United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Martin Becker	)		
		)		
Filing Date:	October 17, 2014	)	Case No.:	FIA-14-0068
		)		

Issued: October 29, 2014

Decision and Order

On October 17, 2014, Martin Becker appealed a September 25, 2014, determination that he received from the Department of Energy (DOE) Office of Information Resources (OIR), the DOE office responsible for processing requests at DOE Headquarters. In that determination, OIR responded to a June 10, 2014, request for documents that Mr. Becker 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. In response to the FOIA request, OIR identified and released various responsive documents, but withheld portions of some documents pursuant to FOIA Exemptions 5 and 6. In his Appeal, Mr. Becker challenges the applicability of Exemption 5 to the withheld information. This Appeal, if granted, would require OIR to release the information that it previously withheld under Exemption 5.

I. BACKGROUND

Mr. Becker submitted a FOIA request for certain email correspondence "to and from all male employees (of any job description) within the [DOE] Office of Congressional Affairs" pertaining to Mr. Becker. *See* Letter from Alexander C. Morris, OIR, to Martin Becker (September 25, 2014) (Determination Letter). In its September 2014 determination, OIR indicated that the DOE's Office of Congressional and Intergovernmental Affairs (CI) identified nineteen documents as responsive to Mr. Becker's request.[1] Of the nineteen documents, five were released in their entirety, six were released with portions withheld pursuant to FOIA Exemption 5, four were released with portions withheld pursuant to FOIA Exemption 6, and the remaining four documents were released with portions withheld pursuant to both FOIA Exemptions 5 and 6. *Id*. After receiving the Determination Letter and the accompanying released documents, Mr.

[1] According to the determination, another DOE office, the Office of the Executive Secretariat, also identified one responsive document. However, the document was a duplicate of a document previously provided to Mr. Becker in response to a prior FOIA request. Determination Letter at 1.

Becker filed the instant Appeal with the DOE Office of Hearings and Appeals (OHA), challenging the applicability of Exemption 5 to the withheld information.[2] *See* Email from Martin Becker to OHA (October 17, 2014) (Appeal).

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 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 are incorporated into Exemption 5: the attorney work-product privilege, the attorney-client privilege, and the executive "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of the released documents pursuant to FOIA Exemption 5, OIR relied upon the attorney-client privilege and the deliberative process privilege.

A. The Attorney-Client Privilege

An agency may withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). While the privilege primarily applies to facts divulged by a client to his attorney, courts have held that it also encompasses opinions given by an attorney to a client based upon, and therefore reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005); *see also McKinley v. Bd. of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 65 (S.D.N.Y 2012); *Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). In the governmental context, "an agency can be a 'client' and agency lawyers can function as attorneys within the relationship of the privilege." *Rein v. U.S. Patent and Trademark Office*, 553 F. 3d. 353, 376 (quoting *Coastal States Gas Corp.*, 617 F.2d at 863). Not all communications between attorney and client are privileged, however. *See Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F.Supp.2d 121 (D.D.C. 2013). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal

[2] Mr. Becker did not challenge the withholding of information from the responsive documents pursuant to Exemption 6. Therefore, the Exemption 6 withholdings fall outside the scope of this Appeal and will not be considered.

advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

In this case, upon review of the documents at issue, we find that the information withheld pursuant to the attorney-client privilege is comprised of legal opinions and advice rendered by DOE attorneys to other DOE staff regarding a pending matter on which the DOE staff specifically sought legal advice. Therefore, we find that OIR correctly applied the attorney-client privilege to the withheld information. Thus, the information was properly withheld under Exemption 5.

B. The Deliberative Process Privilege

Exemption 5 permits the withholding of responsive material that reflects 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). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Id.* 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. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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 (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 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).

In this case, the material withheld by OIR pursuant to the deliberative process consists of emails among DOE employees in which they shared their opinions, assessments, and recommendations regarding a pending matter. After reviewing the documents, we conclude that the withheld information was predecisional and contains material that reflects the DOE's deliberative process. Thus, we find that OIR properly withheld the information pursuant to Exemption 5.

C. Public Interest in Disclosure

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 that disclosure is in the public interest. 10 C.F.R. § 1004.1; *see also, e.g., Hanford Atomic Metal Trades Council*, OHA Case No. FIA-13-0058 (2013).[3] 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.

In this case, Mr. Becker asserts that discretionary release of the withheld information "would be more in accord" with the Government's policy, as articulated above. *See* Appeal. We disagree. In its determination, OIR concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the DOE's ongoing decision-making process. We find that release of such information could have a chilling effect on the Agency's ability to obtain frank opinions and recommendations from its employees in the future. Therefore, discretionary release of the withheld information would not be in the public interest. *See, e.g., Judicial Watch*, OHA Case No. FIA-13-0002 (2013).

D. Segregability

Notwithstanding the above, 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). After reviewing the responsive documents, we find that OIR complied with the FOIA by releasing to Mr. Becker all reasonably segregable information.

III. CONCLUSION

As discussed above, we find that OIR properly applied the attorney-client and deliberative process privileges in withholding information from the responsive documents pursuant to FOIA Exemption 5, and released to Mr. Becker all reasonably segregable, non-exempt material. We further find that discretionary release of the withheld information would not be in the public interest. Accordingly, we will deny Mr. Becker's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on October 17, 2014, by Martin Becker, OHA Case No. FIA-14-0068, 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.

[3] Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/oha.

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