responsive information.

### III. Conclusion

After considering the Appellant's arguments, we agree that BPA properly withheld the documents under the deliberative process privilege of Exemption 5, with the exception of page 88, and properly withheld information as non-responsive to the request. Subsequent to this Appeal, BPA released page 88 to the Appellant. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Richard van Dijk, Case No. FIA-14-0029, 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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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

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