United Sates Department of Energy
Office of Hearings and Appeals

In the Matter of Advocates for the West	)	
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Filing Date: October 28, 2022	)	Case No.: FIA-23-0001
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Issued: November 21, 2022

Decision and Order

On October 28, 2022, Advocates for the West (Appellant) appealed two determination letters dated June 28, 2022 (Third Partial Response Letter) and September 29, 2022 (Fourth Partial Response Letter) issued by the Department of Energy's (DOE) Bonneville Power Administration (BPA). The letters responded to Request No. BPA-2021-00513-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Third Partial Response Letter was accompanied by 6,942 pages of responsive records, which were partially redacted pursuant to FOIA Exemptions 2, 4, 5, and 6. The Fourth Partial Response Letter was accompanied by 1,709 pages of responsive records, which were partially redacted pursuant to FOIA Exemptions 2, 5, and 6. The Appellant challenges the decision to withhold information from the responsive records pursuant to Exemption 5. In this Decision, we dismiss in part and otherwise deny the appeal.

I. Background

On March 29, 2021, Appellant submitted the FOIA request to BPA. FOIA Request from Andrew Missel at 1 (March 29, 2021). The request asked for "(1) all contracts between BPA and Kintama from 2000 to the date of search, (2) all communications between BPA and Kintama from 2000 to the date of search, and (3) all records from 2000 to the date of search mentioning or documenting meetings or communications between BPA and Kintama." *Id.*

BPA acknowledged receipt of the request on April 12, 2021. Acknowledgement Letter from Candice Palen to Andrew Missel at 1 (April 12, 2021). The letter laid out BPA's understanding of the request and informed the Appellant how BPA would fulfill the request going forward. *Id.* at 1–4.

BPA issued a First Partial Response Letter on December 16, 2021. First Partial Response Letter from Candice Palen to Andrew Missel at 1 (Dec. 16, 2021). Attached to the letter were 85 pages of responsive records, five of which were partially redacted pursuant to FOIA Exemption 6. *Id.* at 2.

BPA issued a Second Partial Response Letter on March 21, 2022. Second Partial Response Letter from Candice Palen to Andrew Missel at 1 (March 21, 2022). The letter was accompanied by 153 pages of responsive records with 14 pages partially redacted pursuant to FOIA Exemption 4, and eight pages partially redacted pursuant to Exemption 6. *Id.* at 2.

BPA issued a Third Partial Response Letter on June 28, 2022. Third Partial Response Letter from Candice Palen to Andrew Missel at 1 (June 28, 2022). The letter was accompanied by 6,942 pages of responsive records with 174 pages redacted in part pursuant to FOIA Exemption 2, 90 pages redacted in part or in full pursuant to FOIA Exemption 4, 1,172 pages redacted in part or in full pursuant to FOIA Exemption 5, and 849 pages redacted in part pursuant to FOIA Exemption 6. *Id.* at 2. The letter explained the rationale for each category of redactions. *Id.* at 3. Approximately two weeks after receiving this letter, Appellant contacted the FOIA Public Liaison listed on the letter to express concerns about the sufficiency of BPA's response. Email from Andrew Missel to Jason Taylor (July 12, 2022). BPA responded to that email, informing Appellant that they would speak to BPA's Office of General Counsel about the concerns. Email from Jason Taylor to Andrew Missel (July 14, 2022). A few weeks later BPA notified Appellant that the Office of General Counsel was working on a response to the Appellant's concerns. Email from Jason Taylor to Andrew Missel (July 28, 2022). In a response sent on September 9, 2022, BPA provided the Appellant with additional information about the harm that would come from releasing the withheld information and released some information initially withheld in the Third Partial Response Letter. Letter from Candice Palen to Andrew Missel (Sept. 9, 2022).

BPA issued a Fourth Partial Response Letter on September 29, 2022. Fourth Partial Response Letter from Candice Palen to Andrew Missel at 1 (Sept. 29, 2022). The letter was accompanied by 1,709 pages of responsive agency records with four pages redacted in part pursuant to FOIA Exemption 2, 354 pages redacted in part or in full pursuant to FOIA Exemption 5, and 114 pages redacted in part pursuant to FOIA Exemption 6. *Id.* at 2. The letter explained BPA's rationale for each category of redactions. *Id.* at 2–3.

