

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

In the Matter of InvestigateWest )  
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Filing Date: June 3, 2020 ) Case No.: FIA-20-0034  
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Issued: June 12, 2020

**Decision and Order**

On June 3, 2020, InvestigateWest (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) Golden Field Office (GFO) regarding Request No. GFO-2020-00420-F. In that letter, GFO responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought communications related to the National Renewable Energy Laboratory’s (NREL) Interconnections Seam Study. *See* GFO Determination Letter at 1 (May 21, 2020) (summarizing Appellant’s FOIA request). GFO responded to Appellant’s FOIA request and provided one hundred eighty-three pages of e-mail records and attachments to the e-mails. *Id.* at 3; GFO Interim Response at 4 (April 23, 2020). GFO redacted portions of the e-mails and attachments pursuant to Exemptions 4, 5, and 6 of the FOIA. Determination Letter at 2–3; Interim Determination Letter at 2–4.<sup>1</sup> Appellant asserts on appeal that GFO failed to conduct an adequate search for responsive records and that GFO improperly applied Exemption 5. Appeal at 1–2. As explained below, we deny Appellant’s appeal.

**I. Background**

NREL, in collaboration with government, university, and industry consultants (Research Team), is undertaking the Interconnections Seam Study (“Study”) “to identify cost-effective options for upgrading the U.S. electric grid to create a more integrated power system.” *Interconnections Seam Study*, NREL, <https://www.nrel.gov/analysis/seams.html> (last visited June 8, 2020). On January 8, 2020, Appellant submitted a FOIA request seeking:

copies of emails sent TO - direct, CC or BCC - or BY Aaron Bloom, Josh Novacheck, [and] . . . Douglas Arent [], between January 1, 2015 and January 1, 2020, and containing at least one of the following keywords or phrases: macrogrid, price on carbon, price on co2, co2 price, carbon price, carbon policy, interconnection seam study.

Appeal at 1.<sup>2</sup>

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<sup>1</sup> Appellant’s appeal does not challenge GFO’s redactions made pursuant to Exemptions 4 or 6.

<sup>2</sup> Appellant’s request identified numerous other individuals whose e-mails Appellant wished to receive in response to the request. In its Interim Response, GFO explained that Appellant’s FOIA request had been transferred to another

On May 14, 2020, GFO notified Appellant that Mr. Bloom had left his position with NREL in November 2018, and that the retention period for Mr. Bloom's electronic mailbox had expired. E-mail from GFO FOIA Officer to Appellant (May 14, 2020). Therefore, GFO explained that it could not conduct the requested keyword search of Mr. Bloom's e-mail account. *Id.*

In its response, GFO provided Appellant with one hundred five pages of e-mails between Messrs. Bloom, Novacheck, Arent, other members of the Research Team, and DOE personnel concerning: refining the modeling for the Study, preparing a slideshow for a presentation of Study findings, drafting a paper describing the Study for publication by the Institute of Electrical and Electronics Engineers (IEEE), and addressing feedback from DOE personnel outside of the Research Team regarding the Study. GFO also provided Appellant with records attached to the e-mails, including the final version of the slideshow and four drafts of the IEEE paper which included redlined edits and comments from the Research Team. GFO withheld portions of the e-mails and drafts of the IEEE paper under Exemption 5 of the FOIA based upon the deliberative process privilege. Determination Letter at 2–3; Interim Response at 2–3.

On June 3, 2020, DOE's Office of Hearings and Appeals (OHA) received the appeal. The appeal asserts that GFO failed to conduct an adequate search for responsive records because it had not pursued alternative means to search for Mr. Bloom's e-mails and had not conducted a search for Mr. Arent's e-mails. Appeal at 1–2 (asserting that GFO could have performed a hard drive search for Mr. Bloom's records and that the Determination Letter indicated that GFO had searched for Mr. Bloom's and Mr. Novacheck's e-mails but did not represent that a search had been undertaken for Mr. Arent's e-mails). Appellant also argued that GFO had inappropriately asserted Exemption 5 to withhold responsive records because “[m]ost if not all of the information redacted from GFO's search products relate to the study's findings and their presentation as an article in an engineering journal.” *Id.* Finally, Appellant asserted that, even if Exemption 5 was technically applicable, GFO had not taken reasonable efforts to segregate and release non-exempt portions of the records. *Id.*

