United States Department of Energy
Office of Hearings and Appeals

In the Matter of Anthony Rivera	)	
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Filing Date: August 10, 2015	)	Case No.: FIA-15-0045
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	)	

Issued: August 31, 2015

Decision and Order

On August 10, 2015, Anthony Rivera (Appellant) filed an Appeal from a determination issued to him by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. FOIA 15-00143-H). In that determination, NNSA released a number of documents responsive to the Appellant's request 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. However, NNSA also withheld 19 documents under Exemption 5 of the FOIA. This Appeal, if granted, would require NNSA to release those withheld documents.

I. Background

On March 16, 2015, the Appellant filed a request with NNSA for documents that mention him in specified ways during specified periods of time. Request E-mail dated March 16, 2015, from Appellant to NNSA. On June 11, 2015, NNSA responded, stating that it found 130 responsive documents, but that it was withholding 19 of those documents under Exemption 5. Determination Letter dated June 11, 2015, from Jane Summerson, Authorizing and Denying Official, NNSA, to Appellant. On August 10, 2015, the Appellant filed this Appeal claiming that NNSA had previously released information similar to that which it withheld in its June 11, 2015, determination. Appeal E-mail received August 10, 2015, from Anthony Rivera, Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

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). After reviewing the material that NNSA withheld pursuant to Exemption 5, we have determined that it is subject to the attorney-client privilege.

An agency may withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). While the privilege primarily applies to facts divulged by a client to his attorney, courts have held that it also encompasses opinions given by an attorney to a client based upon, and therefore reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005); *see also McKinley v. Bd. of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 65 (S.D.N.Y 2012); *Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). In the governmental context, "an agency can be a 'client' and agency lawyers can function as attorneys within the relationship of the privilege." *Rein v. U.S. Patent and Trademark Office*, 553 F. 3d 353, 376 (*quoting Coastal States Gas Corp.*, 617 F.2d at 863). Not all communications between attorney and client are privileged, however. *See Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121 (D.D.C. 2013). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

In this case, upon review of the 19 documents at issue, we find that the information withheld pursuant to the attorney-client privilege is comprised of legal opinions and advice rendered by DOE attorneys to other DOE staff regarding a pending matter on which the DOE staff specifically sought legal advice. Accordingly, the documents are withholdable under Exemption 5 based on the attorney-client privilege. In making this determination, we reject the Appellant's apparent argument that once an agency releases an "intra-agency" e-mail of any type, it must release all responsive "intra-agency" e-mails, regardless of their exempt status. Appeal E-mail. Nothing in the FOIA suggests that the previous release of a non-exempt email waives the exemption for other emails containing exempt material. 5 U.S.C. § 552 (a). Therefore, we find that NNSA correctly applied the attorney-client privilege to the withheld information.

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; *see also, e.g., Hanford Atomic Metal Trades Council*, Case No. FIA-13-0058 (2013). 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. 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,* Case No. FIA-13-0002 (2013).

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). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requester. An exception is where the amount of non-exempt information is so small and interspersed with exempt material that its segregation would pose too large a burden on the agency or make the non-exempt information meaning less. *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 83-86 (2d Cir. 1979). After reviewing the withheld documents, we agree with NNSA that no portion of the document could be segregated.

III. Conclusion

After considering the Appellant's claim, we conclude that the 19 documents were properly withheld under Exemption 5. Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Anthony Rivera, Case No. FIA-15-0045, 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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