United States Department of Energy
Office of Hearings and Appeals

In the Matter of the National Security Archive	)	
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Filing Date: February 18, 2016	)	Case No.: FIA-16-0020
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	)	

Issued: March 9, 2016

Decision and Order

On February 18, 2016, the National Security Archive (Appellant) filed an Appeal from a determination issued by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. 13-00217-E). In that determination, the NNSA responded to a request for information filed 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. In response to the Appellant's FOIA request, the NNSA transferred one document to the National Security Council and withheld another document in its entirety pursuant to Exemptions 1 and 5 of the FOIA. This Appeal, if granted, would require the NNSA to release material that it withheld under Exemption 5.

I. Background

On July 11, 2013, the DOE received a FOIA request from the Appellant seeking "any records relating to the White House Office of Science and Technology Comprehensive Test Ban [CTB] review panel's findings on seismic monitoring, stockpile reliability and permitted experiments under CTB, circa March-April 1978." Request from William Burr, National Security Archive, to DOE dated July 10, 2013. DOE headquarters transferred the request to the NNSA. Memorandum from Alexander Morris, Office of Information Resources, to Delilah Perez, NNSA, dated July 19, 2013. The Appellant subsequently clarified to the NNSA that he sought a draft report as well as commentary on that report by Harold Agnew, who during the relevant time period was the Director of Los Alamos National Laboratory (LANL). Memorandum from Geraldine Trujillo, Los Alamos Field Office, NNSA, to Elizabeth Poe, NNSA, dated September 17, 2013 (Trujillo Memo).

Following a search by the NNSA's Los Alamos Field Office (LAFO) and LANL, the NNSA issued a determination on February 5, 2016. Determination Letter from Jane Summerson, Authorizing and Denying Official, NNSA, to William Burr, National Security Archive, dated February 5, 2016 (Determination Letter). In its determination, the NNSA stated that it had located two documents responsive to the request. *Id*. It labeled those documents "Document 1" and "Document 2." *Id*. The

NNSA described Document 1 as a "Memorandum and Options Paper" originating with the National Security Council. *Id*. The NNSA identified Document 2 as a March 17, 1978, letter from Mr. Agnew to Dr. Frank Press. *Id*. The NNSA transferred Document 1 to the National Security Council for processing. *Id*. With respect to Document 2, the NNSA found that almost all the material in the document was exempt from disclosure under Exemption 1 of the FOIA as well as the deliberative process privilege of Exemption 5. *Id*. The NNSA further determined that those portions of Document 2 not falling under any exemption were "so inextricably intertwined with the exempted information" that there was no meaningful information left to release. *Id*. The NNSA therefore withheld the document in its entirety. *Id*.

In its Appeal, the Appellant challenges the withholding of information in Document 2 under both Exemptions 1 and 5. Appeal from William Burr, National Security Archive, to Poli Marmolejos, Office of Hearings and Appeals, dated February 17, 2016 (Appeal). We have bifurcated this Appeal and will consider here only the NNSA's decision to withhold information in the letter pursuant to Exemption 5. We will address the Appellant's challenge to the NNSA's redactions under Exemption 1 in another matter, Case No. FIC-16-0002.[1] *See* Acknowledgement Letter from Gregory Krauss, OHA, to Appellant, dated February 19, 2016.

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*).

As noted, the NNSA withheld information in Document 2 pursuant to the deliberative process privilege of Exemption 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 government decisions and policies are formulated. *Sears*, 421 U.S. at

[1] Those portions of the letter that NNSA withheld under Exemption 1 were apparently withheld under Exemption 5 as well. Consequently, in Case No. FIC-16-0002, we will if necessary review whether the NNSA properly withheld those same portions under Exemption 5.

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.

