

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Judicial Watch)
)
Filing Date: January 14, 2013) Case No.: FIA-13-0002
)
_____)

Issued: January 23, 2013

Decision and Order

On October 9, 2012, Judicial Watch (Appellant) filed an Appeal from a partial determination issued to it on September 26, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2010-00739-F). In that determination, OIR released documents responsive to a request that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIR withheld 10 documents in full, released 13 documents in their entirety, and released 35 documents, in part, withholding portions of those documents under Exemptions 5 and 6 of the FOIA.¹

I. Background

On January 8, 2010, the Appellant filed a request with OIR for:

- Any and all request for papers pertaining to geoengineering;
- Any and all presentations of geoengineering papers/research/findings/reports; and
- Any and all communications (including email) pertaining to geoengineering between the DOE and the White House.²

Request dated January 8, 2010, from Jenny Small, Appellant, to DOE. OIR sent the request to a six different offices within DOE. On September 26, 2012, OIR responded on behalf of the

¹ As unredacted versions of Documents 35 to 44 were not initially provided for our review, we issued a Decision on November 8, 2012, only as to the information redacted in Documents 1 to 34 and 45 to 58, granting in part and denying in part the Appeal. On January 14, 2013, we received the unredacted versions of Documents 35-44 from OIR. Thus, in this Decision, we will review the Appeal pertaining to those documents only, and if granted, OIR will be required to release the withheld information contained in Documents 35 to 44.

² In its original request, the Appellant asked for any and all communications about geoengineering, but on April 14, 2010, the Appellant amended its request to only ask for communications between DOE and the White House.

Office of Science, and released 48 of the responsive 58 documents that were located to the Appellant; 35 of those documents were released with redactions. *Id.*

On October 9, 2012, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging the adequacy of DOE's search for responsive documents and the OIR's withholdings under Exemptions 5 and 6. Appeal Letter dated September 28, 2012, from Appellant to Secretary Steven Chu, DOE.

On November 8, 2012, OHA issued a decision ruling in part on the Appeal, stating that, in regard to the redactions and withholdings in Documents 1 to 34 and 45 to 58, Exemption 5 was properly applied. *In the Matter of Judicial Watch*, FIA-12-0062 (Nov. 8, 2012). OHA also concluded that the personal email addresses were properly withheld pursuant to Exemption 6, but not the conference call numbers. *Id.* However, OHA did not consider the Appellant's argument regarding the adequacy of the search, stating that it was not yet ripe of review as a search was still being conducted in response to the request. As stated above, OIR has now provided copies of the unredacted versions of Documents 35-44. Thus, the issue before us is whether OIR properly withheld information in Documents 35-44 pursuant to Exemption 5.³

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

³ No information was redacted from Documents 35-44 pursuant to Exemption 6.

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 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). 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 OIR withheld under Exemption 5 in Documents 35 to 44, we find that OIR properly invoked the deliberative process privilege. The information that OIR withheld under Exemption 5 consists of email communications among individuals discussing the budget for the 2011 fiscal year. The withheld information is deliberative because it is part of an internal DOE process wherein individuals expressed their recommendations and opinions concerning a specific topic related to the budget. Thus, releasing such information could well compromise the ability and willingness of DOE employees to make honest and open recommendations regarding future discussions on the budget. Accordingly, we find that OIR properly applied Exemption 5 in withholding certain portions of the documents that 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 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 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. OIR 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.

III. Conclusion

It Is Therefore Ordered That:

- (1) The Appeal filed by Judicial Watch, Case No. FIA-13-0002, 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 the provisions of 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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 23, 2013