United States Department of Energy
Office of Hearings and Appeals

In the Matter of National Security Archive)
) Case No.: FIA-13-0056
Filing Date: August 20, 2013)
)

Issued: August 28, 2013

Decision and Order

On August 20, 2013, the National Security Archive ("Appellant") filed an Appeal from a determination issued to it on July 15, 2013, by the Office of Information Resources (OIR) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2013-01498-F). In its determination, OIR responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In response to the Appellant's request, OIR released two documents that it withheld in part pursuant to FOIA Exemption 5. 5 U.S.C. § 552(b)(5). The Appellant claims that OIR should not have invoked Exemption 5 to withhold the information, and accordingly, this Appeal, if granted, would require OIR to produce the information that it withheld.

I. Background

On July 20, 2011, the Appellant submitted a FOIA Request seeking:

> (1) all documents including but not limited to analyses, background papers, briefing papers, cables, letters, memos, memos of conversation, or reports concerned in whole or in part with Israel's oil needs and/or oil imports in 1983 and 1984; (2) documents concerned with meeting U.S. obligations under a memorandum of understanding or other agreements to provide Israel with oil reached in 1975 and subsequently renewed, e.g., in 1977, 1978, 1979, and 1980; and (3) documents concerned with discussions with Israeli officials including energy ministers Itzhak Berman or Yitzhak Modai or their staffs among the records reviewed in response to this request.

Determination Letter from Alexander Morris, FOIA Office, OIR, to Joyce Battle, Appellant (July 15, 2013). On July 15, 2013, OIR issued its final response to the Appellant's FOIA Request, stating that it was disclosing two documents that it withheld in part pursuant to Exemption 5's deliberative process privilege. On August 20, 2013, the Appellant appealed OIR's

determination, stating that the "documents are over three decades old, and should be released in order to ensure that the public is informed about long-term financial, political, and military commitments regarding Israel's oil supply that the government has made in its name." *See* Appeal.

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 has the burden to show that information is exempt from disclosure. 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). The courts have also recognized a number of less frequently invoked privileges as FOIA case law has developed over the years. Pertinent to this decision, as discussed further below, is the presidential communications 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 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 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." *Coastal States Gas Corp.*, 617 F.2d at 866.

The two documents at issue were redacted pursuant to Exemption 5. One document is a Memorandum for the President, Subject: Your Meeting on Oil Supply Agreement with Israel,

8:45 a.m., May 1 [1980] (President's Memorandum) and the other document is a Memorandum for the Secretary of Energy, Subject: The Secretary's Meeting with the President on the U.S. – Israel Oil Supply Agreement, Wednesday, May 1 [1980], at 8:45 A.M. (Secretary's Memorandum).

The President's Memorandum is from Zbigniew Brzezinski, who was then the U.S. National Security Advisor, and Henry Owen, who was the U.S. Ambassador at Large for Economic Summary Affairs on the National Security Council. The D.C. Circuit has stated that the President and his immediate advisors are not an "agency" under the FOIA. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1110 n. 1 (D.C. Cir. 2004). Nevertheless, the DOE has a copy of the President's Memorandum; because it is in the possession and control of the DOE, it is an agency record subject to the FOIA. Exemption 5 incorporates the presidential communications privilege, a "presumptive privilege for [p]residential communications," which "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *See Loving v. DOD,* 550 F.3d 32, 37 (D.C. Cir. 2008). This privilege protects "'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and reviewed' by the President or his 'immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Id.* (citing *Judicial Watch*, 365 F.3d at 1114). This "privilege covers documents 'reflecting presidential decisionmaking and deliberations,' regardless of whether the documents are predecisional or not, and it covers the documents in their entirety.'" *Id.* (citing *In Re Sealed case*, 121 F.3d 729, 744-45 (D.C. Cir. 1997)). Hence, as the President's Memorandum was addressed to him, it was presumptively viewed by the President himself, and therefore, this document falls under the presidential communications privilege and need not be released.

