United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley	)		
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Filing Date: September 8, 2016	)	Case No.:	FIA-16-0050
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Issued: October 11, 2016

Decision and Order

On September 8, 2016, Tim Hadley filed an Appeal from a determination issued to him on that date by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-01908-F). In its determination, OIR responded to Mr. Hadley's request for information 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 his request, OIR released two documents, but withheld portions of those documents on the grounds that they were exempt from disclosure under Exemption 5 of the FOIA. The Appellant asserts that OIR improperly withheld information under Exemption 5. This Appeal, if granted, would require OIR to release the withheld material.

I. Background

Mr. Hadley filed a FOIA request with the DOE seeking "[a]ll records, notes, invoices, phone call transcripts, interview notes, etc., and any other information used to compile . . . [Office of the Inspector General] report OAS-RA-13-08, titled Audit Report on 'The Department of Energy's $700 Million Smart Grid Demonstration Program Funded through the American Recovery and Reinvestment Act of 2009.'" Determination Letter from Alexander C. Morris, OIR, to Tim Hadley (Determination Letter) at 1. As related in the Determination Letter, the DOE's Office of the Inspector General (OIG) reviewed its records and issued a determination letter on April 21, 2016. *Id.* During its review, however, OIG found two documents, Documents 74 and 75, that originated in the Office of Electricity Delivery and Energy Reliability (OE). OIG referred those documents to OE for processing. *Id.*

OIR's September 8, 2016, determination addresses OE's final response regarding Documents 74 and 75. In its response, OIR withheld information from the documents on the grounds that the information was exempt from disclosure under Exemption 5 of the FOIA, invoking the deliberative process privilege. *Id*. Explaining its reasoning, OIR stated that the withheld information consisted

of material that was pre-decisional, because it was developed before the agency adopted a final policy, and deliberative, in that it reflects the opinions of individuals who were consulted as part of the decision-making process. *Id.* OIR concluded that release of the material "would compromise the deliberative process by which government makes its decisions." *Id.*

In his Appeal, Mr. Hadley contends that the withheld information is purely factual and therefore does not reveal the deliberative process and that OIR's assertion that disclosure of the withheld information will inhibit frank and open dialogue is merely conjectural. In an amendment to his Appeal, Mr. Hadley further contends that Exemption 5 has been applied inconsistently to protect some but not all deliberative information. In addition, he argues that, to the extent that Documents 74 and 75 are drafts of audit results, there must be a final version that is responsive to his request and was not provided to him. Appeal and Amendment to 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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA's goal of broad disclosure. *See Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

Exemption 5 of the FOIA exempts from mandatory 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 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 Exemption 5: the attorney-client privilege, the attorney work-product 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) (*Coastal States*).

As noted, OIR withheld information pursuant to the deliberative process privilege of Exemption 5. Under the deliberative process privilege, agencies are permitted to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. The privilege 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 (1958)). The ultimate purpose of Exemption 5's deliberative process privilege is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by the 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) (*Petroleum Info. Corp.*). 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.

In the instant matter, we reviewed redacted and unredacted versions of Documents 74 and 75. Document 74 consists of two parts: the first six pages are a memorandum from the Assistant Secretary for OE to the Deputy Inspector General for Audits and Inspections, and the following ten pages are comments attached to that memorandum. Document 75 is an earlier version of the comments described above. The only issue we must review is whether OIR properly withheld the information under Exemption 5's deliberative process privilege. We conclude that it did. The material withheld from the versions of the documents provided to Mr. Hadley is pre-decisional for one of two reasons: some of the material was proposed findings by OIG for which OIG sought input from OE, and some was OE's responses to those proposed findings. Together, the material, including some factual material, represents the give-and-take within the Department that informs the decision maker, in this case, OIG, as it reaches a final agency position. This is precisely the type of information that the deliberative process privilege routinely protects.

None of the Appellant's several arguments on Appeal is persuasive. To the extent that OIR's protection of deliberative material appears to Mr. Hadley to be inconsistent, the release of some deliberative passages was necessary because those passages had already been disclosed, either in the Audit Report itself[*] (in the case of the first six pages of Document 74) or in OIG's April 21, 2016, response to Mr. Hadley's FOIA request. Exemption 5 was therefore applied only to appropriate deliberative information that had not yet been disclosed to the public.

Finally, DOE's FOIA regulations provide that the DOE should release material exempt from mandatory disclosure if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. OIR, however, concluded that discretionary disclosure would not be in the public interest because the knowledge that deliberative discussions might be shared publicly could inhibit "frank, written discussion of policy matters" and thus harm the quality of agency decisions. Determination Letter at 2. We agree with OIR's reasoning.

It Is Therefore Ordered That:

(1) The Appeal filed on September 8, 2016, by Tim Hadley, Case No. FIA-16-0050, 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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[*] The final version of the Audit Report is publicly available at http://energy.gov/sites/prod/files/OAS-RA-13-08.pdf.

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