



under Exemption 5 are purely factual and, therefore, not protected under that exemption's deliberative process privilege. Appeal at 1. The Center further alleges that a document's title and description generally do not constitute advice or recommendations and are therefore not properly withheld under Exemption 5. It did not challenge Document 17's pre-decisional nature.

NNSA provided our office with additional information about Document 17 and its withholdings. It stated that the document had been considered for inclusion in the Nuclear Posture Review (NPR), but was ultimately rejected. Email from Delilah Perez, NNSA, to Kristin L. Martin, Attorney-Advisor, OHA (May 22, 2018) (NNSA Email). It further stated that the document's topic was entirely omitted from the NPR. *Id.* NNSA confirmed that Document 17 had been presented to a decision-maker who had rejected its inclusion in the NPR. Memorandum of Telephone Conversation between Delilah Perez, NNSA, and Kristin L. Martin, Attorney-Advisor, OHA (May 22, 2018) (Telephone Memorandum). NNSA also provided Document 17 to OHA, which we reviewed.

## II. Exemption 5

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). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of the requested records is not possible." 5 U.S.C. § 552(a)(8)(A). DOE must "take reasonable steps necessary to segregate and release nonexempt information." *Id.*

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). OGC invoked Exemption 5 under the deliberative process privilege.

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *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 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.” *Id.* However, this list is neither definitive nor exhaustive. *Id.* at 867. Documents falling outside the realm of “opinion” or “recommendation” may still be protected under the deliberative process privilege if their release would obstruct the government’s ability to make well-reasoned decisions. *Id.* at 867.

The deliberative process privilege does not typically exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep’t of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). If purely factual information is part of a document meant primarily to inform about the facts upon which a decision will be made, it is not deliberative and, therefore, not exempted under 5 U.S.C. § 552(b)(5). *Vaughn v. Rosen*, 523 F.2d 1136, 1145-1146 (D.C. Cir. 1975). 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.” *Petroleum Info. Corp.*, 976 F.2d at 1435. In such situations, Exemption 5’s proper use requires that disclosure would reveal some part of the deliberative process not already known to the public. *Id.* at 1434.

Decisions to exclude information when formulating a final policy statement are generally protected under the deliberative process privilege. In *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), a chemical manufacturer requested materials from the EPA relating to a decision on DDT use, including material from a public hearing that aides did not include in summaries for the Administrator. There, the court asked “Can Montrose use the FOIA to discover what factual information the Administrator’s aides cited, discarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision? Or would such discovery be an improper probing of the mental processes behind a decision of an agency?” *Id.* at 68. The court decided that allowing the public to access what the government had declined to consider would harm the quality of agency decision-making. “Whether [a decision-maker] weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.” *Id.*

### III. Analysis

It is unsurprising that OGC invoked Exemption 5 in withholding Document 17. The Appellant’s original request was for documents produced *for consideration* by a government entity. In other words, the Appellant requested documents that were specifically created to be part of the Government’s decision-making process. OGC withheld Document 17 in its entirety because the decision to exclude it from the NPR is protected under the deliberative process privilege. *Petroleum Info. Corp.*, 976 F.2d at 1435; *Montrose Chemical Corp.*, 491 F.2d at 68 (D.C. Cir. 1974). Document 17 was intentionally excluded from the NPR, rather than discarded as irrelevant or redundant information. That exclusion was part of a broader policy decision. The United States takes great care in deciding and declaring its nuclear posture; it must be free to consider and exclude information without fear that it may someday look like a “shadow policy” if it is released through a FOIA request. If excluded material could be obtained by the public and identified as a possible nuclear posture of the United States, such information may not be freely presented to decision-makers in the future, giving them an incomplete universe of facts from which to formulate national nuclear policy. Publication of excluded information through FOIA requests essentially hobbles the Government’s ability to reject reports it has considered. In carving out a FOIA exemption for the deliberative process privilege, Congress sought to avoid such outcomes. H. Rep. No. 89-1497, at 31 (1966).

The 2016 FOIA Improvement Act codified the Department of Justice’s existing guidance that agencies only withhold information if they reasonably foresee that disclosure would harm an interest protected by an exemption. FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 539; 5 U.S.C. § 552(a)(8)(A)(i). The potential for harm resulting from disclosure is particularly acute in this case. The requested documents are, by their very nature, quite sensitive. A nation’s nuclear policy must be absolutely clear, as misunderstandings can have dire consequences. Because publication of Document 17 could muddy the waters of understanding by allowing speculation as to whether its contents are “unofficial” U.S. policy, and because this confusion carries the potential for grave harm to the United States and other nations the world over, the FOIA Improvement Act’s standard is properly met here.

The FOIA requires OGC to take reasonable steps to segregate nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii). Document 17 as a whole is properly withheld under Exemption 5 because disclosure of any of its contents would reveal information that the United States does not want to include in its official nuclear posture. The Document’s topic was not included in the NPR, so any information that could identify that topic is properly withheld under Exemption 5. After inspecting the document, we find that while various conjunctions and sentence fragments may technically be segregable, it is not reasonable to expect OGC to make redactions at such a granular level.

#### **IV. Order**

It is hereby ordered that the Appeal filed on May 17, 2018, by the Center for Public Integrity, No. FIA-18-0025 is hereby denied.

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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS,  
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