United States Department of Energy
Office of Hearings and Appeals

In the Matter of Russell Carollo	)	
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Filing Date: August 3, 2016	)	Case No.: FIA-16-0046
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Issued: August 25, 2016

Decision and Order

On August 3, 2016, Russell Carollo (Appellant) appealed a determination that he received from the Department of Energy's (DOE) Office of Information Resources (OIR) (Request No. HQ-2015-00523-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 DOE in 10 C.F.R. Part 1004. OIR located 33 responsive documents, but withheld some portions of these documents under Exemptions 2, 5, and 6 of the FOIA. The Appellant challenges the withholdings made under Exemptions 5 and 6. If granted, this Appeal would require OIR to release the withheld material.

I. Background

On January 19, 2015, the Appellant filed a FOIA request for "copies of all records since June 19, 2010, related in any way to Google, Inc., including, but not limited to, communications with Google employees and/or with any other individuals or entities acting on behalf of Google and communications with federal entities regarding Google, Inc." FOIA Request from Russell Carollo to Alexander C. Morris, DOE (January 19, 2015). The Appellant later amended his request in an email letter on February 15, 2015, to state, among other things:

> My request seeks information about Google as a company and does not include casual communication about Google searches or so-called 'Googling.' This request would, however, include communication related in any way to contracts or agreements involving the company Google, and communications with lawyers, lobbyists and/or other representatives of Google.

Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Russell Carollo (July 21, 2016). The Appellant later agreed in a May 8, 2016, letter to limit his request to emails just between DOE employees and Google employees.

OIR sent the Appellant's request to several DOE offices and he received final responses to certain parts of his request on February 25, 2015, March 16, 2015, April 2, 2015, May 5, 2015, and July 21, 2016. *Id*. The July 21, 2016, Determination Letter at issue pertains to the above quoted section of the FOIA request. *Id*. OIR withheld material from the 33 documents responsive to that section pursuant to Exemptions 2, 5, and 6. *Id*. On August 3, 2016, the Appellant appealed the determination as it relates to Exemptions 5 and 6. Appeal Letter from Russell Carollo to Director, OHA (August 1, 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 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 privilege in four of the responsive documents.

a. Deliberative Process Privilege

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).

The Appellant argues that the records are "at least five years old and that the deliberative process has very likely passed." Appeal Letter from Russell Carollo to Director, OHA (August 1, 2016). He also argues that OIR likely withheld purely factual information. *Id*.

As an initial matter, contrary to the Appellant's argument, the deliberative process privilege does not take into consideration the recency of the agency decision at issue. During the pendency of this Appeal, we spoke with OIR who informed us that they would release the material withheld under Exemption 5 in Documents 11, 12, and 15 in a new determination letter. We therefore find that the Appeal on the redactions in these documents is moot. As to the Exemption 5 redactions in Document 22, we find that OIR properly withheld the material under the deliberative process privilege. We agree with OIR that the withheld material is predecisional as it was developed before the agency adopted a final policy, and deliberative, as it reflects the opinions of those consulted during the decision-making process.

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. Concerning the withheld material in Document 22, OIR concluded, and we agree, that the discretionary release of that material 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 Russell Carollo (July 21, 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 in Document 22, we find that OIR properly released the segregable portions of the responsive document.

B. Exemption 6

Exemption 6 shields from disclosure "personnel 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); *see also* 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 determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. If the agency cannot find a significant privacy interest, the information may not be withheld. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (NARFE); *Associated Press v. Dep't of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *See NARFE*, 879 F.2d at 874; *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 773 (1989). Lastly, the agency must balance the personal privacy interest in the information proposed for withholding against the public interest in the same information. *See NARFE*, 879 F.2d at 874; *Reporters Comm*., 489 U.S. at 762.

The Appellant argues that because Google is "an American multinational technology company" whatever small privacy interest the company has is clearly outweighed by public interest. Appeal Letter from Russell Carollo to Director, OHA (August 1, 2016). However, the Appellant's argument misattributes the relevant privacy interest to Google instead of the individuals associated with the redacted information.

During the pendency of this Appeal, we spoke with OIR who informed us that they would release the material withheld under Exemption 6 in Document 30 in a new determination letter. We therefore find that the Appeal on the redactions in this document is moot. A majority of the information withheld under Exemption 6 consists of cellphone numbers for individuals, some of whom are federal employees. While the non-federal employees' privacy interest in their cellphone numbers is obviously significant, the privacy interest of federal employees in their government cellphone numbers is less clear. As a general rule, civilian federal employees who are not involved in law enforcement generally have no expectation of privacy regarding certain information. *See e.g. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from [OPM]"), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006). However, in this case, OIR found, and we agree, that these cellphone numbers

carry significantly more privacy implications than an office number because employees carry them during off hours and into their homes. We further find that the release of these cellphone numbers would not shed light on the operations and activities of the government and therefore serve no public interest. Because the privacy interests outweigh any public interest in this information, we find that OIR properly withheld the cellphone numbers under Exemption 6 of the FOIA.

III. Conclusion

After reviewing the Appeal, we find that OIR properly withheld material from the responsive documents under Exemptions 5 and 6. We also find that the Appeal is moot as it pertains to the material OIR has agreed to release in a new determination letter. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 3, 2016, by Russell Carollo, Case No. FIA-16-0046, 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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