United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Carolyn Epps	)		
		)		
Filing Date:	December 31, 2014	)	Case No.:	FIA-15-0001
		)		

Issued: January 23, 2015

Decision and Order

On December 31, 2014, Carolyn Epps appealed determinations that she received from the Department of Energy (DOE) Office of Information Resources (OIR), the DOE office responsible for processing requests at DOE Headquarters, on November 20, 2014, and December 4, 2014. In those determinations, OIR responded to her request for a copy of a specified e-mail message that she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 (FOIA Case No. HQ-2014-01898-F). In response to the FOIA request, OIR identified and released two responsive documents, but withheld portions of them pursuant to FOIA Exemptions 5 and 6. In her Appeal, Ms. Epps challenges the applicability of Exemptions 5 and 6 to the withheld information. This Appeal, if granted, would require OIR to release the information that it previously withheld under those Exemptions.

I. BACKGROUND

Ms. Epps submitted a FOIA request for a copy of an e-mail message that Jocelyn Richards of the Office of the General Counsel sent to "Cheryl Keith and/or Donna Williams-Dixon, Office of Employee/Labor Management Relations Division . . . between March 26, 2013 and March 29, 2013." *See* Letter from Alexander C. Morris, OIR, to Carolyn Epps (November 20, 2014) (Determination Letter). In its November 2014 determination, OIR indicated that the DOE's Office of the General Counsel (GC) had searched its files and identified two documents as responsive to Ms. Epps's request. One document was an e-mail message that Ms. Richards sent to Ms. Keith and Ms. Williams-Dixon on March 26, 2013, together with two attachments to that message. OIR withheld portions of the e-mail itself under Exemptions 5 and 6 of the FOIA, and portions of the first attachment under Exemption 6. OIR stated that "the second attachment to [the e-mail] has been omitted because it is a duplicate of document two." Determination Letter at 4. It withheld the second document in its entirety under Exemption 5, stating that the

document, as well as the portions of the first document that were withheld under the same exemption, is protected by the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. *Id.* at 1-2.

OIR issued a second determination letter regarding Ms. Epps's request on December 4, 2014, in which it indicated that the DOE's Office of the Chief Human Capital Officer had searched its files and identified the same two documents, and no additional documents, as responsive to Ms. Epps's request. After receiving the determination letters and the accompanying released documents, Ms. Epps filed the instant Appeal with the DOE Office of Hearings and Appeals (OHA), challenging the applicability of Exemptions 5 and 6 to the withheld information. *See* E-mail from Carolyn Epps to OHA (December 31, 2014) (Appeal).

II. ANALYSIS

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.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory 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 Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149 (1975). 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" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In its determination, OIR characterized the documents in question as being subject to all three of these privileges. Determination Letter at 1. After reviewing the material that OIR withheld pursuant to Exemption 5, we have determined that some of it is subject to the attorney work-product privilege and the remainder is subject to the deliberative process privilege.

1. The Attorney Work-Product Privilege

The attorney work-product privilege protects from disclosure documents that reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S.

495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman,* 329 U.S. at 510-11. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area with which he can analyze and prepare his client's case." *United States v. Nobles,* 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work-product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g., Coastal States,* 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added), *as cited in United States v. Adlman,* 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to court proceedings, but extends to administrative proceedings as well. *See, e.g., Exxon Corp. v. Dep't of Energy,* 585 F. Supp. 690, 700 (D.D.C. 1983).

OIR withheld the second document in its entirety under Exemption 5.[1] The document consists of legal advice that the Office of General Counsel is providing to a DOE client, including the client's responsibilities under applicable laws and regulations. In light of the nature of the information imparted in the document, there is no question that it was prepared because of the prospect of litigation, particularly an adversarial disciplinary hearing or other litigation that might arise if the DOE failed to meet the responsibilities outlined in the document. Consequently, the entire document was properly withheld under Exemption 5 as subject to the attorney work-product privilege. In addition, portions of Ms. Richards's March 26, 2013, e-mail message reiterated the same legal advice contained in the second document. For the same reason, those portions were as well properly withheld under Exemption 5.

2. The Deliberative Process Privilege

Exemption 5 permits the withholding of responsive material that 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). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Id.* at 151. 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. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[1] This document is not identical to the second attachment to Ms. Richards's March 26, 2013, e-mail message, but rather consists of that attachment as well as a short e-mail chain in which DOE counsel and a DOE program office exchanged communication regarding that attachment.

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 (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 Gas Corp.*, 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).

