United States Department of Energy
Office of Hearings and Appeals

In the Matter of The Hill	)	
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Filing Date: August 25, 2020	)	Case No.: FIA-20-0042
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Issued: September 3, 2020

Decision and Order

On August 25, 2020, Rachel Frazin of The Hill appealed a Determination Letter issued by the Department of Energy's (DOE) Office of Public Information (OPI) regarding Request No. HQ-2020-00879-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 the responsive record pursuant to FOIA exemption 5. The Appellant challenged the decision to withhold information pursuant to exemption 5. In this Decision, we deny the appeal.

I. BACKGROUND

On June 22, 2020, the Appellant filed a request with OPI for "a copy of Tab 9 of the DOE document titled 'S1 Visit to Kiev, Ukraine,' referring to official travel taken the week of May 20, 2019. Tab 9 includes information about a bilateral meeting between the U.S. Delegation and Ukrainian President Volodymyr Zelensky." Determination Letter from Alexander C. Morris to Rachel Frazin at 1 (July 1, 2020). The document for which the Appellant asked, Tab 9 of the DOE document titled 'S1 Visit to Kiev, Ukraine,' is a Secretarial Briefing.

On July 1, 2020, OPI issued a final determination and provided the Appellant with one partially redacted Secretarial Briefing dated May 19, 2019. The redacted portions of the document were marked as redacted pursuant to (b)(5). In the Determination Letter, OPI explained that portions of the document were withheld pursuant to exemption 5 of the FOIA. Determination Letter at 1-2.

On August 25, 2020, the Appellant submitted an Appeal to the DOE's Office of Hearings and Appeals (OHA). In her Appeal, the Appellant challenged the OPI's redaction of portions of the Secretarial Briefing, arguing that the exemption was applied "incorrectly or broadly" because some of the redacted portions of the document under the "Purpose," "Key Issues," and "Background" sections were "pre-determined goals and were not part of any new decision-making process." Appeal Letter Email from Rachel Frazin to OHA Filings at 2 (August 25, 2020). The Appellant further argued that the DOE's refusal to release this information to the public effectuates more harm "than the remote possibility of harming future deliberations." *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 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. 5 U.S.C. § 552(a)(4)(B).

A. Exemption 5

Exemption 5 protects "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). One of the purposes of this exemption is to protect the deliberative process within an agency. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975). To be considered deliberative, the document must be one which was created before the agency's final decision was made, and it "reflects the give-and-take of the consultative process." (*Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 35, 43 (D.D.C. 2012) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). As the Supreme Court has stated, "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Id.* at 151. The concern is that the disclosure of the deliberative process will hinder the open discussion of agency policies and related matters within the agency. *Id.* at 150. The pre-decisional nature of the document will not be changed once a final decision is issued, because "disclosure…could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency." *Fed. Open Market Comm. Of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979).

The document in question, as a whole, was drafted to guide the anticipated interaction between the Secretary of the Department of Energy (Secretary) and Ukrainian president Volodymyr Zelenskyy (President Zelenskyy) at their May 20, 2019, meeting. It is clear that the document was authored by employees subordinate to the Secretary for the benefit of the Secretary. Courts have recognized that there is a greater likelihood that documents are pre-decisional in nature when they flow from subordinate employees to more senior officials. *See, e.g., Muttitt v. Dep't of State,* 926 F. Supp. 2d 284, 308 (D.D.C. 2013). The Secretarial briefing contains the opinions, analyses, and recommendations of the individuals who drafted the document for the purpose of guiding the Secretary, all of which are critical to the decision-making process and highly indicative that the document is pre-decisional and deliberative in nature. *See e.g., Am. Ctr. for Law & Justice v. United States* DOJ, 392 F. Supp. 3d 100, 106 (D.D.C. 2019).

In this case, we reviewed the information OPI redacted pursuant to exemption 5. The redacted sections of the Secretarial Briefing include a portion designated as "Key Issues." An examination of the redacted information under "Key Issues" reveals that section is comprised of what appear to be broad suggested talking points or conversation topics for the Secretary. The fact that these redacted items are talking points is not dispositive of whether they were appropriately redacted under exemption 5. Talking points may not fall under exemption 5 if the agency makes an express decision to "use a deliberative document as a source of agency guidance." *Id.* at 107 (quoting

NLRB v. Sears Roebuck & Co., 421 U.S. 132, 161 (1975)). The talking points under "Key Issues" appear to be akin to recommended topics of discussion from subordinate employees to the Secretary and do not, therefore, appear to be anything more than advice on how the Secretary should interact with President Zelenskyy. As a result, this portion appears to be "part of the give-and-take between the drafter" and the Secretary, and accordingly, the Secretary was free to disregard the recommendations and opinions of his subordinates. *Id.* at 106-07. In much the same vein, the redacted "Purpose" section of the document appears to be a rough outline of the suggested aims of this meeting, and the Secretary could, at his discretion, disregard any of the suggested aims. Accordingly, we find that these redactions were appropriately made pursuant to exemption 5.

An examination of the "Background" portion the Secretarial Briefing reveals that this portion not only contains verifiable facts, but also the analyses and recommendations made by subordinates based on the facts contained therein. Again, these analyses and recommendations were made for the Secretary's benefit. It has been established that factual information shall not be disclosed when "the majority of [the document's] factual material was assembled through an exercise of judgement in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take a discretionary action." *Mapother v. DOJ*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). Because the authors of the Secretarial Briefing clearly used their own judgement when summarizing and including pertinent factual material to formulate their opinions and recommendations to the Secretary, we agree that the contents of the "Background" section were appropriately redacted pursuant to exemption 5.

Lastly, we do not agree with the Appellant's argument that the possibility of harming future deliberations between subordinates and their superiors with the release of this information is remote. The Appellant states in her Appeal that "[i]f [the purpose of the visit] was not nefarious, there is no harm in sharing this information since decision-making will not be chilled by releasing this non-damning information." Appeal at 2. The purpose of this exemption is not to protect against the public disclosure of nefarious plans or events. Rather, exemption 5 is, among other things, meant to ensure that subordinates and superiors may continue to engage in open and frank discussions regarding matters of policy. *See Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citing *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991)). Preventing the release of pre-decisional and deliberative information, like the information at issue in the Secretarial Briefing, works to ensure that the flow of the necessary give-and-take process between subordinates and their superiors remains unencumbered.

B. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). However, when the exempt information is "inextricably intertwined" with information that is otherwise properly protected pursuant to an exemption, reasonable segregation is not possible. *Mead Data Cent., Inc. v. United States Dep't of the Air Force,* 566 F.2d 242, 250 (D.C. Cir. 1977). Having examined the contents of the Secretarial Briefing, we believe that the redactions were appropriately made based on the foregoing established standard. Specifically, we find that the potentially releasable portions of the document at issue are inextricably intertwined with the exemption 5 protected information, and as such are not required to be released.

ORDER

It is hereby Ordered that the Appeal filed on August 25, 2020, by Rachel Frazin, FIA-20-0042, is denied.

This is a final order of the Department of Energy from which an 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 Colombia.

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