United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Greentech Media	)		
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Filing Date: October 8, 2019	)	Case No.:	FIA-20-0002
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Issued: November 7, 2019

Decision and Order

On October 8, 2019, Greentech Media (Appellant) appealed a Determination Letter issued to it from the Department of Energy's (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-00891-F. In that determination, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. OPI withheld portions of responsive records pursuant to FOIA Exemptions (b)(5) and (b)(6). The Appellant challenged the decision to withhold information pursuant to Exemption (b)(5). In this Decision, we deny the appeal in part and remand the remaining issue to SRO to issue a new determination regarding the requested documents at issue in this case.

I. BACKGROUND

On April 3, 2018, Appellant sent a FOIA request to DOE in which it sought:

> [A] search of the term "SunShot" contained in the subject or body fields from the below accounts sent or received between September 12, 2017, and April 3, 2018.
>
> Accounts to be searched:
>
> - Charlie Gay
> - Dr. Becca Jones-Albertus
> - Ebony Vauss
> - Susanna Murley
> - Brian McCormack

Determination Letter at 1 (Sept. 30, 2019). Additionally, Appellant requested "any text messages sent to or from the above DOE custodians concerning the given term." *Id.* Appellant later clarified

that the request should include the search terms "SunShot,"[1] "branding," and "rebranding," and agreed to waive publicly available attachments to emails. *Id.* DOE began its search on April 18, 2018, which became the cutoff date for responsive documents. *Id.* Fourteen responsive documents were identified, which consisted of emails between DOE employees, several versions of planning and update documents sent internally as attachments to those emails, and draft documents with tracked changes. *Id.* at 1–2.

DOE withheld information from the responsive documents, invoking Exemptions 5 and 6 of the FOIA to support its redactions. Determination Letter at 2. Appellant timely appealed DOE's use of Exemption 5, arguing that it had improperly used the exemption and that it had not properly described the withheld information or why it fell within Exemption 5's ambit. Appeal at 1–2 (Oct. 8, 2019).

II. ANALYSIS

An informed citizenry is a crucial element of a functioning democracy. The FOIA is intended to ensure such a citizenry, which is "needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It is incumbent upon agencies to conduct a search that is "reasonably calculated to discover the requested documents…." *SafeCard Servs., Inc. v. Sec. and Exch. Comm'n*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1201 (1991). *See also Heffernan v. Azar*, 317 F. Supp. 3d 94, 110 (D.D.C. 2018). When an agency denies a FOIA request, it is the agency's burden to justify its decision, showing that: (1) the responsive records are not agency records; (2) responsive agency records were not withheld; or (3) responsive agency records were withheld properly. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980)).

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). OPI 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

[1] "SunShot" was the name of a DOE initiative launched in 2011 and administered by Solar Energy Technology Office (SETO). During this initiative's tenure, the names SETO and SunShot became somewhat interchangeable. When the initiative ended, SETO worked to "unbrand" itself, realigning its name back to SETO and reframing the Sunshot brand to associate only with SunShot activities.

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.* 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.*

Generally, the version history of a draft is exempt from disclosure under Exemption 5 because comparison of the draft and final versions would reveal the decision-making and policy-making process of the agency. *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982); *Sierra Club Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1017 (9th Cir. 2019). Courts have long held that Exemption 5 "exists to prevent such disrobing of an agency decision-maker's judgment." *Russell*, 682 F.2d at 1049. However, some drafts may be disclosed without compromising the deliberative process. It is well-established that when an agency "chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5." *Sears*, 421 U.S. at 161. The D.C. Circuit recognizes a "general principle that action taken by the responsible decision maker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA." *Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 602 (D.C. Cir. 2001). In *Sierra Club*, an agency sought to withhold draft opinions and their accompanying documents. *Sierra Club Inc.*, 925 F.3d at 1016–17. The Court held that one of the opinions, and its accompanying documents, was not deliberative because, though it was marked "draft," there was no later opinion to which it could be compared, it did not reveal any internal discussions or back-and-forth between agency employees, and it represented the final view of the agency. *Id.* at 1017–18.

The Appellant challenges OPI's use of Exemption 5 to redact the responsive documents, arguing that DOE improperly applied the exemption to information not protected by a privilege that would make the documents unavailable by law to outside parties. Appeal at 1. Appellant further argues that OPI failed to justify why the "deliberative process privilege" applies. *Id.* Specifically, Appellant states that the withheld information appears "to fall within the scope [of the FOIA] and specifically, Section 552(a)(2)(C) which notes the inclusion of 'instructions to staff that affect a member of the public' and 552(a)(2)(B), 'those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.'" *Id.*

The OHA reviewed each page of the responsive records. The email exchanges were deliberative in nature, consisting primarily of substantive discussion of how to best carry out the unbranding project, and pre-decisional in that they discussed actions yet to be taken. Similarly, the documents with tracked changes clearly show the mental processes of agency employees and were comprised of the text of multiple drafts. As both deliberative and pre-decisional, these documents were properly withheld under Exemption 5.

The planning and update documents were evolving documents, updated as needed throughout the process. Memorandum of Telephone Call Between Ebony Brooks, SETO, and Kristin L. Martin, OHA (October 18, 2019). Some of the redacted material in these documents matches the public actions and statements made by SETO in its SunShot unbranding project. *Id.* However, due dates

listed in the document may be different than actual performance or statement dates, and recommended talking points, by their nature, may have varied from actual statements made to the public. *Id.*

Portions of the planning and update documents are not deliberative in nature. There is little underlying analysis in these portions and there is no evidence that the information was created to assist in decision-making. Where, as here, an agency fails to provide evidence that a document was prepared for the purpose of assisting in decision-making, such failure is "sufficient to defeat [the] assertion of the deliberative-process privilege." *Columbia Riverkeeper v. United States Army Corps of Eng'rs*, 38 F. Supp. 3d 1207, 1219 (D. Or. 2014).

For the foregoing reasons, many redacted portions of these documents are not exempt from disclosure under Exemption 5 of the FOIA. On remand, OPI should review the documents at issue and release to the Appellant those portions that are not deliberative in nature or issue another determination justifying the withholding of the information pursuant to another FOIA exemption.

III. ORDER

It is hereby ordered that the Appeal filed on October 8, 2019, by Greentech Media, No. FIA-20-0002, is granted in part and denied in part. This matter is remanded to OPI, 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.

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 one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
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Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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