

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

In the Matter of: Peter Fairley )  
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Filing Date: February 23, 2021 ) Case No.: FIA-21-0005  
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Issued: March 2, 2021

**Administrative Judge Decision**

On February 23, 2021, **Error! Reference source not found.** (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2020-00782-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 documents pursuant to FOIA Exemptions (b)(5) and (b)(6). Appellant challenged the decision to withhold information under Exemption (b)(5) (“exemption 5”). In this Decision, we deny the appeal.

**I. BACKGROUND**

On May 15, 2020, Appellant filed a request under the FOIA, requesting:

Emails sent TO (direct, CC or BCC) or BY Daniel R Simmons, Alex Fitzsimmons, Rick Perry, and Dan Brouillette, between January 1, 2017 and May 8, 2020, and containing at least one of the following keywords or phrases: “price on carbon” “price on co2” “co2 price” “carbon price” “carbon policy” “carbon tax” “interconnection seam study” “interconnections seam study” “seams study”[.]

OPI assigned the request to DOE’s Office of the Executive Secretariat (ES) and DOE’s Office of Energy Efficiency & Renewable Energy (EE) to conduct a search of their files for responsive documents. Fourteen documents were identified and released to Appellant, with some information redacted pursuant to Exemptions 5 and 6 of the FOIA. Appellant appealed the redactions made pursuant to Exemption 5, arguing that “the public interest in greater release outweighs the public interest in withholding information because applying exemption 5 to this request inappropriately shields unethical behavior.” He further argued that the information withheld concerned unethical behavior, specifically interference with research at a DOE laboratory, which “violated Department of Energy policy, delayed critical climate actions, wasted public resources, and damaged the careers of federal scientists.” OPI provided unredacted copies of the responsive documents to this office, which we reviewed in their entirety.

**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). When an agency denies a FOIA request, it is the agency’s burden to justify its decision, showing that: (1) the requested 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 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.* 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).

After determining that information is exempt from disclosure under a FOIA exemption, an agency must evaluate whether such information could be released without causing foreseeable harm to an interest protected by that exemption. 5 U.S.C. § 552(a)(8)(A). Where disclosure would not cause foreseeable harm to an interest protected by the invoked exemption, the information must be disclosed unless disclosure is prohibited by law. *Id.*

In the instant case, the information redacted under exemption 5 consisted of lists of topics to be researched before a Senate confirmation hearing, and updates on the progress of that research which were contained in emails between DOE employees. The lists are deliberative in that they reflect an employee’s opinion of what is important or pressing enough to warrant assignment, rather than

reflecting DOE policy. The progress updates reflect proposed timelines for completing the lists and also disclose list items that are, as previously stated, protected as deliberative. More to the point of Appellant's argument, the list items and progress updates do not address interference with scientific research.<sup>1</sup>

Appellant further argues that the public interest in disclosure far outweighs the public interest in withholding the redacted information. It is well-established that "the deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery," and that "its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (internal quotation marks omitted) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). A Senate confirmation is necessarily an intensive experience; a nominee must prove to the Senate that he or she is knowledgeable enough to lead an agency in its mission. When a nominee is a current employee of DOE, briefings on the state of various programs, within the bounds of what is appropriate for the employee's current position, are a necessary part of preparing for a confirmation hearing. Public scrutiny of selected topics and proposed timelines could make employees hesitant to provide advice, recommendations, and assistance during the confirmation process, which could have a significant impact on DOE's leadership and, consequently, its ability to complete its mission for the American people.

The information Appellant seeks does not indicate any unethical behavior or wrongdoing, as Appellant's argument suggests. However, OPI identified in its Determination letter that the redacted information's release could have a chilling effect on frank discussion, which would harm the deliberative process that exemption 5 protects. OPI has sufficiently connected disclosure of the redacted information to a foreseeable harm, and we therefore find that OPI has fully justified its deliberative process withholdings under exemption 5.

### III. CONCLUSION

For the foregoing reasons, we find that OPI was justified in withholding the redacted information under FOIA Exemption (b)(5). It is hereby ordered that the Appeal filed on **Error! Reference source not found.**, by Peter Fairley, No. FIA-21-0005, 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

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<sup>1</sup> Appellant's argument fails for a second reason as well. Courts have long recognized that "it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information." *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). Appellant's argument presumes that he knows the content of the redactions; however, as the FOIA regulates disclosure of information not already disclosed to the public, such knowledge would put the redacted information outside the scope of the FOIA. *Id.*

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  
National Archives and Records Administration  
8601 Adelphi Road-OGIS, College Park, MD 20740  
Web: <https://www.archives.gov/ogis> Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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