United States Department of Energy
Office of Hearings and Appeals

In the Matter of William B. Ray	)	
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Filing Date: September 10, 2012	)	Case No.: FIA-12-0049
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Issued: October 1, 2012

Decision and Order

On September 10, 2012, William B. Ray filed an appeal from a determination the Department of Energy's (DOE) Oak Ridge Office (OR) issued on August 21, 2012. In its determination, OR responded to a request for documents that Mr. Ray submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

I. Background

The Appellant requested from OR a copy of his Personnel Security File. On April 13, 2012, OR provided Mr. Ray with certain documents responsive to his request. Letter from Larry C. Kelly, Manager, OR, to William Brian Ray (August 21, 2012) (Determination Letter). Mr. Ray, on April 18, 2012, requested a document referenced in one of the documents that OR had provided him, an opinion from OR's Office of Chief Counsel. On August 21, 2012, OR issued a determination stating that it was withholding this document in its entirety pursuant to 5 U.S.C. §§ 552a(d)(5) and 552a(k)(2) (Exemption (d)(5) and (k)(2) of the Privacy Act), and 5 U.S.C. § 552(b)(5) (Exemption 5 of the Freedom of Information Act). *Id.* In his Appeal, Mr. Ray contends that the document at issue is not exempt from disclosure under either the Freedom of Information Act (FOIA) or Privacy Act.

II. Analysis

A. FOIA 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 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) (*Sears*). 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). In its determination, OR characterized the document in question as being subject to both the attorney work-product and attorney-client privileges. Determination Letter at 2.

The attorney work-product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work-product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g., Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to court proceedings, but extends to administrative proceedings as well. *See e.g., Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

With regard to the applicability of the attorney work-product privilege to the document at issue, the Appellant cites *Adlman* for the proposition that the Exemption 5 work-product privilege does not extend to

> documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well

> established that work-product privilege does not apply to such documents. Even if such documents might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created "because of" actual or impending litigation.

Adlman, 134 F.3d at 1202 (citations omitted); Appeal at 6-7. The Appellant argues that the document at issue in this case, an opinion from the OR's Office of Chief Counsel, was prepared in the ordinary course of business, and therefore is not shielded by the attorney work-product privilege. Appeal at 6.

We disagree. First, the Appellant states that the determination of "whether to suspend or continue Access Authorization is an everyday activity of [OR's] Access Authorization Branch." *Id.* The document in question, however, was prepared not by OR's Access Authorization Branch, but rather by OR's Office of Chief Counsel. Moreover, even if we were to assume, *arguendo*, that such documents are produced in the ordinary course of business of the Office of Chief Counsel, this fact would only be relevant if the document at issue "would have been created in essentially similar form irrespective of the litigation." *Adlman*, 134 F.3d at 1202.

It is clear from our review of the withheld document, however, that it contains the author's analysis of a case being considered under 10 C.F.R. Part 710, in particular concerning OR's proposal to conduct an Administrative Review proceeding, the procedures of which allow an individual to request a hearing before a DOE Hearing Officer "to present evidence in his own behalf, through witnesses, or by documents, or both; and . . . to be present during the entire hearing and be accompanied, represented, and advised by counsel or representative of the individual's choosing . . . ." 10 C.F.R. § 710.21(b). Thus, there is no question that this document was created by the OR's Office of Chief Counsel in anticipation of, and *solely because of* the prospect of administrative litigation under 10 C.F.R. Part 710. As such, we find that it was properly withheld under the Exemption 5 attorney work-product privilege.

Though OR also invoked the *attorney-client* privilege in withholding the document at issue, we need not address the application of that privilege, as we have found a proper basis for the withholding of the document under the work-product privilege. We, therefore, turn to whether OR properly withheld the document under the Privacy Act.

B. Privacy Act Exemption (d)(5)

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, the Privacy Act also states that it does not "allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). In its determination, OR states that the "Chief Counsel opinion was prepared in anticipation of a potential Personnel Security Hearing." Determination Letter at 1. For the reasons explained below, we conclude that the document in question was properly withheld under Privacy Act Exemption (d)(5).