Appellant appealed the Third and Fourth Partial Response Letters on October 28, 2022. Appeal Letter Email from Jason Missel to OHA Filings (hereinafter, "Appeal") at 1. First, Appellant argues that the "consultant corollary" does not apply to communications between BPA and Kintama that were redacted pursuant to Exemption 5 because Kintama is an independent expert. *Id.* at 4–7. Next, Appellant contends that BPA's justifications for withholding records pursuant to Exemption 5 were insufficiently specific. *Id.* at 8. Then, Appellant argues that many of the records redacted pursuant to Exemption 5 were not pre-decisional and deliberative. *Id.* at 8–9. Finally, Appellant asserts that BPA has not taken sufficient steps to show that releasing the withheld records would cause harm. *Id.* at 9–10.

II. Analysis

A. Timeliness

DOE FOIA regulations state that when the agency "has denied a request for records in whole or in part . . . the requester may, within 90 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals." 10 C.F.R. § 1004.8(a).

Appellant contends that its appeal is timely because it was made within 90 calendar days of September 29, 2022, the date of the Fourth Partial Response Letter. Appeal at 3. We agree that the appeal of the Fourth Partial Response Letter is timely. However, the Appellant notes in its appeal that it received the Third Partial Response Letter on June 28, 2022. *Id.* In the Third Partial Response Letter, BPA stated that any appeal regarding the accompanying responsive records must be made "within 90 calendar days from the date of this communication" and informed the Appellant that any such appeals should be directed to OHA. Third Partial Response Letter at 4. As the Appellant does not contend that it appealed the contents of Third Partial Response Letter to OHA within 90 days of its receipt of that letter, the appeal of the records released with the Third Partial Response Letter is not timely, and we therefore dismiss that part of this appeal.

B. Exemption 5

Exemption 5 of FOIA allows an agency to withhold "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 exemption includes the deliberative-process privilege, which involves records "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

1. The "Consultant Corollary"

In some instances, an agency can, pursuant to FOIA Exemption 5, appropriately withhold documents prepared by an outside party acting as an agency consultant, so long as that outside party is not advancing an opinion that is "necessarily adverse" to its competitors. *See, e.g. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 14 (2001) (holding that the Klamath Tribe could not be considered consultant-like because its interests in the government's water rights allocation decision was necessarily adverse to other interested parties); *In the Matter of the Seattle Times*, OHA Case No. FIA-20-0024 (2020)[1] ("Documents prepared by a contractor acting in furtherance of its contracted role are protected unless the contractor 'assume[s] a position that is "necessarily adverse" to the government,' even if the contractor acts in its own self-interest in preparing the documents." (quoting *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 892 F. Supp.2d 28, 46 (D.D.C. 2012))).

The records attached to BPA's Fourth Partial Response Letter consisted of email communications between BPA and Kintama, a Canadian research organization that works with BPA, as well as presentation slides where a variety of contractors shared their expert thoughts and opinions on issues that BPA is facing. BPA explained in the Fourth Partial Response Letter that it

> relie[d] on Exemption 5 to protect deliberative and pre-decisional communications appertaining to the agency's interests in the Columbia River System Operations Environmental Impact Statement ("CRSO EIS") dated July 2020, the associated Endangered Species Act consultations, the 2020 CRSO EIS Record of Decision,

[1]Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/OHA.

> and ongoing decision-making related to Columbia River System operations and participation in discussions related to the litigation stays in the *NWF et al. v. NMFS et al.* and *Pacific Coast Federation of Fishermen's Association v. Bonneville Power Administration* litigation.

Fourth Partial Response Letter at 2–3. Appellant has not argued, and we cannot find any indication, that the views Kintama was expressing to the agency in these documents were "necessarily adverse" to any competitor. Therefore, BPA has appropriately withheld records created by Kintama under FOIA Exemption 5.

Appellant argues that in order for the redactions under FOIA Exemption 5 to be appropriate, Kintama must have been acting in a capacity similar to that of an employee. Appeal at 5. First, they argue that because BPA has repeatedly confirmed Kintama's status as an "independent scientific expert," the company cannot be like an employee. *Id.* In *Klamath*, the Supreme Court explicitly noted that consultants used for intra-agency purposes are "independent contractors and [are] not assumed to be subject to the degree of control that agency employment could have entailed," and then continued on to explain that this independence is acceptable so long as "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." 532 U.S. at 10–11. The Court further expressed its belief that these independent consultants often act like employees, saying "[the consultant's] only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 11; *see also Rojas v. FAA*, 989 F.3d 666, 674–75 (9th Cir. 2021) (reiterating that a consultant functions as an employee when it advises the agency without representing an interest of its own). Given this precedent, we cannot find that independence, in and of itself, indicates that Exception 5 is being inappropriately used to cover a consultant.

