

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

In the Matter of Julie A. Reddick	)	
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Filing Date: October 16, 2015	)	Case No.: FIA-15-0057
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Issued: November 17, 2015

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**Decision and Order**

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On October 16, 2015, Ms. Julie A. Reddick (Appellant) filed an Appeal from a determination issued to her by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2015-00249-F). In that determination, OIR responded to a 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. On appeal, the Appellant requests that OIR be required to release information that it withheld in its determination pursuant to FOIA Exemptions 5 and 7(E) of the FOIA.

**I. Background**

The Appellant filed a FOIA request for records relating to an investigation by the Employee Concerns Program (ECP) at DOE Headquarters. Request from Appellant to DOE (November 25, 2014) (Request) at 1. The investigation regards concerns about inadequate policies and procedures, the lack of a safety conscious work environment, retaliation and other matters at a DOE facility. Memorandum of Telephone Conversation between Gregory Krauss, Office of Hearings and Appeals (OHA), and Pat Zarate, Office of Economic Impact and Diversity (November 12, 2015) (Zarate Memo) at 1. Specifically, the Appellant sought ECP records consisting of:

- (1) copies of all correspondence (emails, letters, report submittals) between DOE-HQ employee concerns program office personnel (for example, Pat Zarate) and employee concerns investigator Mark Van der Puy related to his investigation of the employee concern that originated in October 2012, submitted by Julie Reddick; and
- (2) [c]opies of Mr. Van der Puy's investigation report (submitted approximately September 1, 2014) and any comments and responses associated with this report.

Request at 1. The Appellant limited the request's time frame to records dated between August 2014 and November 25, 2014, the date of the request. *Id.*

In a determination letter, OIR informed the Appellant that it had asked the Office of Economic Impact and Diversity (ED), the office overseeing the ECP, to perform a search for responsive documents. Determination from Alexander Morris, OIR, to Appellant (October 14, 2015) (Determination) at 1.<sup>1</sup> ED located 11 responsive documents. *Id.* OIR provided 10 of those documents to the Appellant, although with information redacted pursuant to various FOIA exemptions. *Id.* at 2-5. OIR also withheld one document, an ECP investigation report, in its entirety.<sup>2</sup> *Id.* at 5. OIR withheld the report citing the deliberative process privilege of Exemption 5 as well as Exemption 7(E). *Id.* In her Appeal, the Appellant contends that the exemptions cited by OIR are not applicable to the report and that the report should have been finalized by now and released. Appeal from Appellant to OHA (October 16, 2015) at 1-2.

## 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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA's goal of broad disclosure. *See Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

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 an 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) (*Sears*). The courts have identified three traditional privileges, among others, that fall under Exemption 5: 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*). In its determination, OIR withheld information pursuant to the deliberative process privilege of Exemption 5. Determination at 5.

Under the deliberative process privilege, agencies are permitted to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of the process by which

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<sup>1</sup> OIR's October 14, 2015, determination was its second determination in this matter. In a prior determination, OIR released two documents, redacting information in one of them pursuant to Exemption 6 of the FOIA. *See* Determination from Alexander Morris, OIR, to Appellant (August 12, 2015). When the Appellant contended that the documents were not responsive to her request, OIR asked ED to perform an additional search for responsive records. *See* Email from Appellant to Angelia Bowman, OIR (August 12, 2015); Determination at 1.

<sup>2</sup> The ECP refers to its investigation reports as "Letters of Finding." Zarate Memo at 1. However, for the purposes of this Decision we will simply use the term "report."

government decisions and policies are formulated. *Sears*, 421 U.S. at 151. The privilege 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 (1958)). The ultimate purpose of Exemption 5's deliberative process privilege is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by the 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 instant matter, our analysis must take into account our decision in a related case, *Julie A. Reddick*, Case No. FIA-0067 (2013) (*Reddick*).<sup>3</sup> That Appeal dealt with a draft investigation report prepared by two DOE investigators responding to the same October 2012 employee concern at issue here. *Id.* at 2. When the Appellant filed a FOIA request for that draft report, the National Nuclear Security Administration (NNSA) issued a determination withholding it under Exemption 5 of the FOIA. *Id.* at 3. On appeal, we found that that the draft was predecisional and deliberative because it contained opinions, observations and conclusions generated as part of an ongoing investigation. *Id.* at 4. As a result, we held that Exemption 5 was applicable and denied the Appeal. *Id.* at 5.

After receiving the initial draft report, the ECP decided to hire an outside contractor to perform a new investigation. Zarate Memo at 1. The document the Appellant now requests is the draft report by that investigator. This latest draft report is therefore a different document by a different author. It is much longer and more detailed and addresses concerns not considered at the time of the first draft report. *Id.* However, this latest document is also a draft; it is marked "draft" on every page and has not been finalized. *Id.* We have been informed that the ECP is examining this draft report, revising it and putting it into final form. *Id.* Moreover, the draft reflects the opinions and observations of the author only and not DOE. Final reports must be signed by ED's director. *Id.* Accordingly, we find that this draft report, like the prior one, is predecisional and deliberative and that OIR was correct in finding that Exemption 5 protects it from disclosure.

We next must consider whether it is proper to withhold the entire draft report or whether any portions can be reasonably segregated and released. *See* 5 U.S.C. § 552(b); *see also* Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) (Attorney General Memorandum) at 1 ("Agencies should always be mindful that the FOIA requires them to take reasonable steps to

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<sup>3</sup> OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/office-hearings-and-appeals>.

segregate and release nonexempt information.”) We observed in our review that there are sections of the draft report that summarize and characterize facts and other sections that draw conclusions based on those facts. Nevertheless, the factual information in the report is still being verified and is subject to change. Zarate Memo at 1. Given that even the facts in the report are part of an ongoing deliberative process, we find, as we did in our decision on the earlier draft, that no portion of the report can be reasonably segregated. *See Reddick* at 5; *Hamilton Sec. Group, Inc. v. HUD*, 106 F. Supp. 2d 23, 31-32 (D.D.C. 2000) (finding that facts in draft audit report, including factual data, could not reasonably be segregated because “it would chill further agency deliberations”).

Finally, DOE’s FOIA regulations provide that the DOE should release material exempt from mandatory disclosure if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. OIR concluded that discretionary disclosure would not be in the public interest because the knowledge that deliberative discussions might be shared publicly could inhibit future discussions, and therefore harm the quality of agency decisions. Determination at 2. We agree. We also agree with an argument that the ECP raised to us, which is that there could be harms associated with releasing a draft document if it contains inaccuracies or is misleading as to the report’s final conclusions. *See Zarate Memo* at 1.

Accordingly, we conclude that Exemption 5 protects the entire draft report from disclosure and that any discretionary disclosures would not be in the public interest. Having reached that conclusion, we need not address OIR’s other finding that the document is also exempt from disclosure under Exemption 7(E).

It Is Therefore Ordered That:

- (1) The Appeal filed on October 16, 2015, by Ms. Julie Reddick, Case No. FIA-15-0057, 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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