

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

In the Matter of Idaho Conservation League)	
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Filing Date: July 17, 2012)	Case No. FIA-12-0040
)	
_____)	

Issued: August 16, 2012

Decision and Order

On July 17, 2012, the Idaho Conservation League (Appellant) filed an Appeal from a determination issued to it on June 13, 2012, by the Department of Energy's Bonneville Power Administration (BPA) (FOIA Request Number HQ-2012-00243-F), in response to a request for documents that the Appellant filed under 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. In response to the Appellant's FOIA Request, BPA provided the Appellant with a number of documents in their entirety. However, BPA also withheld some documents in part. This Appeal, if granted, would require BPA to release the information withheld in the previously provided documents.

I. Background

On November 7, 2011, the Appellant submitted a FOIA request seeking the Project file for the Albeni Falls Dam Flexible Winter Operations Environmental Assessment. The request also included correspondence between agencies regarding this proposal as well as other materials related to the environmental assessment and the final decision. In a February 7, 2012, Determination Letter, BPA released some of the documents responsive to Appellant's request, but indicated that other documents were still under review. On February 22, 2012, BPA issued another Determination Letter releasing one additional document, but indicated that 66 documents which were responsive to the Appellant's request would be withheld under FOIA Exemption 5. On March 22, 2012, the Appellant appealed BPA's decision to withhold the 66 documents and on April 30, 2012, BPA responded by indicating that it would review the 66 documents again to determine if any additional documents could be released. On May 16, 2012, BPA released seven documents in their entirety, stated that 15 documents originated from the U.S. Army Corps of Engineers (the Corps) and that those documents would be forwarded to the Corps for a FOIA determination, and that the remaining of the 66 documents would be reviewed further for possible discretionary release. In a June 13, 2012, Determination Letter, BPA issued its final response to the Appellant's FOIA request, releasing 17 more documents in their entirety, releasing one

partially redacted document, withholding two documents as non-responsive, withholding 25 documents in their entirety under Exemptions 5 and 6 and providing a list of the electronic file names for the 25 documents which were withheld in full. *See* June 13, 2012 Determination Letter.

On July 17, 2012, the Appellant filed the present appeal, asserting that (1) BPA failed to justify the withholding of deliberative documents under Exemption 5; (2) BPA failed to justify any withholdings under Exemption 6; (3) BPA failed to state why discretionary release of the 25 withheld documents is not appropriate; (4) BPA failed to determine whether non-exempt information could be segregated from the 25 withheld documents; and (5) BPA improperly withheld the 15 documents which were forwarded to the Corps. *See* Appeal Letter.

II. Analysis

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552 (a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

An agency therefore has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Servs., Inc.*, Case No. VFA-0235 (1996) (*RIS*).¹ Generally a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *State of New York*, Case No. TFA-0269 (2008). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determination. *RIS*.

A. Adequacy of the Determination and the Adequacy of the Justifications

For our review of this Appeal, we obtained the documents that BPA withheld. After examining these documents, we conclude that BPA's determination letter is inadequate to permit the Appellant to file an informed appeal. As stated above, BPA withheld 25 documents in their entirety pursuant to Exemptions 5 and 6, and withheld two documents as non-responsive. BPA provided the Appellant with an index listing the electronic file names of all 27 documents. However, as the Appellant has asserted, BPA has failed to identify which documents were withheld under FOIA Exemptions 5 and 6 and which documents are the two non-responsive documents. In addition, while BPA generally stated in its determination letter that Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency . . ." and incorporates both the deliberative process privilege and the attorney work-product privilege, it

¹ All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

does not indicate whether any of the withheld documents are inter-or intra-agency documents nor does it specify which Exemption 5 privilege is being applied to the withheld documents. With respect to Exemption 6, while BPA states that the withheld information consists of names and personal contact information of individual citizens who have expressed an interest in the project at issue; again, it does not identify the documents to which BPA applied the exemption.

Moreover, BPA's description of the withheld documents is vague. Simply listing the electronic file name of a document is insufficient and does not adequately describe the subject matter. Again, the description of the document need not contain information that would compromise the privileged nature of the document, but rather a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date on which the document was produced, its authors and recipients. *State of New York* at 3.

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination so that the Appellant and our office will understand the rationale for withholding the information. Therefore, we will remand this matter to BPA to issue another determination which will inform the Appellant which documents are being withheld pursuant to Exemptions 5 and 6 and adequately explain how Exemption 5 and 6 apply to the withheld documents.

B. Segregability of Non-Exempt Material and Discretionary Public Interest Disclosure

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . ." 5 U.S.C. § 552(b). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. In its determination letter, BPA stated that it withheld 25 documents in their entirety pursuant to Exemption 5, but did not address the issue of segregability in the determination. This office reviewed a sample of material that was withheld in its entirety, and based on our review, we find that there may be some non-exempt, factual material in the responsive documents. BPA should consider what non-exempt, factual material may be segregated and released on remand.

In addition, the DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. Although, in its determination letter, BPA asserts Exemption 6 and states that there is no public interest in the disclosure of information because it does not shed any light on how BPA has performed its statutory duties, it does not provide a public interest analysis with respect to documents withheld pursuant to Exemption 5. This analysis should also be provided on remand.²

III. Conclusion

For all the reasons stated above, we will remand the matter to BPA to issue a new determination. Therefore, we will grant the Appeal in part and remand it to BPA.

² With respect to the 15 documents which BPA asserts were improperly withheld and forwarded to the Corps to issue a determination, we find that BPA appropriately determined that these documents originated with the Corps and correctly forwarded the Appellant's request to the Corps for a direct response to the Appellant. 10 C.F.R. § 1004.5(c).

It Is Therefore Ordered That:

- (1) The Appeal filed by Idaho Conservation League, OHA Case No. FIA-12-0040, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the Bonneville Power Administration of the Department of Energy, 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. 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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