Next, the Appellant argues that the consultant corollary cannot apply to any communications made after Kintama's last contract with BPA concluded on March 31, 2020. Appeal at 7. This argument fails because the federal courts have not held that the consultant corollary requires a consultant to be paid for the advice that they are giving the government. *See, e.g.*, *Wu v. Nat'l Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (holding that extending Exemption 5 to unpaid outside consultants was appropriate); *Nat'l Inst. Of Military Justice v. Dep't of Defense*, 512 F.3d 677, 686–87 (D.C. Cir. 2008) (explaining that Exemption 5 can be applied to advice an agency has solicited from an expert even if the expert is not paid).

As such, Appellant's challenges to use of the consultant corollary are not successful, and we find that BPA appropriately withheld records created by Kintama and other contractors under FOIA Exemption 5.[2]

[2]Appellant also argued that BPA could not withhold communications related to contract negotiations under the consultant corollary. Appeal at 6. We do not decide this issue because the relevant documents were attached to the Third Partial Response Letter, the appeal of which, as we have explained, was not timely. *See supra* Section II.A.

2. Explanations

When responding to requests for records under FOIA, agencies are required to notify requesters of the decisions reached "and the reasons therefor." 5 U.S.C. § 552(a)(6)(A)(i)(I). DOE regulations further explain that an agency must release "[a] statement of the reason for denial, containing a reference to the specific exemption under the FOIA authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld . . . ." 10 C.F.R. § 1004.7. Here, as described above, BPA stated that it used Exemption 5

> to protect deliberative and pre-decisional communications appertaining to the agency's interests in the Columbia River System Operations Environmental Impact Statement ("CRSO EIS") dated July 2020, the associated Endangered Species Act consultations, the 2020 CRSO EIS Record of Decision, and ongoing decision-making related to Columbia River System operations and participation in discussions related to the litigation stays in the *NWF et al. v. NMFS et al.* and *Pacific Coast Federation of Fishermen's Association v. Bonneville Power Administration* litigation.

Fourth Partial Response Letter at 2–3. The Appellant has not identified any deficiency in this explanation, and as such, we find that this provided explanation meets the requirement for a "brief explanation" of why Exemption 5 applies to the withheld information. *See, e.g., In the Matter of William Gagner*, OHA Case No. FIA-22-0018 at *6 (2022) (finding the general explanation given by the agency was sufficient to be considered a "brief explanation" because the requestor had not noted any deficiencies).

Appellant contends that BPA's justifications for redacting records were insufficiently specific, citing *Transgender Law Center v. ICE*, 46 F.4th 771 (9th Cir. 2022). In *Transgender Law Center*, the court determined that several federal agencies failed to create sufficiently specific *Vaughn* indices in the course of litigation over a FOIA request. *Id.* at 781. Unlike in *Transgender Law Center*, the case before us here is an administrative appeal. Our precedent, and that of the federal courts, makes it clear that agencies are not required to produce a *Vaughn* index until a requestor has exhausted the administrative process. *See, e.g., In the Matter of Dan Zegart*, OHA Case No. FIA-15-0050 (2015) at 5 (explaining that a *Vaughn* index is not required "when a FOIA request is at the administrative level"); *Bangoura v. U.S. Dep't of the Army*, 607 F. Supp.2d 134, 143 n.8 (D.D.C. 2009) (noting that agencies are not required to provide *Vaughn* indices prior to filing of lawsuit); *Schwarz v. Dep't of Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000) ("The requirement for detailed declarations and *Vaughn* indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court."). Thus, Appellant's argument fails, and we find that BPA's explanations for invoking Exemption 5 were suitable at this stage of the proceedings.

3. Pre-decisional and Deliberative

Exemption 5 permits agencies to withhold documents protected by deliberative process privilege, which requires that the information in the documents be both pre-decisional and deliberative. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 150–51 (D.C. Cir. 2006). A document is "pre-

decisional" if it is "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The Supreme Court has emphasized that agencies need not point to a specific final agency decision:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, Roebuck & Co., 421 U.S. at 151 n.18.

In order to be deliberative, a communication must "reflect[] the give-and-take of the consultive process." Deliberative documents include personal opinions or recommendations that do not necessarily reflect a current agency position or policy. *Coastal States Gas Corp.*, 617 F.2d at 866–67.

