United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tri-Valley CAREs	)	
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Filing Date: September 30, 2014	)	Case No.: FIA-14-0064
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	)	

Issued: October 7, 2014

Decision and Order

On September 30, 2014, Tri-Valley CAREs (the Appellant) filed an Appeal from a final determination issued on September 18, 2014, by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA). In that determination, NNSA released portions of one responsive document under the Freedom of Information Act (FOIA), and redacted portions under FOIA Exemption 5. This Appeal, if granted, would require NNSA to release the remaining portions of the document to the Appellant.

I. BACKGROUND

On November 20, 2013, the Appellant filed a request for information under the FOIA with NNSA. That request sought "all documents containing information pertaining to the National Nuclear Security Administration's (NNSA) Revised Plutonium Strategy and/or the Alternative Plutonium Strategy from July 11, 2012 to [November 20, 2013]." Determination Letter at 1. On September 18, 2014, NNSA issued a determination letter (the Determination Letter) releasing one responsive document, entitled *A Proposal for an Enduring Plutonium Infrastructure*, to the Appellant. NNSA, however, redacted portions of this document under Exemption 5. On September 30, 2014, the Appellant submitted the present Appeal challenging NNSA's withholding determinations under Exemption 5.

II. ANALYSIS

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, NNSA withheld information pursuant to Exemption 5's deliberative process privilege. 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*, 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*, 617 F.2d at 866. 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).

We have reviewed the information withheld by NNSA under the "deliberative process privilege." As NNSA has accurately stated in its determination, the withheld information consists of pre-decisional and deliberative information that reflects internal collaboration, deliberations, comments, assessments, recommendations, and proposals concerning NNSA's plutonium policy.

Disclosure of this material would clearly inhibit frank and open discussions and hinder the DOE's ability to reach sound and well-reasoned solutions. Therefore, we find that the withheld information is protected from mandatory disclosure under the FOIA by the deliberate process privilege under Exemption 5. Moreover, it is clear that NNSA has conducted a thoughtful, careful and complete review of this document and, pursuant to 5 U.S.C. § 552(b), has redacted only those portions of the document which, if released, could reasonably be expected to stifle the free exchange of ideas and frank discussion of policy, or mislead the public, and has released as much of the document as possible without causing the type of harms the privilege was designed to prevent.

Public Interest in Disclosure

10 C.F.R. § 1004.1 mandates that "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." The Appellant contends that release of the withheld information would be in the public interest. We disagree. As noted above, our review of the

document shows that NNSA has carefully withheld only those portions of the document which, if released, would be likely to cause the type of harms the deliberative process privilege is intended to prevent. Because release of the withheld information could reasonably be expected to cause such harm, its release would not further the public interest.

III. CONCLUSION

For the reasons stated above, we have found that the information withheld under Exemption 5 by the National Nuclear Security Administration was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, Case No. FIA-14-0064, 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.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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