**United States Department of Energy**
**Office of Hearings and Appeals**

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| In the Matter of Ayyakkannu Manivannan | ) | |
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| Filing Date: October 12, 2017 | ) | Case No.: FIA-17-0035 |
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Issued: November 2, 2017

## Decision and Order

On October 12, 2017, Ayyakkannu Manivannan (Appellant) filed an Appeal from a determination issued by the Department of Energy (DOE) National Energy Technology Laboratory (NETL) (Request No. HQ-2017-00833-F/NETL-2017-01017-F). In that determination, NETL responded to a request 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. NETL located and released several documents, but it withheld some of the information under FOIA Exemptions 5 and 6. Furthermore, NETL informed the Appellant that it failed to locate information responsive to many of his requests. The Appellant challenged the adequacy of NETL's search and its use of exemptions to withhold information. This Appeal, if granted, would require NETL to release the withheld information and conduct an additional search for responsive information.

## I. Background

On April 4, 2017, the Appellant filed a request with NETL seeking several different categories of information. FOIA Request Email (Request). In response, NETL issued a determination letter which segregated the request into nineteen individual requests and provided a response for each one. Determination Letter (October 6, 2017). All of the requests related to the Appellant's employment with NETL. For each request, NETL provided one of three responses: it located responsive documents, it failed to locate responsive documents, or it failed to locate responsive documents because the request was too "vague and unspecific." *Id.* NETL released some of the records it located, but it also redacted and withheld other records under Exemption 5 and 6. *Id.*

On October 12, 2017, the Appellant appealed NETL's Determination Letter. Appeal Letter (October 12, 2017). In the Appeal, the Appellant challenged the adequacy of NETL's search and NETL's use of Exemption 5 and 6 to withhold information. *Id.*

## 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 exemptions 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).

### A. Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ralph Sletager*, Case No. FIA-14-0030 (2014).[1]

We spoke with NETL regarding how the search was conducted for the Appellant's FOIA requests. NETL informed us that it is very familiar with the Appellant because he is a former employee of NETL and he has submitted several separate FOIA requests, many of which are still pending. Memorandum of telephone conversation between OHA and NETL (Telephone Memorandum) (October 17, 2017). To process the request, NETL identified the individuals who were most likely to locate responsive records and contacted those individuals, provided them a copy of the FOIA request, and asked them to conduct a search of their records for anything that may be responsive to the request. *Id.* Those individuals searched their physical and electronic records, including outlook emails, using the search term "Manivannan." Email chain between OHA and NETL (Email Chain) (October 19, 2017); Telephone Memorandum. Additionally, the FOIA Officer at NETL conducted an electronic and hard copy file search using "Manivannan" and "Mani." Email Chain. The FOIA Officer also searched the Sharepoint database, which allows access to all NETL personnel email, using the search terms "Manivannan," "Mani," "Centre County," and the names of two individuals relevant to the Appellant's request. *Id.* Subsequently, the FOIA Officer reviewed the results of the above searches to determine which information was responsive to the Appellant's requests. *Id.* After concluding its review, NETL determined that it had searched all locations where responsive records may reside. *Id.*

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

Of the nineteen separate FOIA requests, the Appellant challenged the adequacy of NETL's search for fifteen: requests #1-10, 12, 13, 15, 16, and 18. For all but requests #12 and 16, we are satisfied that NETL did a search reasonably calculated to locate all responsive documents. However, we first needed to consult with NETL to clarify the response it provided after processing requests #3, 5, 10, 13, and 16. For each one, NETL's response stated that "a comprehensive search for possible responsive records could not be conducted because this request is vague and unspecific" and that "NETL has no documents responsive to this request as it is currently phrased." *See, e.g.*, Determination Letter at 1, 2, 3. According to 10 C.F.R. 1004.4, "[i]f a request does not reasonably describe the records sought . . . the DOE response . . . will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request . . . ." *See also David B. McCoy*, Case No. VFA-0707 (2002) (remanding determination where agency responded that a request was "unclear and needed justification" and Appellant clarified his request on appeal). Therefore, if NETL could not make sense of the Appellant's original request, it should have contacted him to obtain clarification. However, NETL informed us that despite the Determination Letter language, it did conduct a search of its electronic and physical records for information responsive to each request. Telephone Memorandum. But, due to the nature of the requests, NETL knew that no responsive documents existed. *Id.* In other words, the "vague and unspecific" language meant that the requests sought documents that NETL knew did not exist; notwithstanding, a search was conducted; and—unsurprisingly—no responsive documents were found. *See id.* Consequently, we reviewed NETL's search in response to #3, 5, 10, 13, and 16 as if it had used the same language in its answers to the other requests: "A comprehensive search for responsive records was conducted. NETL has no documents responsive to this request."

Based on the foregoing, we conclude that NETL reasonably interpreted the Appellant's requests as written and used its interpretation to conduct searches using the process described above. Using the Appellant's name, along with other relevant terms from the request, would surely produce any records in their electronic or hardcopy files, especially given NETL's knowledge of the Appellant. While NETL's search did not produce documents in each instance, this result is not surprising given the wording of some requests, which in some instances asked for the "justification document[s]" for why certain actions were or were not allegedly taken. *See, e.g.*, requests #3 and 5.

