

United States Department of Energy
Office of Hearings and Appeals

In the matter of Newport Partners, LLC)
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Filing Date: March 7, 2013) Case No.: FIA-13-0016
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Issued: April 2, 2013

Decision and Order

On March 7, 2013, Newport Partners, LLC (“Appellant”) filed an Appeal from a determination issued to it on February 12, 2013, by the Golden Field Office (GFO) of the United States Department of Energy (DOE) (FOIA Request Number GO-13-0036). In its determination, the GFO 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. In response to the Appellant’s request, the GFO located and produced 10 pages of documents, but withheld portions of those documents pursuant to FOIA Exemptions 4 and 5. 5 U.S.C. § 552(b)(4), (5). The Appellant appeals the applicability of Exemptions 4 and 5 to the withheld material. This Appeal, if granted, would require the GFO to produce the information that it withheld.

I. Background

In its FOIA Request, the Appellant requested “Copies of evaluators’ comments on these proposals [awarded under DE-FOA-0000621].” *See* Determination Letter from Carol Battershell, Manager, Golden Service Center, GFO, to Liza Bowles, Newport Partners, LLC (Feb. 12, 2013).

On February 12, 2013, the GFO provided the Appellant with 10 pages of documents, wherein the criteria and merit reviewers’ expert opinions on the winning proposals were redacted pursuant to Exemptions 4 and 5 of the FOIA. *See* Determination Letter. In invoking Exemption 4, the GFO asserted that the redacted information identifies the strengths and weaknesses of each awarded proposal under DE-FOA-0000621, and that the awardees have a substantial commercial interest in protecting the data because their competitors could use the data “to undercut the awardees’ future pricing schedules and bid proposals.” *Id.* at 2. The information would also provide competitors with knowledge of the awardees’ technical capabilities, thereby providing competitors with an unfair competitive advantage in future competitive funding opportunities. *Id.* Furthermore, the GFO stated that information was redacted pursuant to Exemption 5’s deliberative process privilege because it “consists of the discussion of strengths and weaknesses

identified during the merit review of each awardee's proposal submitted pursuant to DE-FOA-000621." *Id.* It stated that the "redacted information does not represent a final agency position, and its release would compromise the deliberative process by which the DOE government makes its award decisions." *Id.* at 3. Finally, the GFO explained that it could not reasonably segregate nonexempt information because it is "inextricably intertwined with the exempt information." *Id.*

On March 7, 2013, the Appellant filed an Appeal, stating that it finds "the description that it is even a partial release to be totally misleading." On March 13, 2013, the GFO submitted its Comments in support of its redactions pursuant to Exemptions 4 and 5 and provided our Office with the redacted and unredacted versions of the documents for our review.

In its Comment, the GFO provided our Office with more details as to how the redacted information was created. Comment from Kimberly J. Graber, Legal Counsel, GFO, and Michele Harrington Altieri, FOIA Officer, GFO, to Shiwali Patel, Attorney Examiner, OHA (Mar. 13, 2013). The GFO explained that it issued a Funding Opportunity Announcement (FOA), for which it requested proposals from the private sector. *Id.* at 2. The submitted proposals "contain[ed] specifics regarding [the applicants'] proposed technologies, processes, partners, vendors, and budgetary figures which address criteria established in the FOA." *Id.* Subsequently, merit reviewers, who were either federal employees, or subject matter experts hired by the DOE, reviewed the proposals, compiled their expert opinions "concerning a proposal's strengths and weaknesses under the criteria established in the FOA," and prepared their recommendations as to whether a proposal should be selected for funding. *Id.* The expert opinions and recommendations were then forwarded to the Selection Official, who made a final determination as to which proposals would be selected. *Id.* It is the criteria considered and the merit reviewers' opinions on the strengths and weaknesses of the winning proposals, which the GFO redacted, that are the subject of the instant Appeal.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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. 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.

Upon review of the GFO's Comments and the unredacted versions of the released documents, we conclude that the GFO properly invoked Exemption 5 in support of the majority of its withholdings. Accordingly, we will deny in part and remand in part this Appeal.

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 courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the “deliberative process” or “predecisional” privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of the released documents, the GFO 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 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 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears, Roebuck & Co.*, 421 U.S. at 151. 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.

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 Gas Corp.*, 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 its Comment, the GFO states that the withheld information “consists of identified consensus strengths and weaknesses of the respective winning proposals under DE-FOA-0000621,” and that “[t]he redacted information is pre-decisional, because it was compiled by the merit reviewers and provided as part of a decision-making process prior to the DOE Selection Official’s determination of the ‘winning proposals.’” Comment at 4. The GFO further asserts that the withheld information “was part of an internal DOE process wherein individual merit reviewers expressed their recommendations and opinions concerning each proposal for use by the Selection Official in deciding which proposals to fund under the FOA.” *Id.*

Upon review of the unredacted documents and the GFO's arguments, we conclude that the GFO properly invoked Exemption 5 in support of most of its redactions, specifically, the opinions concerning the strengths and weaknesses of each proposal. As that information consists of the merit reviewers' expert opinions on the winning proposals, it falls within the "deliberative process" privilege of Exemption 5 because it reflects opinions, recommendations, and deliberations comprising part of the process by which government decisions were made regarding the DE-FOA-0000621. *See Sears, Roebuck & Co.*, 421 U.S. at 150. Hence, we are satisfied that the GFO properly invoked Exemption 5's deliberative process privilege only as to the opinions on the strengths and weaknesses of the proposals.

However, we cannot conclude that the *criteria* listed on each document can be withheld under the deliberative process privilege. The GFO has not explained how the criteria itself reflects any opinions or deliberations, particularly as the FOA already listed the criteria in its announcement. *See* Comment at 2 ("merit reviewers review each proposal, compiling their expert opinions concerning a proposal's strengths and weaknesses under the criteria established in the FOA."). Yet, the GFO states that the "criteria titles were not released because not every winning proposal was evaluated on the complete set of criteria. Some were evaluated by the merit reviewers on all three criteria. Others were evaluated using only one or two of the established criteria." *Id.* at 4-5. However, our review of the unredacted documents indicates that the GFO considered all three criteria for each winning proposal. Indeed, on March 20, 2013, the GFO confirmed that all three criteria were evaluated for each proposal and that the criteria itself are publicly known. Memorandum of Telephone Conversation between Kimberly Graber, Legal Counsel, GFO, and Shiwali Patel, OHA (Mar. 20, 2013).

Thus, we are remanding this matter in part to the GFO to either release the criteria titles or, if the GFO intends to continue to withhold the criteria titles, issue a new determination explaining how they fall within the deliberative process privilege, or another FOIA exemption. *See* 5 U.S.C. § 552(b) (the FOIA requires that "any reasonable 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.").

Thus, as we conclude that Exemption 5 was properly invoked in part, we need not consider GFO's invocation of Exemption 4, as that exemption only applied to the information we deemed properly withheld pursuant to Exemption 5.

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 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 against 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) (Mar. 19, 2009) at 2. The GFO

states that disclosure of the information “would harm the pre-decisional evaluation process that leads to DOE’s final award decision,” and that release of it “would compromise the deliberative process by which the DOE government makes its award decisions.” *See* Comment at 5. Accordingly, the GFO contends that that release of the information would not be in the public interest. We agree, and conclude that discretionary release of the withheld information would not be in the public interest.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Newport Partners, LLC on March 7, 2013, OHA Case Number FIA-13-0016, is hereby denied in part and remanded in part as set forth in Paragraph (2) below.

(2) This matter is hereby remanded in part to the Department of Energy’s Golden Field Office, 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 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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