

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

In the Matter of:	Another Way BPA)	Case Nos.:	FIA-12-0012
Filing Date:	March 26, 2012)		FIA-12-0013
)		FIA-12-0014
)		

Issued: April 20, 2012

Decision and Order

On March 26, 2012, Another Way BPA filed appeals from three determinations issued to it on March 8, 2012, by the Department of Energy’s (DOE) Bonneville Power Administration (BPA). In those determinations, BPA responded to requests for documents that Another Way BPA 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 each of the three requests, BPA located numerous documents responsive to Another Way BPA’s requests. BPA identified and released a number of responsive documents, but withheld portions of the documents pursuant to FOIA Exemptions 5 and 6. In its appeals, Another Way BPA challenges the adequacy of BPA’s search, as well as the applicability of Exemption 5 to the withheld information. This appeal, if granted, would require BPA to (1) release the information it previously withheld under Exemption 5, and (2) perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

Another Way BPA submitted FOIA requests to BPA for records pertaining to BPA’s I-5 Corridor Reinforcement Project, also known as the I-5 Corridor Project, which proposes to build a high-voltage transmission line near the Interstate 5 corridor in southwestern Washington. In two of its requests, Another Way BPA requested emails, meeting agendas and minutes, planning documents, preliminary designs, CAD drawings, and mitigation plans for two proposed substations, the Pearl substation and the Troutdale substation. *See* Letters from Christina J. Munro, BPA, to Richard van Dijk, Another Way BPA, March 8, 2012 (collectively, the “Determination Letter”). In a third FOIA request, Another Way BPA requested emails, meeting agendas, minutes and strategies, and handwritten notes pertaining to a December 2011 Public

Meeting, also referred to as a “listening meeting,” held by BPA regarding the I-5 Corridor Reinforcement Project. *See* Determination Letter.

In its three March 2012 determinations, BPA identified numerous documents as responsive to the requests, and released some in their entirety and others with information withheld pursuant to FOIA Exemptions 5 and 6. *See* Determination Letter. BPA withheld the remaining responsive documents in their entirety under FOIA Exemption 5. *Id.* In applying Exemption 5, BPA noted that the documents it withheld under Exemption 5 are “draft documents that discuss several options for the design/function” of proposed BPA substations. *Id.* BPA further noted that it withheld under FOIA Exemption 6 some “names and personal contact information (address, email, and/or phone numbers) of individual citizens who have expressed an interest in [the I-5 Corridor] Project, as well as the personal cell phone numbers and email addresses of various individuals working on this project.” *Id.*

After receiving the Determination Letter and the accompanying released documents, Another Way BPA filed the instant appeals. With respect to the determinations pertaining to the requests for information regarding the proposed Pearl and Troutdale substations, the Appellant challenges both the adequacy of BPA’s search, and BPA’s withholding of information under FOIA Exemption 5.¹ *See* Email from Richard van Dijk, Another Way BPA, to OHA, March 26, 2012 (Appeals, Case Nos. FIA-12-0012 and FIA-12-0013). Specifically, the Appellant argues that the searches for records responsive to these requests cannot be adequate because, given the complexity of the I-5 Corridor Project and the two-year period of time for which the Appellant requested records, it is likely that more records exist. *Id.* In addition, the Appellant maintains that the Exemption 5 withholdings in each case were improper because decisions have been made regarding the Pearl and Troutdale substations and, therefore, documents generated regarding those substations can no longer be considered predecisional. *Id.* With respect to BPA’s response regarding the December 2011 public meeting records, Another Way BPA alleges that BPA’s search was inadequate because several BPA employees were seen taking notes during the meeting, and the documents released by BPA contained “only one unidentified person[’s]” handwritten notes. *See* Email from Richard van Dijk, Another Way BPA, to OHA, March 26, 2012 (Appeal, Case No. FIA-12-0014).

