

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

In the Matter of Peter Shulman)		
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Filing Date: January 28, 2016)	Case No.:	FIA-16-0017
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_____)		

Issued: February 5, 2015

Decision and Order

On January 28, 2016, Peter Shulman (Appellant) appealed a determination that he received from the Department of Energy’s (DOE) Office of Information Resources (OIR) (Request No. HQ-2016-00122-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. OIR located one responsive document, but withheld it in its entirety under Exemption 5 of the FOIA. The Appellant challenges this withholding. If granted, this Appeal would require OIR to release the withheld document.

I. Background

On October 27, 2015, the Appellant filed a request for “an 89-page memorandum . . . from DOE General Counsel to the Secretary of Energy, found in the eDOCS system.” FOIA Request from Peter Shulman (October 27, 2015). On January 6, 2016, OIR sent a determination letter, which identified one document responsive to the Appellant’s request. Determination Letter from Alexander C. Morris, OIR, to Peter Shulman (January 6, 2016). The Determination Letter stated that the document was being withheld in full pursuant to Exemption 5 of the FOIA. *Id.*

On January 28, 2016, the Appellant appealed the Determination Letter. Appeal Letter from Peter Shulman to Director, Office of Hearings and Appeals (OHA) (January 28, 2016). In his Appeal, the Appellant states that because the withheld document is “nearly 19 years old” and “on a subject whose political significance has long-since passed” that its release would not hamper DOE’s future ability to provide legal advice. *Id.*

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 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). 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 (1974). 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” or “predecisional” privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). OIR withheld information pursuant to Exemption 5's deliberative process and attorney-client privileges.

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*, 421 U.S. at 149. 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*, 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. 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 the Determination Letter, OIR stated that it withheld, under the deliberative process privilege, material that included “deliberations, comments, assessments, and proposals by agency officials.” Determination Letter from Alexander C. Morris, OIR, to Peter Shulman (January 6, 2016). Our review of the responsive document revealed that the document included markups and intra-agency communications on a draft of the requested memorandum. This document was clearly predecisional, in that it was not the final policy adopted by the agency, and deliberative, in that the consultative process was still ongoing. Therefore, OIR properly withheld this document under Exemption 5’s deliberative process privilege.

Under Exemption 5, an agency may also 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*, 617 F.2d at 863). Not all communications between attorney and client are privileged, however. *See Judicial Watch, Inc. v. U.S. 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 the Determination Letter, OIR stated that it withheld information, under Exemption 5’s attorney-client privilege, that included “confidential communications between DOE attorneys and legal advice provided by those attorneys.” Determination Letter from Alexander C. Morris, OIR, to Peter Shulman (January 6, 2016). This information included “statements prepared by an attorney related to the substance of a legislative proposal and the legal procedure to advance that proposal.” *Id.* Although this document was properly withheld in full under the deliberative process privilege, we find that OIR also properly withheld it under the attorney-client privilege.

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, OIR concluded, and we agree, that discretionary release of the responsive document withheld in full under Exemption 5 would adversely affect the “quality of agency decisions...if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public.” Determination Letter from Alexander C. Morris, OIR, to Peter Shulman (January 6, 2016). Therefore, discretionary release of the withheld information would not be in the public interest.

C. Segregability

The FOIA also 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). After reviewing the withheld material, we find that OIR properly determined that “the factual information is so inextricably intertwined with privileged information that reasonable segregation is not possible.” Determination Letter from Alexander C. Morris, OIR, to Peter Shulman (January 6, 2016).

III. Conclusion

After reviewing the Appeal, we find that OIR properly withheld the responsive document under Exemption 5 of the FOIA. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on January 28, 2016, by Peter Shulman, Case No. FIA-16-0017, 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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