The remaining material that OIR withheld from Ms. Richards's March 26, 2013, e-mail message under Exemption 5 consists of information subject to the deliberative process privilege. These redacted portions consist of Ms. Richards's descriptions of her observations and assessment of a DOE employee. They are purely subjective, and appear to have been offered to the addressees—employees in an office that concerns itself with labor and employee relations—to inform that office of a potential issue that falls within its area of expertise. The withheld material clearly precedes any official agency position with respect to the information she imparted, and it represents a form of intra-agency consultation protected by this privilege. Consequently, we find that this material was properly withheld under Exemption 5 as subject to the deliberative process privilege.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The Supreme Court and other federal courts have given the phrase "personnel and medical files and similar files" a broad meaning when a requested document refers specifically to an individual. *See, e.g., Washington Post*, 456 U.S. at 602; *Forest Serv. Employees for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals). The information withheld in this case under Exemption 6 consists of the names of, and identifying information about, federal employees that appear in the March 26, 2013, e-mail message and the first attachment to that message.

In determining whether a record may be withheld under Exemption 6, an agency must perform a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the record. If the agency cannot find a significant privacy interest, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired*

Federal Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (NARFE); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information at issue would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Lastly, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally NARFE*, 879 F.2d at 874.

We find that there is a significant privacy interest in the identities of the federal employees whose names and other identifiers were redacted from the March 26, 2013, e-mail and its first attachment. Generally, civilian federal employees who are not involved in law enforcement have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees. *See Office of Pers. Mgmt. Regulation*, 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public). However, federal employees do have an expectation of privacy in other information about them. Disclosure of the information withheld under Exemption 6 would reveal the identity of participants in a labor management action. Federal employees have an expectation of privacy in their involvement in such actions, as it is not a matter of public record, in contrast to their names, titles, grades, salaries, and duty stations. The courts generally recognize the sensitivity of information, both favorable and unfavorable, contained in personnel-related records. *Ripskis v. HUD*, 746 F.2d 1, 3-4 (D.C. Cir. 1984) (identity of employees who received outstanding performance ratings); *Wilson v. Dep't of Trans.,* 730 F. Supp. 2d 140, 156 (D.D.C. 2010), *aff'd,* No. 10-5295, 2010 WL 5479580 (D.C. Cir. Dec. 20, 2010) (identity of Equal Employment Opportunity complainant).

Because we find that a protectable privacy interest exists, we must now consider if release of the withheld information would further the public interest by shedding light on the operations and activities of the government. As a general matter, the courts have not found that release of individual federal employee names, when presumptively withholdable, provides any light to the workings of a federal agency. *See Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996) ("There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of [various federal employees]"). In reviewing the documents, we find that no additional information regarding labor-management relations specifically, or the DOE's operations generally, would be disclosed by release of the withheld information. Consequently, we find that there is no public interest that would be furthered by release of the information withheld in the documents.

In applying the Exemption 6 balancing test, we have found that there is a significant privacy interest in the names of, and identifying information about, the federal employees. We also find that there is no public interest that is furthered by release of the withheld information. Balancing these factors pursuant to Exemption 6, we find that release of the withheld information would constitute a clearly unwarranted invasion of personal privacy. Consequently, Exemption 6 was properly invoked to withhold the redacted information.

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; *see also, e.g., Hanford Atomic Metal Trades Council*, OHA Case No. FIA-13-0058 (2013).[2] 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.

We have determined that discretionary release of the information withheld under Exemption 5 would cause harm to the DOE's ongoing decision-making process and to the expectation of confidentiality between clients and legal counsel because of the prospect of litigation. We find that release of such information could have a chilling effect on the agency's ability to obtain frank opinions and recommendations from its employees in the future. Therefore, discretionary release of the withheld information would not be in the public interest. *See, e.g., Judicial Watch,* OHA Case No. FIA-13-0002 (2013). Similar consideration of discretionary release regarding information subject to withholding under Exemption 6 is not necessary, as the public interest in disclosure has already been weighed in the Exemption 6 analysis itself.

D. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). After reviewing the responsive documents, we find that OIR complied with the FOIA by releasing to Ms. Epps all reasonably segregable information.

III. CONCLUSION

As discussed above, we find that OIR properly applied Exemptions 5 and 6 in withholding information from the responsive documents, and released to Ms. Epps all reasonably segregable, non-exempt material. We further find that discretionary release of the withheld information would not be in the public interest. Accordingly, we will deny Ms. Epps's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on December 31, 2014, by Carolyn Epps, OHA Case No. FIA-15-0001, 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

[2] Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/oha.

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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 23, 2015