

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Dan Zegart)
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Filing Date: September 9, 2015) Case No.: FIA-15-0050
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Issued: October 23, 2015

Decision and Order

On September 9, 2015, Dan Zegart (“Appellant”) of the Climate Investigation Center filed an Appeal from determinations issued to him on August 17 and 28, 2015, by the Department of Energy’s National Energy Technology Laboratory (NETL). In its determinations, NETL responded to a request for documents (FOIA Request No. 2015-01534-F) 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 NETL to release the information it withheld pursuant to Exemptions 4, 5 and 6 of the FOIA.

I. BACKGROUND

On March 29, 2015, the Appellant submitted a FOIA Request (Request) to NETL regarding information relating to the development of clean coal and carbon capture and storage technologies during the period January 1, 1998, through December 31, 2011. August 17, 2015, partial determination letter from R. Paul Detwiler, Authorizing Official, NETL to Dan Zegart (8/17 Partial Determination Letter). After a discussion with NETL officials, the Appellant narrowed his Request to six specific categories of information relating to meetings between NETL and various named power companies regarding clean coal and carbon capture and storage technologies and the “TRIG” process.¹

On July 7, 2015, NETL sent a partial determination letter (7/7 Partial Determination Letter) to the appellant in which it provided the Appellant a copy of a cooperative agreement (Cooperative Agreement) between NETL and Southern Company Services, Inc. (Southern) that had information withheld pursuant to FOIA Exemptions 4 and 6, along with various other documents modifying and amending the Cooperative Agreement.² 7/7 Partial Determination Letter.

¹ TRIG (Transport Reactor Integrated Gasification) is a coal-gasification process that converts coal to synthesis gas that can produce electrical power. See <http://www.mississippipower.com/about-energy/plants/kemper-county-energy-facility/gasification-and-trig> (visited on September 23, 2015).

² The Cooperative Agreement is a DOE agreement to provide financial assistance to Southern in order to build a demonstration project – a 285 Megawatt Power Plant that would use the TRIG technology (Project).

On August 6, 2015, the Appellant filed an Appeal from NETL's 7/7 Partial Determination Letter based on a number of grounds, including the argument that NETL had not specified which Exemption applied to which specific redaction. August 6, 2015, FOIA Appeal at 2. During the pendency of this Appeal, the Office of Hearings and Appeals (OHA), was informed that NETL was going to withdraw its 7/7 Partial Determination Letter and issue another partial determination letter regarding the Cooperative Agreement. Given this information, OHA subsequently dismissed the Appellant's August 6, 2015, Appeal as moot.³ August 13, 2015, Dismissal Letter (OHA Case No. FIA-15-0043) from Poli A. Marmolejos, Director, OHA, to Sharon Eubanks, Esq., Counsel for Appellant.

On August 17, 2015, NETL issued a partial determination letter (8/17 Partial Determination Letter) in place of the withdrawn 7/7 Partial Determination Letter. In the 8/17 Partial Determination Letter, NETL identified the specific exemption (Exemption 4 or 6) that pertained to each of withheld portions of the Cooperative Agreement and the Cooperative Agreement's amendments and modifications. On August 28, 2015, NETL issued another partial determination letter (8/28 Partial Determination Letter) in which it released various other documents, some of which had information withheld pursuant to Exemptions 4 and 5.

In its present Appeal, the Appellant asserts three arguments: (1) NETL has failed to produce a final response to the Appellant's FOIA Request within the time deadline required by the FOIA; (2) NETL should be required to produce a Vaughn index of responsive documents in its possession; and (3) NETL's invocation of Exemptions 4, 5 and 6 do not support its withholding of the redacted material it provided in the 8/17 and 8/28 Partial Determination Letters.

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) (*Klamath*). 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 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. Timeliness of the Response

We find that the Appellant's arguments concerning a NETL's failure to provide a final response to its Request to be unavailing. OHA does not have jurisdiction over matters that relate to whether

³ On August 6, 2015, NETL sent another partial determination letter to the Appellant in which NETL provided a number of documents in their entirety to the Appellant. August 6, 2015, partial determination letter from R. Paul Detwiler, Authorizing Official, NETL to Dan Zegart.

