

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

In the Matter of the Manufactured Housing Association for Regulatory Reform )  
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 ) Case No.: FIA-16-0031  
Filing Date: May 20, 2016 )  
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Issued: June 08, 2016

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**Decision and Order**

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On May 20, 2016, the Manufactured Housing Association for Regulatory Reform (Appellant) filed an Appeal from a determination issued to it on April 22, 2016, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2015-01874). In its determination, the OIR responded to the Appellant’s request for information 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. In response to the Appellant’s request, the OIR released 30 documents, but withheld portions of some documents on the grounds that they were either nonresponsive or exempt from disclosure under Exemptions 5 or 6 of the FOIA. The Appellant asserts that OIR improperly withheld information under Exemption 5 and that it failed to release a responsive email attachment. This Appeal, if granted, would require OIR to release additional withheld material.

**I. Background**

On September 21, 2015, the Appellant filed a FOIA request with the DOE. In the request, the Appellant sought records related to DOE’s development of energy efficiency standards for manufactured homes.<sup>1</sup> Request from Appellant to DOE (September 21, 2015). Specifically, the

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<sup>1</sup> This FOIA request is a follow-up to an earlier request filed by the Appellant on May 7, 2015. *See* Request from Appellant to DOE (May 5, 2015). In response to that request, OIR issued a determination in which it released documents obtained from the Office of Energy Efficiency and Renewable Energy. *See* Determination from Alexander C. Morris, FOIA Officer, OIR, to Appellant (September 24, 2015). On September 21, 2015, OIR also informed the Appellant that the Office of General Counsel possessed additional responsive documents. Letter from Alexander C. Morris, FOIA Officer, to Appellant (April 22, 2016) (Determination Letter) at 2. On that date, the Appellant agreed to file a new FOIA request, i.e. the instant request, for those records and to make certain amendments to the original request. *Id.*; Email from Michael Schierloh, OIR, to Gregory Krauss (May 31, 2016, 5:29 p.m.) (Schierloh Email). Accordingly, OIR considers this request to have been filed on September 21, 2015. *See* Schierloh Email.

Appellant requested (1) documents reflecting certain in-person meetings or communications on those energy efficiency standards between DOE employees and certain non-DOE employees, from January 1, 2010 to the filing date; (2) documents reflecting electronic communication, or any other type of communication, on the standards between any DOE official and certain non-DOE employees, from January 1, 2010 to the filing date; and (3) documents reflecting communications between DOE and the Office of Management and Budget (OMB) regarding the standards, from October 1, 2011 to the filing date. *See* Determination Letter at 1-2.

In response to the request, OIR referred the request to the DOE's Office of General Counsel (GC), which located 30 responsive documents. *Id.* at 2. OIR released 10 of those documents in their entirety and referred one document, a portion of Document 27, to OMB for review. *Id.* at 5-6. OIR also withheld certain information from other documents on the grounds that the information was either nonresponsive or that it was exempt from disclosure under Exemptions 5 and 6 of the FOIA. *Id.* at 2. With respect to its Exemption 5 withholdings, OIR withheld the information under the deliberative process privilege. *Id.* Explaining its reasoning, OIR stated that the withheld information consisted of material that was pre-decisional and not representative of a final agency decision. *Id.* OIR concluded that release of the material "would compromise the deliberative process by which government makes its decision." *Id.*

In the Appeal, the Appellant asks for clarification regarding what information was withheld under Exemption 5 in Documents 26 and 27 and what information was transferred to OMB. Letter from Appellant to OHA (May 18, 2016) (Appeal) at 2. The Appellant challenges those Exemption 5 withholdings to the extent that they consist of either a proposed DOE manufactured housing energy efficiency rule or a cost benefit analysis of that rule. *Id.* In addition, the Appellant observes that there appears to have been an attachment to Document 3 that OIR did not release. The Appellant asserts that DOE must either release the document or provide a reason for withholding it. *Id.*

## II. Analysis

### A. Exemption 5

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, OIR withheld information 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 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) (*Petroleum Info. Corp.*). 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, we reviewed redacted and original versions of Documents 26 and 27 and verified with OIR what information was withheld under Exemption 5 and what information was sent to OMB for review. We confirmed that, although an email in Document 26 refers to a draft notice of proposed rulemaking (Draft NOPR), the email does not attach that draft but rather indicates that the draft was uploaded to a certain online location. Memorandum of Conversation between Michael Schierloh, OIR, and Gregory Krauss, OHA (May 23, 2016). Further, the only information referred to OMB for review is a portion of Document 27, an email chain. *Id.* The attachment to Document 27 is a 172-page spreadsheet, withheld under the deliberative process privilege of Exemption 5, consisting of cost calculations related to the Draft NOPR. The email correspondence in Document 27 indicates that DOE sent the cost calculations to OMB in response to an OMB request for that information. The spreadsheet does not include a copy of the Draft NOPR.

The Appellant has challenged the withholding of the Draft NOPR and the cost calculation spreadsheet under Exemption 5. Given that the Draft NOPR was not among the withheld documents, the only issue we must review is whether OIR properly withheld the spreadsheet under Exemption 5’s deliberative process. We conclude that it did. The material in the spreadsheet is predecisional in that it was offered as part of an inter-agency policymaking process regarding a proposed rule. Regardless of whether the calculations in the spreadsheet were subsequently revised,<sup>2</sup> the document reflects a point in a decision-making process prior to a final agency decision

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<sup>2</sup> We note that the spreadsheet itself is titled “Manufactured Home NOPR Total cost calculator *draft* Jan 21 2011” (emphasis added).

on an energy efficiency rule for manufactured homes. Indeed, DOE decided not to move ahead with the proposed rule and instead, in 2014, turned to a negotiated rulemaking process. *See* Memorandum of Conversation between Kavita Vaidyanathan, GC, and Gregory Krauss, OHA (June 6, 2016) (Vaidyanathan Memo); *see also* Appeal at 3. A Notice of Proposed Rulemaking was issued only in May 2016. Vaidyanathan Memo. We further find that the material in the spreadsheet is deliberative both because it consists of draft mathematical cost analysis and because DOE shared it with OMB as part of the give-and-take of a consultative process. In short, given that the spreadsheet reflects deliberations at a preliminary policymaking stage, it is the type of information that the deliberative process privilege routinely protects.