The released records in question contain slides from contractor presentations and email exchanges[3] between BPA officials and Kintama staff. Examination of the slides reveals that these presentations were made to BPA officials in order to present the views and recommendations of the contractors on various environmental problems that BPA was facing. The email exchanges also reflect the give-and-take of a deliberative process as BPA solicited ideas and input from outside consultants about how its work affects wildlife populations and how to deal with those effects and assessed the potential strength of these consultants' views. This kind of exchange of opinions is precisely what Exemption 5 aims to protect.

Appellant argues that BPA's explanations as to why "many of the withheld records" are pre-decisional and deliberative are "implausible." Appeal at 9. At the request of OHA, Appellant provided examples of occasions where they felt that BPA withheld information that was not pre-decisional and deliberative.[4] Email from Andrew Missel to Erin Weinstock (Nov. 8, 2022). Appellant specifically alleged (1) that pages 7136–37 are not deliberative because "it appears to be raw data"; (2) that the slideshows from the 2018 Technical Service Contract Retreat are not pre-decisional or deliberative because the slideshows were not prepared to help an agency make a specific decision; and (3) that email exchanges regarding peer review, journal articles, and data are not pre-decisional and deliberative because "there is no plausible agency decision that the emails were written to assist with." *Id.* Our review of these records has shown that all of the withheld information involves Kintama sharing its recommendations and viewpoints in order to help BPA make decisions about the CRSO EIS dated July 2020, the associated Endangered Species

[3] One set of emails contained discussion of a contracting issue between BPA and Kintama. BPA has agreed to withdraw the Exemption 5 redactions in those emails. Email from Paul Mautner to Erin Weinstock (Nov. 10, 2022).

[4] In its appeal, Appellant explained one specific instance where it found BPA's contention that the redactions protected deliberative information to be implausible. Appeal at 9. This example referenced a document released with the Third Partial Response Letter, the appeal of which, as we have explained, *supra*, was not timely. As such, we do not consider this example.

Act consultations, the 2020 CRSO EIS Record of Decision, and ongoing decision-making related to Columbia River System operations and ongoing litigation, or BPA inquiring about factors that affect the weight the agency might give Kintama's opinion. We emphasize the Court's words in *Sears, Roebuck & Co.*, which noted that agencies need not identify any specific decision to protect a document as pre-decisional. 421 U.S. at 151 n.18. As such, we find that BPA properly characterized the withheld information in question as deliberative and pre-decisional.

4. Foreseeable Harm

As we explained, *supra*, an agency is required to provide a brief explanation of the decisions reached in response to a FOIA request. 5 U.S.C. § 522(a)(6)(A)(i)(I). DOE also requires a determination letter to contain information about (1) why a discretionary release of records is not appropriate; (2) the name and position of each denying official; (3) segregation of nonexempt material; (4) appeals. 10 C.F.R. § 1004.7.

Appellant argues that BPA was required to show that releasing the redacted records would cause harm to the agency and failed to do so. Appeal at 9–10. We are not aware of any requirement that an agency must show such harm at the time it releases redacted records to a requester. Appellant cites *Reporter's Comm. for Freedom of the Press v. FBI,* 3 F.4th 350, 369 (D.C. Cir. 2021) to argue that BPA is required to show how the agency would be harmed by releasing the redacted records. However, the court there required the agency to prove foreseeable harm using *Vaughn* indices and affidavits that were made by the agency in the course of litigation, not in response to the original request or as a part of an administrative appeal. *Reporter's Comm. for Freedom of the Press v. FBI*, No. 15-1392 RJL, 2020 U.S. Dist. LEXIS 48925 at *6 (D.D.C. March 20, 2020). The idea that an agency is not required to produce explanations of potential harm in an initial response to a FOIA request is consistent with our precedent as well. *See In the Matter of Joe Smyth*, OHA Case No. FIA-22-0014 (May 14, 2022) ("While affidavits and *Vaughn* indices are produced by agencies in connection with motions for summary judgment in federal court [to determine if FOIA exemptions were appropriately applied], 'agencies are not required to produce declarations, affidavits or *Vaughn* indices when initially responding to FOIA requests.' Accordingly, it was not necessary for the agency to provide the detailed explanations [of foreseeable harm that] counsel is seeking." (quoting *In the Matter of Center for Biological Diversity*, OHA Case No. FIA-17-0053 at 3 (January 5, 2018))). Accordingly, BPA was not required to demonstrate in its Fourth Partial Response Letter that release of the redacted information would cause harm to the agency.

III. Order

It is hereby ordered that the Appeal filed on October 28, 2022, by Advocates for the West, FIA-23-0001, is dismissed in part and otherwise 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. § 522(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.

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