Accordingly, we will proceed to examine whether the second document, the DOE Secretary's Memorandum, was properly redacted pursuant to Exemption 5's deliberative process privilege. The Secretary's Memorandum was from the Assistant Secretary for International Affairs. Hence, that document meets the Exemption 5 threshold requirement as an intra-agency record. *See Klamath Water Users Prot. Ass'n*, 532 U.S. at 2 ("'[A]gency is defined to mean 'each authority of the Government,' [5 U.S.C.] § 551(1), and includes entities such as Executive Branch departments, military departments, Government corporations, Government-controlled corporations, and independent regulatory agencies, § 552(f).'") (internal citations omitted).

Upon further inquiry, DOE's Office of General Counsel (GC) explained that the Secretary's Memorandum was redacted as it briefed the Secretary on the "recommendations regarding proposed policy and strategy concerning a sensitive negotiation with Israel." *See* Email from Jocelyn Richards, Deputy Assistant General Counsel for Personnel Law and Administrative Litigation, Office of the Assistant General Counsel for General Law, to Shiwali Patel, Attorney-Examiner, OHA (Aug. 22, 2013). Furthermore, GC stated that "it is not clear whether the recommendations were incorporated into the U.S.'s final policy regarding this negotiation, and release of this information could cause confusion regarding the U.S.'s final policy or strategy concerning this negotiation, and have a chilling effect on subordinate's ability to speak freely to decision makers." *See id.*

Based on our review of the document, we conclude that the Secretary's Memorandum was properly redacted pursuant to Exemption 5's deliberative process privilege. First, the document is predecisional, as it was created in preparation for a meeting concerning negotiations on the U.S.'s oil supply agreement with Israel. Specifically, GC stated that it was from subordinate employees making recommendations on the oil agreement; accordingly, the drafter lacked the final decisionmaking authority on this issue, rendering the documents predecisional. *See Pfeiffer v. CIA*, 721 F.Supp. 337, 340 (D.D.C. 1989) ("What matters is that the person who issues the document has authority to speak finally and officially for the agency."); *see also Muttitt v. Dep't of State,* 2013 WL 781709, at *19 (D.D.C. 2013) (citing *Coastal States* and noting that "'a document from a subordinate to a superior official is more likely to be predecisional.'").

Second, the document is deliberative as it contains opinions, advice and recommendations regarding the U.S.'s oil agreement with Israel. While the Appellant contends that the document contains factual material that should be released, we find that the factual material was used to develop recommendations and advice regarding the oil supply agreement. Moreover, the Memorandum, by its very nature, is the type of document that is often protected under the deliberative process privilege as it reflects the government's "thinking in the process of working out its policy." *See Sears, Roebuck & Co.,* 421 U.S. at 150; *see also Klamath Water Users Prot. Ass'n*, 532 U.S. at 8-9 ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."). Indeed, courts have recognized that briefing materials and reports summarizing issues and advising superiors in preparation for further events, such as, in this instance, meetings concerning the U.S.'s oil agreement with Israel, are protected. *See Access Reports v. DOJ*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991); *Judicial Watch, Inc. v. DOE*, 310 F.Supp. 2d 271, 317 (D.D.C. 2004) (protecting briefing materials prepared for the Secretary of the Interior), *aff'd in part, rev'd in part on other grounds & remanded*, 412 F.3d 125, 133 (D.C. Cir. 2005). Finally, the Appellant avers that as the document is over 30 years old, no harm would result from its full release. However, that argument is inapposite to our conclusion as the "predecisional character of a document is not lost simply because . . . of the passage of time." *See Bruscino v. BOP*, 1995 WL 444406, at *5 (D.D.C. May 15, 1995), *aff'd in part, rev'd in part on other grounds & remanded*, 1996 WL 393101 (D.C. Cir. 1996).

The DOE regulations provide that the DOE should nonetheless 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. As to the information that we deemed properly withheld because it revealed a deliberative process, we conclude that it should remain withheld as discretionary disclosure of the redacted portions of the documents is not in the public interest because the quality of agency decisions would be adversely affected if frank, written discussions of policy matters were inhibited by the knowledge that the content of such discussions might be made public. Accordingly, we hold that Exemption 5 was properly invoked in support of the redactions.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the National Security Archive, on August 20, 2013, 2013, OHA Case Number FIA-13-0056, 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.

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