

United States Department of Energy
Office of Hearings and Appeals

In the matter of Citizens for Responsibility)
and Ethics in Washington)
)
Filing Date: February 26, 2013) Case No.: FIA-13-0010
)
_____)

Issued: March 20, 2013

Decision and Order

On February 26, 2013, the Citizens for Responsibility and Ethics in Washington (“Appellant” or “CREW”) filed an Appeal from a determination issued to it on February 19, 2013, by the Office of Fossil Energy (FE) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2012-01210-F). In its determination, FE responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. FE released one document that it partially redacted pursuant to FOIA Exemption 5, which the Appellant contests. 5 U.S.C. § 552(b). Thus, this Appeal, if granted, would require FE to provide a new determination regarding the information that it withheld pursuant to Exemption 5. Furthermore, since a portion of the redacted information had been redacted by the Office of Information Resources, that office will also need to provide a new determination, if this Appeal is granted.

I. Background

In its original FOIA Request, the Appellant requested the following information:

1. “[C]opies of all correspondence, memoranda, email and phone records with, involving, or referencing Jigar Shah and/or representatives of the Coalition for Affordable Solar Energy (“CASE”), SunEdison, Edison International, or Edison So[u]thern California from January 1, 2008 to April 30, 2012.”
2. “[A]ll documents referencing, concerning, or explaining the relationship between SunEdison and Edison International and/or Edison Southern California.”
3. “[A]ll documents referencing, concerning, or explaining the March 20, 2012 preliminary decision of the U.S. International Trade Commission to impose import duties on solar panels from China ranging from 2.9% to 4.73% as well

as all documents referencing or concerning the upcoming final decision of the U.S. Department of Commerce on May 16, 2012, on whether to impose anti-dumping duties on China.”

Letter from Alexander C. Morris, FOIA Officer, Office of Information Resources, to Anne Weismann, CREW (Dec. 21, 2012) (Initial Response Letter).

In response to this request, on December 12, 2012, the Office of Information Resources stated that it located 56 responsive documents, and further provided that one document was under the jurisdiction of DOE’s Office of Fossil Energy (FE), and that document had been sent to FE for review. On February 19, 2013, FE provided a partial response advising that four sentences were being withheld under Exemption 5. Letter from Eugene Duah, FE, to Anne Weismann, CREW (Feb. 19, 2013) (Determination Letter). In the redacted document, two of the sentences had already been redacted by OIR.¹ FE invoked Exemption 5 for all four sentences, stating that the redacted material was predecisional and deliberative because it contained exchanges between government employees and government representatives regarding decisions not yet made. *Id.*

On February 26, 2013, the Appellant appealed FE’s determination, arguing that it did not identify how the withheld information was part of a deliberative process. Appeal at 1. The Appellant further asserts that FE did not meet its burden in demonstrating that it segregated all non-exempt factual material. *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 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). Nonetheless, the FOIA exemptions must be narrowly construed in order to maintain its 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 responding to the FOIA request has the burden to show that any withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

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 courts have identified three traditional privileges 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).

¹ Only two of the sentences had been redacted by FE. FE had informed OHA that when it received the document from OIR, it had already had redacted material. (Email from Pamela Gentel, Management Analyst, FE, to Shiwali Patel, OHA (Mar. 7, 2013)).

In withholding portions of the email correspondence, FE relied upon the “deliberative process” privilege of Exemption 5. The “deliberative process” privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). It is intended to promote frank and independent discussions 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 (Cl. Ct. 1958)). In order to be shielded by this 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 Gas Corp.*, 617 F.2d at 866. Moreover, this 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).

The United States District Court for the District of Columbia has summarized the rules and requirements for agencies withholding information under the deliberative process privilege. *See Animal Legal Defense Fund, Inc. v. The Department of the Air Force*. 44 F.Supp.2d 295 (D.D.C. 1999).

As a general rule, “an agency in possession of material it considers exempt from FOIA [must] provide the requestor with a *description of each document being withheld, and an explanation of the reason for the agency’s nondisclosure.*” *Oglesby*, 79 F.3d at 1176 (emphasis added). The need to describe each withheld document when Exemption 5 is at issue is particularly acute because “the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.” *Coastal States*, 617 F.2d at 867. [. . .] Although of course, the agency need not provide a description so rich in detail that it reveals the purportedly exempt information, this Circuit has consistently recognized that “[t]he description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection.” *Oglesby*, 79 F.3d at 1176; *see also King v. U.S. Department of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Id. at 299-300.

Here, FE’s justification for invoking Exemption 5 does not satisfy the requirements listed by the District Court in *Animal Legal Defense Fund*, and is the type of conclusory explanation that OHA has previously found to be invalid. *See State of Nevada*, Case No. TFA-0083 (2005) (determinations under the FOIA must include a general description of the denied material, a statement of the reason for the denial, and an explanation of how the specific exemption applies to the withheld information)².

FE’s Determination Letter lacks sufficient specificity to permit the Appellant and OHA to understand the rationale for withholding the information in the responsive document. FE

² Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://energy.gov/oha/office-hearings-and-appeals>.

provided a general, conclusory statement invoking Exemption 5 when it stated “[t]he material being withheld as deliberative includes exchanges between government employees and government representatives regarding decisions not yet made.” This statement does not meet the requirements for invoking Exemption 5. FE’s Determination Letter does not identify the particular decision making process or final policies to which the redacted information contributed. *See Judicial Watch v. USPS*, 297 F.Supp.2d 252, 259 (D.D.C. 2004) (stating that beyond demonstrating the withheld information is “predecisional,” “an agency must also either ‘pinpoint an agency decision or policy to which the document contributed,’ or identify a decisionmaking process to which a document contributed.”) (internal citations omitted).

Additionally, Appellant argued that FE failed to segregate non-exempt factual portions of the withheld documents. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester. FE, and also OIR bear the burden of showing that the invoked exemption applies to all the information it withholds under that exemption. On remand, FE and OIR must consider whether any of the information it intends to withhold under Exemption 5 through a claim of privilege can be segregated and released.

Hence, this matter will be remanded to FE and OIR so that both offices may procedurally correct the processing of the Appellant’s FOIA Request. Both OIR and FE shall issue a determination letter to provide the proper a justification for their withholdings to comport with the requirements summarized above.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on February 26, 2013, OHA Case Number FIA-13-0010 is hereby remanded as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Office of Fossil Energy and to the Office of Information Resources, which shall issue new determinations as to the document containing the July 19, 2010 email correspondences in accordance with the instructions set forth in the Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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 your right to pursue litigation. You 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
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 20, 2013