



the public interest in the information is greater than the need to shield it from disclosure. *Id.* Upon further inquiry by OHA, on November 6, 2013, the Subject Matter Expert (SME), who reviewed the released documents before responding to the Appellant's FOIA Request, explained that the documents were redacted pursuant to Exemption 5 because they were in draft form. *See* Memorandum of Telephone Conversation between Josh McKearin, International Relations Specialist, Office of International Affairs (OIA), to Shiwali Patel, Attorney-Examiner, OHA (Nov. 6, 2013).

## 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 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 Exemption 5: 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).

Here, in invoking Exemption 5, OIR relied on the "deliberative process" privilege. 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 exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency. . . ." *Id.*

The United States Court of Appeals for the District of Columbia Circuit, however, clarified that designation of documents as drafts "does not end the inquiry" with regards to the deliberative process privilege because drafts are not per se exempt. *Anderson & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982). The court explained that "[e]ven if a document is a 'draft of what will

become a final document,' the court must ascertain 'whether the document is deliberative in nature.'" *Id.* at 258.

OIR provided the following documents to the Appellant that it either entirely redacted or redacted in part pursuant to Exemption 5: 1) four documents entitled "Sole Source Determination and Justification for the Conduct of an Independent Assessment of Iraqi Hydrocarbon Laws and Expert Assistance in the Drafting of an Iraqi National Hydrocarbon Law Office of Policy and International Affairs, U.S. Department of Energy Procurement Request"; 2) five documents entitled "Legal and Technical Assistance on Iraqi Hydrocarbon Legislation and Regulation"; 3) four charts entitled "Middle East Energy Near-Term Action Plan Matrix:"; 4) Interagency Acquisition Agreement between DOE and the United States Department of State; 5) a document entitled "Development and Passage of Iraqi Hydrocarbon Law"; 6) five documents entitled "IPOG Essential Services Working Group Energy Policy Sub-working Group"; 7) two documents entitled "Critical Issues Regarding the Hydrocarbon Law and Revenue; 8) four documents entitled "U.S-Iraqi Energy Cooperation Proposal Summary: An Integrated Energy Program for Iraq"; 9) Memorandum for the Secretary of Energy, dated July 6, 2006; 10) two copies of Briefing for Secretary of Energy Samuel Bodman, dated July 10, 2006; and 11) three copies of "Summary of Critical Issues for Decision."

While the SME informed OHA that the documents were redacted because they were in draft form, that does not end the inquiry, as clearly articulated by the District of Columbia Circuit in *Anderson & Co. v. IRS*. 679 F.2d at 257-58. Drafts are not per se exempt and accordingly, in order to sustain a challenge to the redactions, OIR would have to demonstrate that the withheld information in the drafts is predecisional and deliberative. *See id.* Yet, as explained below, OIR's determination letter is inadequate in explaining why the redactions were properly made pursuant to Exemption 5.

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal. We have consistently held that determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *See Research Information Services, Inc.*, OHA Case No. VFA-0235 (Nov. 27, 1997).\*

OIR stated in its determination that the withheld documents are pre-decisional and that they "reflect deliberations, comments, assessments and proposals." OIR further stated that "[t]he DOE considered these preliminary views as part of the process that will lead to the agency's final policy decision about these matters." However, it did not specify nor explain which decision making process or matters would be compromised by release of the documents. It also did not sufficiently indicate which information was withheld. Such vague, conclusory and generalized allegations will not support an agency's decision to withhold requested documents. *See Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir 1976); *see also*

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

*Environmental Defense Institute*, Case No. TFA-0289 (2009) (citing *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). Accordingly, OIR must issue a new determination letter that provides sufficient justifications for its redactions. See *Research Information Services, Inc.*, OHA Case No. VFA-0235 (Nov. 27, 1997).

Moreover, there are portions of the redacted documents that are factual and may therefore be releasable to the Appellant. OIR has failed to reasonably segregate releasable portions of the draft plan, which they shall do unless the exempt material is so inextricably intertwined that disclosure of it would reveal “only essentially meaningless words and phrases.” 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 record after deletion of the portions which are exempt.”). Accordingly, we will remand this matter to OIR to release segregable factual portions of the released documents and to issue a new determination letter.

Finally, the DOE regulations provide that DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Thus, to the extent that OIR continues to withhold information in the released documents, it shall explain in its new determination letter how there is no public interest in the release of that information.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the National Security Archive, on October 31, 2013, OHA Case Number FIA-13-0069, is hereby remanded in accordance with Paragraph (2) set forth below.

(2) This matter is hereby remanded to the Department of Energy’s Office of Information Resources, 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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Poli A. Marmolejos  
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Date: November 15, 2013