OHA contacted GFO concerning its search for records responsive to Appellant's request. GFO indicated that NREL had searched Mr. Arent's electronic mailbox and provided documentation of the search from NREL's cyber team. E-mail from GFO FOIA Officer to OHA (June 5, 2020). With respect to the search for Mr. Bloom's e-mails, GFO explained that NREL retained hard drive backups of users' computer for six months following the date of account termination. E-mail from GFO FOIA Officer to OHA (June 9, 2020). Since Mr. Bloom separated from NREL in November 2018, NREL indicated that the retention period for the hard drive backup of Mr. Bloom's account ended in April 2019 and was no longer available for search when Appellant submitted his FOIA request. *Id.*

## II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA].” *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE

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DOE office to conduct a search for responsive e-mails to and from the other named individuals. Interim Response at 1.

regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. 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 a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

### **A. Adequacy of GFO’s Search**

In responding to a request for information filed under the FOIA, 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*, OHA Case No. FIA-14-0030 (2014).<sup>3</sup>

In this case, Appellant identified two grounds for his challenge to the adequacy of GFO’s search: (1) that GFO had not searched Mr. Arent’s e-mail account, and (2) that GFO had not verified that Mr. Bloom’s e-mail account was discontinued or pursued alternative means of searching for Mr. Bloom’s e-mails. With respect to Mr. Arent’s e-mail account, GFO notified OHA that NREL searched Mr. Arent’s e-mail account, provided e-mails from NREL’s cyber team dated February 2020 reporting on the results of the search, and indicated that the few responsive e-mails located in Mr. Arent’s account were included in the documents provided to Appellant. E-mail from GFO FOIA Officer to OHA (June 5, 2020). In light of this information from GFO, we are convinced that the omission of Mr. Arent’s name from the Determination Letter issued to Appellant was a harmless typographical error and that a search of Mr. Arent’s e-mail account was performed.

As to the search for Mr. Bloom’s e-mails, GFO provided e-mails from the NREL cyber team sent contemporaneously with the search indicating that the NREL cyber team tried unsuccessfully to search Mr. Bloom’s e-mail account and subsequently discovered that the account was deactivated and unavailable for search. *Id.* NREL also clarified that a hard drive backup of Mr. Bloom’s account had existed until approximately April 2019, at which time the retention period for the hard drive backup ended, and that the hard drive backup was no longer available for search when Appellant submitted his FOIA request. E-mail from GFO FOIA Officer to OHA (June 9, 2020). In light of the evidence that NREL verified that Mr. Bloom’s e-mail account no longer existed, and its explanation that there was no longer a hard drive copy to search as of the date of Appellant’s FOIA request, we are not persuaded that the search was inadequate.

Additionally, it is not clear to us that the results of the search would have been meaningfully different had Mr. Bloom’s account been available for search. Mr. Bloom was included on all but one e-mail chain provided to Appellant in GFO’s response, except for those dated after he departed from NREL in November 2018. Responsive E-mails at 1–100. Moreover, the e-mails provided to Appellant show that Mr. Bloom routinely forwarded e-mails to Mr. Novacheck on which he was not copied, and vice versa. *See id.* at 12, 34, 38, 67. In light of the highly-specific search terms specified by the Appellant, and the documented sharing of information between Mr. Bloom and Mr. Novacheck, we find that the search of Mr. Novacheck’s account was reasonable, and

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<sup>3</sup> Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

essentially the only viable means to search for Mr. Bloom's responsive e-mails. Accordingly, we determine that the bases for Appellant's challenge to the adequacy of GFO's search are resolved and that the search was reasonable under the circumstances.

## **B. Applicability of Exemption 5 to the Interview Summaries**

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters that 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). The U.S. Supreme Court has interpreted this provision to "exempt those documents, and only those documents[] [that are] normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). GFO withheld responsive e-mails and attachments under the deliberative process privilege because they contained "discussions and documents related to the progress of a DOE funded study." Determination Letter at 2. The deliberative process privilege protects records which are both pre-decisional and deliberative. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014). A document is pre-decisional if it is "generated before the adoption of an agency policy." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is deliberative if "it reflects the give-and-take of the consultative process. The exemption thus covers 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. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

### **1. The Research Team E-mails are Intra-Agency Records**

Courts deem records created by or shared with consultants to federal agencies intra-agency records under Exemption 5 when "outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10 (2001). Private parties selected by a federal agency to provide advice "based on their undisputed experience and qualifications" act as consultants even if they participate on a voluntary basis without a formal contract. *Nat'l Inst. of Military Justice v. DOD*, 512 F.3d 677, 683–84 (D.C. Cir. 2008). Appellant did not challenge the intra-agency status of the e-mail records identified by GFO, and it is readily apparent that non-governmental consultants participating on the Research Team demonstrated superlative experience and qualifications. *Interconnections Seam Study*, NREL, <https://www.nrel.gov/analysis/seams.html> (last visited June 8, 2020) (identifying the composition of the Research Team). Accordingly, we find that the e-mails and attachments identified by GFO are intra-agency records.