the agency has responded to a FOIA request in a timely manner. Section 1004.8(a) of the DOE regulations grants the OHA jurisdiction to consider FOIA appeals when: 1) the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request or 2) when the Freedom of Information Officer has denied a request for waiver of fees. 10 C.F.R. § 1004.8(a). The OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when an appeal is based on the agency's failure to process a FOIA within the time specified by law. *See Alliance to Protect Nantucket Sound*, OHA Case No. FIA-13-0018 (2013) (no administrative remedy for agency's non-compliance with a timeliness requirement). Accordingly, the Appellant's argument in this regard is unavailing.⁴

B. Whether a *Vaughn* Index was Required

With regard to the Appellant's argument that NETL should be required to provide a *Vaughn* index of the documents responsive to the Appellant's Request, we note that the search for documents is still ongoing – thus such an index could not be created. More importantly, there is no requirement for NETL to produce a *Vaughn* index when a FOIA request is at the administrative level. *See Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, inter alia, "[i]nitial agency responses to FOIA requests are not required to contain a *Vaughn* index"); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide a *Vaughn* indices until ordered by court after plaintiff has exhausted administrative process).

C. Whether the Redacted Material was Exemption from Disclosure

As for the Appellant's remaining argument concerning the propriety of NETL's use of Exemption 4, 5 and 6, we have obtained and reviewed unredacted copies of the withheld material. We find that, for the majority of the withheld information, NETL appropriately used Exemptions 4, 5, and 6.

1. 8/17 Partial Determination

As stated above, in its 8/17 Partial Determination, NETL released portions of the Cooperative Agreement and related modifications and amendments, but withheld portions pursuant to Exemptions 4 and 6. The Appellant challenges the applicability of those exemptions.

a. Information Withheld Pursuant to Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). The 8/17 Partial Determination Letter does not claim that the release of the withheld information would reveal a trade secret or that the withheld information is "privileged," but contends that the information it withheld under Exemption 4 is "sensitive

⁴ NETL has attempted to meet with the Appellant to see if its Request could be narrowed to provide the Appellant a quicker response with regard to the information he seeks.

proprietary and commercial information” which is kept in confidence by Southern. 8/17 Partial Determination Letter at 2.

In order to determine whether the information is “confidential,” the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. NETL has informed us that the withheld information was involuntarily submitted. Memorandum of Telephone Conversation between Ann Dunlap, Office of Chief Counsel, NETL, and Richard Cronin, Staff Attorney, OHA (September 23, 2015). NETL asserts that release of the redacted information would cause substantial competitive harm to Southern. 8/17 Partial Determination Letter at 2.

In its 8/17 Partial Determination Letter, NETL provided the Appellant with the Cooperative Agreement along with various modification and amendment documents to the agreement. In the Cooperative Agreement, NETL withheld the “Unlimited Rights,” “Limited Rights,” and “Protected” categories of data in the Cooperative Agreement pursuant to Exemption 4. Our review of these portions of the Cooperative Agreement does not lead us to believe that release of the material would cause substantial competitive harm to Southern.⁵ The withheld material consists of only descriptions of the type of data and not the data itself. Consequently, we will remand this matter to NETL to either release this information or provide a new partial determination justifying the withholding of this material.

NETL also withheld, in its entirety, the section of the Cooperative Agreement titled “Restricted Computer Systems.” We find that this section consists of a list of computer software to be used in the Project itself. It is not immediately clear how release of the list of software itself could cause competitive harm to Southern. On remand, NETL should either release the “Restricted Computer Systems” section of the Cooperative Agreement or provide a new determination justifying withholding of this section under Exemption 4 or another FOIA exemption.

Pursuant to Exemption 4, NETL also withheld, in its entirety, Section 3.13 of the Cooperative Agreement, “Commercialization of Demonstration Technology.”⁶ This section outlines general provisions regarding the future licensing of the Project’s technology such as the duty to negotiate in good faith with responsible applicants. Cooperative Agreement, Section 3.13(a). These provisions do not appear to reveal the type of commercial information that could cause substantial competitive harm to Southern. On remand, NETL should either release Section 3.13 or issue the Appellant another determination letter justifying the withholding.

⁵ This information is contained in pages 26-28 and 31-35 of the redacted Cooperative Agreement.

⁶ This information is located in pages 34-35 of the redacted Cooperative Agreement.