II. Analysis

A. Adequacy of the Searches

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not

¹ Another Way BPA did not challenge the Exemption 6 withholdings in the three determinations. Therefore, the Exemption 6 withholdings fall outside the scope of this Appeal and will not be considered.

hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire, Case No. VFA-0760 (2002).*²

In reviewing the instant appeals, we contacted BPA to ascertain the scope of its searches for responsive documents. *See* Email from Diane DeMoura, OHA, to Christina J. Munro, BPA, March 27, 2012. BPA informed us that the searches for records responsive to each of the three FOIA requests were conducted in a substantially similar manner. The requests were forwarded to the project manager for the I-5 Corridor Project. *See* Email from Paul Mautner, BPA, to Diane DeMoura, OHA, April 13, 2012. The project manager then made a list of each person working on the project in question (the proposed Pearl substation, the proposed Troutdale substation, and the December 2011 Public Meeting), and emailed each of those individuals “requesting that they search all electronic and paper documents that they have or have access to related to the I-5 project.” *Id.* With respect to the request for information on the proposed substations, the project manager specifically requested that those individuals search for emails, meeting agendas and minutes, preliminary designs, CAD drawings, tower designs, and mitigation plans for the period indicated by the Appellant (January 2008 through February 2010 for the Pearl substation, and January 2008 through July 2010 for the Troutdale substation). The project manager also directed those individuals to use the search terms “Pearl,” “Troutdale,” and “Sundial” in performing their searches. *Id.* As to the request for information pertaining to the December 2011 Public Meeting, the project manager specifically requested that the pertinent individuals search for emails, meeting agendas, minutes and strategies, including all documents from before and after the meeting, as well as any handwritten notes made during the meeting. *Id.* Finally, the project manager followed up with each of the individuals to ensure that they understood the request, and requested that they inform him if no responsive documents were located. *Id.*

Based on this information, we find that BPA performed an exhaustive search reasonably calculated to reveal records responsive to the Appellant’s FOIA requests, despite the fact that the searches did not yield the volume of information that the Appellant expected. Therefore, the search was adequate.

B. 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). 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. Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters

² OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

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). Exemption 5 permits the withholding of responsive material that reflects 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). 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. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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 this case, we have reviewed the documents containing information that BPA withheld under Exemption 5 and find that BPA properly invoked the deliberative process privilege. The information that BPA withheld under Exemption 5 consists of email communications among individuals working on the I-5 Corridor Project containing recommendations, proposals, opinions, etc. The withheld information also includes draft designs and other related data. This information is clearly predecisional, because, despite the Appellant’s contentions that decisions have been made regarding specific substations, the I-5 Corridor Project is an ongoing project and no final decisions have been rendered regarding if, and how, the project should proceed. *See* Email from Paul Mautner, BPA, to Diane DeMoura, OHA, April 13, 2012. Moreover, the withheld information is deliberative because it is part of an internal BPA process used to evaluate and analyze the various alternatives at issue in this project. *Id.* Releasing such information could well compromise the ability and willingness of BPA employees to make honest and open recommendations regarding the I-5 Corridor Project or other similar projects in the future. Accordingly, we find that BPA properly applied Exemption 5 in withholding certain portions of documents that it released to the Appellant.

C. 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 it 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. BPA concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the agency's ongoing decision-making process. Therefore, discretionary release of the withheld information would not be in the public interest.

D. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). BPA has informed us that it inadvertently withheld segregable portions of certain email communications. BPA has corrected this oversight by releasing that information to the Appellant. *See* Letter from Christina J. Munro, BPA, to Richard van Dijk, Another Way BPA, April 12, 2012. We reviewed the remaining withheld information and did not find any additional non-exempt, segregable information.

III. Conclusion

As discussed above, we have concluded that BPA's searches for records responsive to Another Way BPA's three FOIA requests were adequate. We have further found that BPA properly withheld information pursuant to FOIA Exemption 5 in the documents it released to the Appellant. Finally, BPA complied with the requirements of the FOIA by releasing to the Appellant all non-exempt portions of the responsive documents.

It Is Therefore Ordered That:

(1) The Appeals filed on March 26, 2012, by Another Way BPA, OHA Case Nos. FIA-12-0012, FIA-12-0013, and FIA-12-0014, are hereby denied.

(2) 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 20, 2012