### **2. The Research Team E-mails and Draft IEEE Article are Pre-Decisional and Deliberative**

Drafts of articles and manuscripts, recommendations from individuals who reviewed the drafts, and communications regarding the content and conclusions of an article are both pre-decisional and deliberative because they are part of the agency's deliberation as to whether to publish an article and, if so, in what form. *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118 (D.C. Cir. 1989) (holding that a review letter concerning an unpublished journal article was exempt from disclosure under the deliberative process privilege); *see also Judicial Watch v. Dep't of Commerce*, 2017 WL 3822733 (D.D.C. 2017) (finding that drafts of an article published by National Oceanographic and

Atmospheric Administration scientists in the journal *Science*, as well as communications concerning the drafts, were exempt from disclosure under the deliberative process privilege). The responsive e-mails identified by GFO reflect the Research Team's ongoing updates to the Study, drafts of presentation materials and the IEEE article, and incorporation of feedback from DOE personnel outside of the Research Team into the drafts. These communications and the accompanying drafts of the IEEE article are pre-decisional because they concerned how to design the final methodology and inputs into the Study and whether, if at all, to communicate the existing findings through the proposed IEEE article.

The e-mail communications and drafts of the IEEE article are also deliberative. The e-mail communications reflect a robust give-and-take exchange between the Research Team members as they shared their respective opinions and expertise as to how to refine the drafts and the Study methodology. The e-mails between study members and drafts of the IEEE article, including comments and redlined edits from Research Team members, are precisely the material that the deliberative process privilege is intended to protect as the disclosure of the drafts would reveal the editorial judgment of the Research Team members and "inhibit creative debate and candid consideration of alternatives" by exposing the Research Team members' blunt opinions to public scrutiny. *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *see also* 889 F.2d at 1125 (finding that disclosing "reviewers' editorial comments would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all.").

Appellant argues that the deliberative process privilege does not protect the contents of the responsive records because they "relate to the [S]tudy's findings" and are "scientific material . . . ." Appeal at 2. This challenge to the invocation of the deliberative process is without merit. The Study aims "[t]o quantify the value of enhancing the U.S. interconnection seams" in the regional power systems using a combination of data models. *Interconnections Seam Study*, NREL, <https://www.nrel.gov/analysis/seams.html> (last visited June 8, 2020). While the Research Team prepared a presentation and drafts of the IEEE article based on preliminary findings of the Study, the records compiled by GFO reflected the ongoing refinement of the modeling approach and none of the responsive documents presented DOE's final findings as to the results of the Study. The invocation of the phrase "scientific material" by Appellant does not transform the iterative process of refining the Study's modeling and accounting of "value" into a recitation of factual material that DOE cannot withhold under the deliberative process privilege because "even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process to which Exemption 5 applies." *Goodrich Corp. v. EPA*, 593 F.Supp.2d 184, 189 (D.D.C. 2009). Thus, we find that GFO properly determined that the e-mails and draft documents circulated among the Research Team and other DOE personnel were exempt from disclosure under the deliberative process privilege.

### **C. Segregability**

The FOIA requires agencies to take reasonable steps to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). Appellant takes issue with the "blanket nature of the redactions" made by GFO to the responsive documents. Appeal at 2. In this case, GFO judiciously redacted deliberative comments concerning the Study design and the contents of the attached draft documents from the e-mails provided to Appellant. Moreover, although GFO made "blanket

redactions” to the drafts of the IEEE paper, we see no alternative because releasing the drafts of the IEEE paper would have revealed the editorial judgments and thoughts of the authors which GFO was entitled to withhold under Exemption 5. *Dudman Commc'ns Corp.* 815 F.2d at 1568. Accordingly, we find that GFO took reasonable steps to release segregable material.

### **III. Order**

It is hereby ordered that the appeal filed by InvestigateWest on June 3, 2020, No. FIA-20-0034, is 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:

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