The Appellant offers several arguments on Appeal, none of which are persuasive. First, the Appellant argues that the cost calculations were not preliminary because, when DOE shared them with OMB, the calculations represented an endpoint of DOE's own analysis. The Appellant cites *Pies v. IRS*, 668 F.2d 1350 (D.C. Cir. 1980) (*Pies*) for the proposition that, for an agency to withhold a document under the deliberative process privilege, the agency must show evidence that the document was subject to an internal give-and-take process. Appeal at 8. The Appellant, however, neglects to consider that the deliberative process privilege of Exemption 5 extends to inter-agency policymaking processes. *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 . . ."); *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 223 (D.C. Cir. 2009) (noting that OMB is considered an agency for FOIA purposes). The spreadsheet at issue clearly reflects a consultative process between DOE and OMB.

The Appellant's argument also reflects a misreading of the Federal Circuit's decision in *Pies*. In *Pies*, counsel in the Treasury Department returned a draft regulation to the Internal Revenue Service (IRS) with suggestions for revision. *Pies*, 668 F.2d at 1352. Subsequently, the draft rule was revised and a Notice of Proposed Rulemaking was issued. *Id.* at 1352-53. The Court found that the first draft of the IRS regulation, along with analysis relating to that draft, were protected under the deliberative process privilege. *Id.* at 1354-55. Specifically, the Court determined that the agency could withhold the documents not because the agency had provided evidence of internal disagreement, but because the documents at issue were "predecisional documents, which do not reflect the final opinion, interpretation, or guidance of the agency." *Id.* at 1355. In the matter at hand, like the withheld documents relating to the draft regulation in *Pies*, the spreadsheet consists of analysis relating to a draft rule that never became final. Accordingly, rather than supporting the Appellant's argument, *Pies* only serves to demonstrate why it is proper to withhold the spreadsheet under the deliberative process privilege.

The Appellant's other arguments are not convincing. The Appellant contends that DOE may not withhold the spreadsheet under Exemption 5 because the Draft NOPR was disclosed to some private parties. Appeal at 9. We verified with GC that the Draft NOPR may have been accidentally disclosed to some parties by an agency other than DOE. Vaidyanathan Memo; *see also Talbot v. CIA*, 578 F. Supp. 2d 24, 29 (D.D.C. 2008) (agency does not waive its right to assert a FOIA exemption because another agency released information). Nevertheless, we need not consider the Appellant's argument because the Appellant has not alleged, let alone shown, that the spreadsheet was disclosed. Indeed, GC indicated to us that it believes that only the Draft NOPR, and not the spreadsheet, was released inadvertently. *Id.*

The Appellant further argues that DOE must segregate and release factual material in the spreadsheet. Appeal at 9. It is true that the FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . .” 5 U.S.C. § 552(b). Nevertheless, even if the spreadsheet contains information that is factual in nature, we find that this information is exempt from disclosure because it reflects DOE’s preliminary positions or ruminations regarding a policy matter. *See Petroleum Info. Corp.*, 976 F.2d at 1435; *Hamilton Sec. Group, Inc. v. HUD*, 106 F. Supp. 2d 23, 31-32 (D.D.C. 2000) (finding that “even decisions to gather or report factual data” in a draft audit report could not be released 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. The Appellant also believes that, in the interest of public policy, DOE should release the cost analysis. *See* Appeal at 7. OIR, however, concluded that discretionary disclosure would not be in the public interest because the knowledge that deliberative discussions might be shared publicly could inhibit “frank, written discussion of policy matters” and thus harm the quality of agency decisions. Determination Letter at 3. We agree with OIR’s reasoning. We further find that, particularly here, where DOE still has not issued a final regulation, releasing analysis related to an earlier draft of that regulation could inhibit the willingness of policymakers to participate in ongoing discussions.

### **B. Attachment to Document 3**

As a separate matter, the Appellant contends that OIR neglected to make a determination regarding a responsive document, an email attachment. The Appellant observes that Document 3, an email chain, contains a March 26, 2010, email from Lois Starkey of the Manufactured Housing Institute to a DOE official. Appeal at 1. The email states, “Please see the attached letter.” The Appellant notes, correctly, that OIR did not provide the attached letter and asserts that OIR must either release the letter or explain its reasons for withholding the letter. *Id.*

We contacted OIR regarding the attachment referenced in the March 26, 2010, email from Lois Starkey. OIR informed us that that it was able to locate the attachment. Memorandum of Telephone Conversation between Michael Schierloh, OIR, and Gregory Krauss, OHA (June 3, 2016). We will therefore remand this matter to OIR so that it may make a determination on whether that attachment should be released.

It Is Therefore Ordered That:

- (1) The Appeal filed on May 20, 2016, by the Manufactured Housing Association for Regulatory Reform, Case No. FIA-16-0031, 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 Office of Information Resources, 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740  
Web: [ogis.archives.gov](http://ogis.archives.gov)

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Date: June 08, 2016