The remaining information withheld pursuant to Exemption 4 consists of the entirety of the “Amended and Restated Repayment Agreement” (Repayment Agreement) contained in Attachment D to the Cooperative Agreement.⁷ We find that some of the information, such as the amount of fees to be paid to DOE, might constitute commercial information that could give Southern’s competitors insight regarding Southern’s pricing strategy with DOE. However, the vast bulk of the withheld information seems to consist of information that does not directly reveal commercial information (e.g., “Article I. General Objectives”). On remand, NETL should consider whether any non-Exemption 4 material could be segregated⁸ from the Repayment Agreement and released to the Appellant or issue a new determination letter justifying withholding of this information.

b. Information Withheld Pursuant to 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 the 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). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep’t of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 769, 773 (1989). Finally, 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 Ripskis*, 746 F.2d at 3. In its 8/17 Partial Determination Letter, NETL removed the names and contact information of individuals to protect their privacy.

Pursuant to Exemption 6, NETL withheld the names and contact information of the Southern employees listed in Modifications 004⁹, 005, 006, 007, 008, and Amendments 009 and 0010 to the Cooperative Agreement.¹⁰ In its 8/17 Determination Letter, NETL states that “the names of key personnel, business officers, and principal investigators have been removed to protect their privacy.” 8/17 Partial Determination Letter at 2-3. Given that NETL has not identified the privacy interests of the withheld individuals’ names and business addresses in more detail, we cannot make

⁷ This information is contained in pages 74-78 of the redacted Cooperative Agreement.

⁸ *See supra* at 10 regarding the duty to segregate non-exempt from exempt material responsive to a FOIA request.

⁹ Modification 004 and 010 also contains a copy of Section 3.13, the Unlimited Rights,” Limited Rights,” and “Protected” sections of the Cooperative Agreement which were withheld pursuant to Exemption 4 and are discussed *infra*.

¹⁰ This information was withheld in pages 1, 9, 73, 79, 81-82, 85, 91 and 98 of the redacted Cooperative Agreement as modified by Modifications 004 to 007.

a finding regarding the propriety of its application of Exemption 6. Therefore, on remand, NETL should make a more detailed analysis of why Exemption 6 applies to the withheld names and business contact information, explain how another FOIA Exemption is applicable to the Exemption 6 withheld material, or release the information to the Appellant.¹¹

2. 8/28 Partial Determination

NETL released various redacted documents to the Appellant in its 8/28 Partial Determination Letter. As authority for the redactions, NETL cited either Exemption 4, 5, or 6.

We have already discussed the scope of Exemptions 4 and 6 in subpart 1 above. 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) (*Coastal States*). NETL asserts in its 8/28 Partial Determination Letter that the material withheld pursuant to Exemption 5 consists of information that is protected by the deliberative process, attorney-client, and attorney work product privileges.¹² 8/28 Partial Determination Letter at 2. The 8/28 Partial Determination Letter states that release of the redacted Exemption 5 material would adversely affect the quality of agency decision making processes. *Id.*

The “deliberative process” privilege of Exemption 5 permits the government to withhold documents that reflect 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). It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The

¹¹ We note that the names of businesses owners who participate in government programs with the federal government may have reduced Exemption 6 privacy interests. *See Wash. Post Co. v. USDA*, 943 F. Supp. 31, 34-36 (D.D.C. Oct. 18, 1996) (names of recipients of payments in cotton price support program found not withholdable under Exemption 6); *Ackerson & Bishop Chartered v. USDA*, No. 92-1068, *slip op.* at 1 (D.D.C. July 15, 1992) (concluding that commercial mushroom growers operating under individual names have no expectation of privacy). With regard to business contact information, some courts have held, in certain business contexts, that employees’ business contact information may have a reduced privacy interest in the Exemption 6 context. *See Hersh & Hersh v. HHS*, 2008 WL 901539, *slip op.* at 8 (N.D. CA March 31, 2008) (finding that business addresses, phone numbers, and job titles of non-federal corporate employees do not implicate the same type of heightened concerns as “private citizens’ identities, home addresses, home telephone numbers, social security numbers, medical information, etc.”). On remand, NETL should identify the specific privacy interests involved with the withheld names and business contact information and weigh them against any identified public interests in making its Exemption 6 analysis.

¹² The only documents withheld pursuant to the attorney-client and attorney-work product privileges were legal memoranda prepared for Southern by outside counsel. We have been informed that NETL, on remand, will conduct another review of these documents to determine if they can be released to the Appellant. Memorandum of telephone conversation between Ann Dunlap and Richard Cronin, (September 28, 2015). Consequently, we need not discuss the withholdings in the 8/28 Partial Determination Letter that relied upon these privileges.

ultimate purpose of the deliberative process prong of Exemption 5 is to protect the quality of agency decisions. *Sears, Roebuck & Co.*, 421 U.S. 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*, 617 F.2d at 866. 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.

