

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Aaron Silberstein)	
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Filing Date: March 11, 2013)	Case No. FIA-13-0014
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Issued: April 11, 2013

Decision and Order

On March 11, 2013, Aaron Silberstein (Appellant) filed an Appeal from a determination issued to him on February 8, 2013, by the Department of Energy’s Bonneville Power Administration (BPA) (FOIA Request Number BPA-2013-00001-FP). In that determination, BPA released information responsive to a request that the Appellant filed under the Privacy Act, 5 U.S.C. § 552(a) and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004 and 1008. BPA provided the Appellant with a number of documents under the Privacy Act. However, with respect to records processed under the FOIA, BPA withheld portions of documents pursuant to Exemption 5. This Appeal, if granted, would release information withheld pursuant to Exemption 5.

I. Background

In his Privacy Act and FOIA request (Request), the Appellant asked for the following information:

“Only electronic records and communications to or in regards to Aaron Silberstein to or from Dale Coulombe, Kim Howell, and Tim Barga for the year prior to the receipt of this request are requested. In addition, any file labeled as containing files on or about Aaron Silberstein in TFEV, or Facilities Maintenance. No date range.”
See Determination Letter.

In its February 8, 2013, Determination Letter, BPA stated that it located e-mail communications that were not part of the Privacy Act and as such, it processed these records under the FOIA. BPA redacted, pursuant to Exemption 5 of the FOIA, some of the information in the responsive records. On March 11, 2013, the Appellant appealed BPA’s determination, asserting that it did not justify how the withheld information was part of a deliberative process of BPA.

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.

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "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). 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 "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). Only the deliberative process privilege is at issue here.

a. Deliberative Process Privilege

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." *Id.* at 862. The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinion" 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). Information is deliberative if it "reflects the give and take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id.* at 866.

After reviewing the information that BPA withheld under Exemption 5, we find that BPA properly invoked the deliberative process privilege. The information that BPA withheld under Exemption 5 consists of e-mail communications between managers and the BPA Labor Relations Office. The withheld information is deliberative because it is part of an internal DOE process wherein managers expressed their recommendations and opinions and gave advice related to a formal grievance. Thus, releasing such information could well compromise the ability and willingness of DOE/BPA employees to make honest and open recommendations regarding future discussions related to formal grievances. Accordingly, we find that BPA properly applied Exemption 5 in withholding portions of the documents it released to the Appellant.

b. Segregability

Notwithstanding the above, 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 material, even if ‘factual’ in form, reflects an agency’s preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5.” *Id.* 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). We reviewed the withheld information and did not find any non-exempt, segregable information.

c. Public Interest

The DOE regulations provide that the DOE should 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 disclosure of the requested information would cause an unreasonable harm to DOE’s ongoing decision-making process. Therefore, release of the withheld information would not be in

the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed on March 11, 2013, by Aaron Silberstein, OHA Case No. FIA-13-0014, 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 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:

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Fax: 202-741-5759
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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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