The NNSA provided us with most of the text in Document 2, with the exception of some small portions that it found were classified and exempt from disclosure under Exemption 1. The NNSA reached the conclusion that the deliberative process privilege applies to nearly the entirety of Document 2, including the non-classified material we examined. *See* Trujillo Memo. Our review of this non-classified material indicates that it is indeed generally protected by the deliberative process privilege. At the time the letter was written, Dr. Press was the Director of the Office of Science and Technology Policy (OSTP), a unit in the Executive Office of the President. *See* Appeal at Attachment 2; *see also Soucie v. David*, 448 F.2d 1067, 1074-75 (D.C. Cir. 1971) (finding that Office of Science and Technology in the Executive Office of the President is an "agency" for purposes of the FOIA). The material in the letter is predecisional in that it was offered by Mr. Agnew to Dr. Press, as well as other recipients, as part of an inter-agency policymaking process. *See Defenders of Wildlife v. U.S. Dep't. of Interior*, 314 F. Supp. 2d 1, 18 (D.D.C 2004) ("Exemption 5 expressly encompasses inter-agency, as well as intra-agency documents . . . ."). The letter is deliberative in that it offers Mr. Agnew's personal opinions on a report by a review panel examining the feasibility of a comprehensive test ban. In short, given that that the letter reflects Mr. Agnew's deliberations on policy matters, it is the type of information that the deliberative process privilege routinely protects.

The Appellant contends that the letter is not protected by the deliberative process privilege because too much time has passed. *See* Appeal. It argues that Exemption 5 "was not designed to withhold inconvenient or embarrassing information decades after the fact." *Id*. Nevertheless, "it is far from clear that the effects of the [deliberative process] privilege diminish in effectiveness or become inconsequential when older documents are involved." *Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 360 (E.D.N.Y. 2009) (*Kempthorne*); *see also Bruscino v. Fed. Bureau of Prisons*, Civ A. No. 94-1955, 1995 WL 444406, at *5 (D.D.C. May 15, 1995) *vacated in part on other grounds by* 1996 WL 393101 (D.C. Cir. Jun 24, 1996) ("The predecisional character of a document is not lost simply . . . because of the passage of time."). In *Kempthorne*, the Court found that the deliberative process privilege extended to documents approximately 30 years old. *Kempthorne*, 652 F. Supp. 2d at 359. The Court further found that there was "no clear rationale" for deciding that "the privilege should stop at some arbitrary point in time." *Id*. at 360. We decline

to create some arbitrary cutoff point ourselves. Accordingly, we agree with the NNSA that the deliberative process privilege exempts Document 2 from mandatory disclosure.

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 the instant matter, the NNSA found that release of information protected by Exemption 5 could "confuse the public about the Government's later policy decisions and could harm future LANL input on important national policy matters." Determination Letter at 2. However, the Appellant, on Appeal, has provided three publicly-released documents from the State Department's *Foreign Relations of the United States* series, a collection of historical documents, dating to May, June and July of 1978. *See* Appeal at Attachments 1-3. The documents provide information about Mr. Agnew's views on a comprehensive test ban and show that he made those views known to Dr. Press and other Executive branch officials. *See id.*

We provided the Appellant's materials to the LAFO so that it could better assess the policy implications of a discretionary release. LAFO maintains, and we agree, that release of the withheld information would not be in the public interest. LAFO observed, correctly, that a handwritten note on the letter suggests that Mr. Agnew wished to prevent its public release. Email from Sean Counce, LAFO, to Gregory Krauss, OHA, dated February 26, 2016. LAFO also noted that the "CTB treaty is still an active issue today" and stated that release of the letter could have a chilling effect by reducing the willingness of current laboratory directors and other agency leaders to express uninhibited opinions on this issue. *Id.* We share LAFO's assessment that release of the withheld information could diminish the agency's ability to obtain frank opinions and recommendations from its employees in the future. Therefore, we find a discretionary release 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 meaningless. *Lead Indus. Ass'n v. OSHA,* 610 F.2d 70, 83-86 (2d Cir. 1979).

The NNSA determined that no meaningful information remained after applying Exemption 5, as well as Exemption 1, to the document. However, it appears that a limited amount of the non-classified information that we reviewed may not be Exemption 5 material and that some of this material could be reasonably segregated. This material includes the handwritten note and the names of the recipients of the letter besides Dr. Press. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29-30 (D.D.C. 2011) (finding that headers on meeting minutes identifying the names of meeting attendees was not exempt material under the deliberative process privilege and that the information should be released). Upon review, the NNSA should consider whether it may be possible to segregate any information that is not protected by the deliberative process privilege and, assuming no other FOIA exemptions apply, release that information.

It Is Therefore Ordered That:

(1) The Appeal filed on February 18, 2016 by the National Security Archive, Case No. FIA-16-0020, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's National Nuclear Security Administration, 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 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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Date: March 9, 2016