In the present case, NETL has asserted Exemption 5 withholdings on a number of documents created by Southern concerning the Project. A communication between an agency and a private party can be considered an intra-agency communication when the “common interest” doctrine applies. *Hunton & Williams v. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord, Klamath*, 532 U.S. at 10; *Carter & Burgess, Inc.*, OHA Case No. FIA-12-0008 (2012). The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-83. “[I]n a limited sense,” the private party “becomes a part of the enterprise that the agency is carrying out.” *Id.* at 280. Therefore, the communications “can be understood as ‘intra-agency’ for the purposes of Exemption 5.” *Id.* Further, documents and communications may qualify as “intra-agency” materials when they “ha[ve] been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency- e.g., in a capacity as an employee or consultant to the agency.” *Citizens for Responsibility and Ethics in Washington v. DHS*, 514 F. Supp. 2d 36,44 (D.D.C. 2007) (*citing Klamath*, 532 U.S. at 9-10). With regard to the documents created by Southern regarding the Project, we find that NETL and Southern had a common interest in insuring that the Project would be built. Therefore, unless otherwise noted we find that documents created by Southern regarding the Project can be considered as “intra-agency” documents for purposes of Exemption 5.

For the purposes of analysis, we have divided the 8/28 Partial Determination Letter documents into several groups.

1. E-mails

NETL released a number of redacted and unredacted E-mails to the Appellant. NETL redacted the information pursuant to Exemption 5. The withheld material in these E-mails consist of recommendations by DOE employees regarding various aspects of Southern’s proposal for the Project and DOE and possible actions the Secretary of Energy might take. As such, we find the withheld material to be predecisional and deliberative in nature and thus properly redacted pursuant to Exemption 5.

Several of the E-mails have attached memoranda which were also withheld pursuant to Exemption 5’s deliberative process privilege. An E-mail dated March 26, 2008, between two DOE employees

contains a draft meeting agenda for a proposed meeting with the then-Secretary of Energy Samuel Bodman, Governor Haley Barbour and an official from Southern. As such, this letter is deliberative and predecisional and was thus properly withheld pursuant to Exemption 5's deliberative process privilege. Another E-mail, dated April 1, 2008, sent between two DOE officials, contains a draft letter for the Secretary of Energy to send to an official of Southern. We find that this draft letter was also properly withheld pursuant to Exemption 5's deliberative process privilege. A May 22, 2008, E-mail sent at 10:43 p.m. contains a memorandum for the Secretary of Energy recommending a proposed course of action with respect to the Project along with a one-page "Approval Determination."¹³ This memorandum is deliberative and predecisional in nature and thus was properly withheld pursuant to Exemption 5.

2. Various Memoranda and Draft Letter

Two redacted memoranda, each entitled "Financial Assistance Negotiation Memorandum"¹⁴ had only the various Southern employee's names and contact information withheld pursuant to Exemption 6. As discussed above, this type of information is withholdable under Exemption 6 and we find no error in NETL's use of the exemption for these documents. The other memorandum, a draft meeting memorandum, was prepared by DOE officials and which had comments marked upon it by another DOE official. Given the deliberative nature of this document, we find that NETL properly applied the deliberative process privilege to invoke Exemption 5 to withhold the deliberative portion of the draft memo.

NETL also provided to the Appellant a portion of a draft letter to be sent by the Secretary of Energy to a Southern official. The redacted portion draft letter was deliberative and predecisional and, therefore, was properly withheld by NETL pursuant to the deliberative process privilege and Exemption 5.

3. Miscellaneous Documents

Among a set of miscellaneous documents (Misc. Documents) partially redacted by NETL was a document entitled "Selection Statement for Financial Assistance Announcement DE-PS26-04NT42061" (Selection Statement), which was signed in September 2004. Almost all of the statement itself was withheld pursuant to Exemption 4. The Selection Statement listed those firms, along with a synopsis of their proposals, to whom DOE would provide some type of financial assistance pursuant to the Clean Coal Power Initiative. Given the general nature of the synopses, it is not apparent how release of this information could cause competitive harm to the selected firms. On remand, NETL should release the information withheld in the Selection Statement or issue another partial determination letter justifying the withholding under Exemption 4 or another FOIA exemption.