First, the longstanding guidelines of the Office of Management and Budget (OMB) regarding implementation of the Privacy Act state that the term "civil action or proceeding" as set forth in

the Act "was intended to cover . . . quasi-judicial and preliminary judicial steps . . . ." Privacy Act Guidelines, 40 Fed. Reg. 28948, 28960 (July 9, 1975). Further, the OMB has, in another context, specifically recognized the "quasi-judicial nature of hearing and review functions" under 10 C.F.R. Part 710. Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material, 59 Fed. Reg. 35178, 35179 (July 8, 1994).

The U.S. Court of Appeals for the District of Columbia has cited the OMB Privacy Act guidelines in finding that "Privacy Act Exemption (d)(5) protects documents prepared in anticipation of quasi-judicial administrative hearings." *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987). Though the court's holding did not rely solely on OMB's interpretation of Congress's intent, the court considered that interpretation worthy of its "attention and solicitude." *Id.*

Aside from the OMB guidelines, the court in *Martin* relied on its own reasoning that, of "all types of administrative hearings, quasi-judicial hearings are most like the formal civil actions Congress clearly and specifically intended to protect." *Id.* at 1188. At issue in *Martin* were documents prepared in anticipation of proceedings before the Merit System Protection Board (MSPB). The court noted similarities both in the functions of tribunals such as the MSPB, and found that "[w]hatever Congress may have intended for other types of administrative proceedings, it must have intended quasi-judicial hearings to fall within the term 'civil proceedings.'" *Martin*, 819 F.2d. at 1188.

The court in *Martin* stated that its holding specifically applied to documents prepared in anticipation of "adversarial proceedings, subject to the rules of evidence and with opportunity for discovery," all characteristics of proceedings before the MSPB. In this regard, we note that proceedings under Part 710 share similar characteristics with those before the MSPB. Part 710 hearings are adversarial in nature, with counsel for the DOE, on the one hand, "participating on behalf of and representing the Department of Energy," which has determined that there is "substantial doubt" regarding an individual's clearance eligibility, and the individual, on the other hand, presenting (often through legal counsel) "evidence in his own behalf, through witnesses, or by documents, or both," for "the purpose of affording the individual an opportunity of supporting his eligibility for access authorization; . . . ." 10 C.F.R. § 710.21(b).

Moreover, in Part 710 hearings, as in proceedings before the MSPB, formal rules of evidence do not apply, but the Federal Rules of Evidence may be used as a guide. 10 C.F.R. § 710.26(h); *Bowen v. Department of Navy*, 112 M.S.P.R. 607, 618 (2009) ("Although the Federal Rules of Evidence do not apply to Board proceedings, the Board will look to them for guidance"). And though the Part 710 regulations do not contain formal discovery procedures, the practice of this office in conducting Part 710 hearings allows for the pre-hearing exchange of documents, including the provision by the DOE Counsel to the individual of documents not being offered as hearing exhibits.

In sum, we find that, following the guidance of the OMB and the reasoning set forth in *Martin*, if not its explicit holding as applied to the MSPB, proceedings conducted under Part 710 are sufficiently similar to formal civil actions that they should be considered "civil proceedings" under Privacy Act Exemption (d)(5). As we discussed above, the document at issue in this case

was prepared in anticipation of a Part 710 administrative review proceeding, and therefore we find that the document was properly withheld by OR under Exemption (d)(5).

Finally, as with our analysis above of OR's withholding under the FOIA, although OR also based its withholding of this document on Privacy Act Exemption (k)(2), we need not address the application of that Exemption here, as we have found that OR had a sufficient basis for withholding the document at issue under Exemption (d)(5). Thus, having found that OR properly withheld the requested document under both the FOIA and the Privacy Act, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on September 12, 2012, by William B. Ray, OHA Case No. FIA-12-0049, 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) (FOIA) and 5 U.S.C. § 552a(g)(1) (Privacy Act). 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: October 1, 2012