In reaching our conclusion, we reviewed the arguments and information provided in the Appellant's Appeal Letter. A lot of the information does little to support his challenge to the adequacy of NETL's search. For instance, request #3 requested "release of the justification document information how NETL circumvented the government EEO procedures in this particular investigation . . . ." Request at 1. In his Appeal of NETL's response to request #3, the Appellant provided the name of a person who allegedly "initiated the EEO complaint" and then stated that "[d]ocument[s] explaining the procedure following [sic] the government EEO procedure should be released." Appeal Letter at 2. However, NETL explained that Appellant's request #3 sought a document that does not exist because the investigation was not an EEO investigation. Telephone Memorandum. It reasonably follows that there would be no document justifying the circumvention of EEO regulations. Therefore, the additional information the Appellant provided in his Appeal would not have changed the result of NETL's search. And even more importantly, the additional information does not indicate that NETL acted unreasonably in searching for records based on the original request language.

Other information the Appellant provided in his Appeal would have been helpful in directing NETL's search, but it does not demonstrate that NETL's search was inadequate. For instance, the original request #13 sought "release of the management discussion and decision why the report prepared by [the investigator] was delayed for 4 months[,] . . . wasting taxpayer funds." Using the search methods articulated above, NETL conducted its search and reviewed the results to find any records of management discussion as to why the investigative report was delayed. Telephone Memorandum. In his Appeal of NETL's response to request #13, the Appellant stated that "NETL communication records with my lawyer . . . must be released." Appeal Letter at 3. Certainly the Appellant's response provides a specific scope of information NETL could have searched for: namely, all communications with the Appellant's attorney. However, that is not an interpretation that the original request reasonably encompassed. There may have been, conceivably, many communications between the Appellant's attorney and NETL that had nothing to do with the delay justification or decision to delay the report's release. In other words, the Appellant's purported clarification seeks an entirely different type of search. After reviewing requests #1-10, 13, 15, and 18, we find that NETL conducted a search reasonably calculated to recover responsive documents.

Turning to request #16, NETL has not demonstrated that it conducted an adequate search. Request #16 sought "release of the information regarding the identity of the person [who] prepared the 'Notice of proposal removal . . . .'" NETL failed to locate any responsive records. Determination Letter at 3. In response, the Appellant stated that "[t]he name of the person who prepared the letter has been requested and NETL is still refusing to release it." Appeal Letter at 3. After considering the information provided by NETL, we cannot conclude that NETL adequately searched for records that may have identified additional authors of the document at issue in request #16. Accordingly, we will remand request #16 for NETL to conduct a new search and issue another determination.

Finally, we cannot say that NETL conducted an adequate search for request #12, which sought, in part, "release of all communication documents, including . . . emails with Centre County officials." NETL informed us that their search failed to encompass records of certain individuals who may have communicated electronically with the Centre County officials. Telephone Memorandum. Based on the foregoing, we cannot find that NETL conducted a search reasonably calculated to locate all relevant documents responsive to the Appellant's request. Accordingly, we will remand request #12 for NETL to conduct a new search and issue another determination.

B. FOIA Exemptions

1. Exemption 5

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). 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).

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*, 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 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.

Here, NETL redacted information that it located in response to requests #6, 7, and 8. Determination Letter at 2. The sole redaction occurred in an email communication. *Id.* We have viewed the unredacted email, and it is indeed an exchange between an agency employee seeking and receiving legal advice from an agency attorney. As such, NETL properly withheld the information under Exemption 5.

b. The attorney work-product privilege

The attorney work-product privilege protects from disclosure documents that reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. However, the privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work-product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g., Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 30–31 (D.D.C. 2013) (quoting *In re Sealed Case*, 146 F.3d 881, 885 (D.C.Cir. 1998). The privilege is not limited to court

proceedings, but extends to administrative proceedings as well. *See, e.g., Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

NETL invoked Exemption 5 to withhold the entirety of the records it located in response to request #17 and its subparts. Those records consist of a report entitled the Confidential Management Directed Inquiry, which was created after NETL directed an investigation into the conduct of the Appellant. As an initial matter, the report qualifies as an intra-agency memorandum because it was created and provided to the agency by an attorney contracted to conduct the investigation. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) ("when an agency solicits opinions from and recommendations by temporary, outside consultants, those materials are considered "intra-agency" for FOIA purposes").

We have reviewed the report. It was compiled by a contracted attorney-investigator; it recounts details, circumstances, and events; and it provides analysis, conclusions, recommendations, and supporting attachments. We therefore find that its disclosure would reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney."[2] Furthermore, the conduct alleged therein created the prospect of potential litigation and that potential precipitated the creation of the report. Thus, NETL appropriately applied Exemption 5 to withhold the entire report, and we therefore need not determine whether NETL appropriately applied Exemption 6 to withhold the same.

## III. Conclusion

For the reasons stated above, we conclude that NETL conducted an adequate search based on the Appellants requests for all but requests #12 and 16. We also find that NETL appropriately applied Exemption 5 to redact or withhold information in response to requests #6, 7, 8, and 17. We will therefore grant the present Appeal in part and refer the matter to NETL for further processing for requests #12 and 16, and we will deny the Appeal in all other respects.

## IV. Order

It is hereby ordered that the Appeal filed on October 12, 2017, by Ayyakkannu Manivannan, Case No. FIA-17-0035, is granted in part.

This matter is hereby referred to the Department of Energy's National Energy Technology Laboratory, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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.

[2] Our finding also covers the extensive exhibits that accompany the report. *See In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 19 (D.D.C. 2008) ("an attorney's work-product may be reflected in interviews, statements, . . . and countless other tangible and intangible ways . . . .").

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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