¹³ The one-page "Approval Determination" was provided in its entirety to the Appellant.

¹⁴ One memorandum, signed in 2006, applied to the original Cooperative Agreement and the other memorandum, signed in 2008, was submitted pursuant to Amendment 004 where Southern requested permission to build the Project at a site in Mississippi instead of Florida.

NETL also provided to the Appellant two versions of a Document entitled “Site Change Request for Cooperative Agreement DE-FC26-06NT42391” (Site Change Document).¹⁵ Part of this document is a section entitled “Plant Site Information for Kemper County Mississippi.” NETL withheld various cost breakdowns, estimations, and financing plans relating to the Project pursuant to Exemption 4. Given that this information could give future competitors insight into Southern’s methodology for building and financing the Project, we find that release of this information would cause Southern substantial competitive harm and thus this information was properly protected by Exemption 4. Similarly, another redacted document, entitled “Justification for Waiver of Repayment,” contained information, summarized in a chart, relating to Southern’s estimation of economic benefits associated with a proposed DOE waiver of the Project’s repayment agreement. Portions of this chart were redacted pursuant to Exemption 4. Release of the redacted chart information could provide Southern’s competitors with insight into the methodology used to make this economic calculation. Consequently, we find that NETL properly withheld the chart data in the Justification for Waiver of Repayment document.

The Appellant was also provided a set of other miscellaneous documents (Misc. Southern Documents) relating to a request that the Secretary approve a change in location of the Project to Mississippi and that the Secretary waive the repayment agreement associated with the Cooperative Agreement.¹⁶ Two identical comparative analysis charts in the Misc. Southern Documents, identical to the chart contained in the “Justification for Waiver of Repayment” document, were redacted in the same manner pursuant to Exemption 4. For the reasons discussed above, we find that NETL properly withheld this information under Exemption 4.¹⁷

A paragraph on page 9 of the redacted Misc. Southern Documents was withheld pursuant to Exemption 4 and 5.¹⁸ The withheld portion consists of mostly factual matters. The last sentence of paragraph consists of a Southern recommendation for action to be taken by DOE. Consequently, we find that only the last sentence qualifies for the deliberative process privilege and was properly withheld pursuant to Exemption 5. On remand NETL should either release the remainder of the paragraph or issue another partial determination letter justifying the withholding under Exemption 5 or another FOIA exemption.

NETL redacted, pursuant to Exemption 5, a section of the Misc. Southern Documents entitled “Analysis of Waiver Request” located on page 10. This section, except for the chart contained on page 12, contains financial and legal arguments supporting Southern’s request to NETL for a waiver of the repayment provision of the Cooperative Agreement. We find that this material is pre-decisional and deliberative. Consequently, we find that NETL properly withheld the “Analysis of Waiver Request” section pursuant to the deliberative process privilege and Exemption 5

¹⁵ Both documents were attached to unredacted E-mails. These versions are essentially identical except that one version contained an additional unredacted letter as part of the document.

¹⁶ NETL informed us that these documents were discovered in a retired counsel’s file in the NETL’s Chief Counsel Office. September 29, 2015, Memorandum of telephone conversation between Ann Dunlap and Richard Cronin.

¹⁷ These charts are located on page 7 and 52 of the Misc. Southern Documents.

¹⁸ Our review of the withheld material indicates that only the last sentence of the withheld paragraph contains commercial information regarding Southern. Consequently, because we find that the sentence may be withheld under Exemption 5, we need not consider the applicability of Exemption 4.

The chart on page 12 of the Misc. Southern Documents is unreadable and as such we are unable to determine if Exemption 5 was properly applied. On remand NETL should release this chart or issue another determination explaining why the chart is being withheld pursuant to the FOIA.

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, NETL concluded, and we agree, that discretionary release of the information properly 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 properly redacted material at issue 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). As discussed above, on remand, NETL should consider whether non-exempt portions of the withheld materials can be segregated and provided to the Appellant.

It Is Therefore Ordered That:

- (1) The Appeal filed by Dan Zegart, Case No. FIA-15-0050, is hereby granted as specified in Paragraph (2) below and denied in all other respects.
- (2) This matter is hereby remanded to the National Energy Technology Laboratory of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) 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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Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 23, 2015