United States Department of Energy
Office of Hearings and Appeals

In the Matter of Al Evans	)	
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Filing Date: November 22, 2023	)	Case No.: FIA-24-0008
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Issued: December 21, 2023

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Decision and Order

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Al Evans (Appellant) appeals a final determination letter (Determination Letter) issued to him from the Department of Energy (DOE), Office of Public Information (OPI), concerning Request No. HQ-2023-01822-F, filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Determination Letter informed the Appellant that DOE completed its search and identified three documents, consisting of forty-two pages, responsive to his FOIA request. Determination Letter from DOE OPI to Al Evans at 1 (November 21, 2023). The Determination Letter also informed the Appellant that portions of the records were withheld under Exemptions 5 and 6 of the FOIA. *Id*. In this appeal, the Appellant challenges the adequacy of DOE's search, DOE's decision to redact portions of the responsive records under Exemptions 5 and 6 of the FOIA, DOE's finding that reasonably foreseeable harm would result from disclosure of the unredacted records, and DOE's finding that it released all non-exempt information that could be reasonably segregated from the exempt portions of the records. Appeal Letter Email from Al Evans to OHA at 1–2 (November 22, 2023). As explained below, we deny the appeal.

I. Background

On September 20, 2023, the Appellant submitted a FOIA request to DOE, which sought "records of all successful job applicants" related to a vacancy announcement for a Personnel Security Specialist. FOIA Request from Al Evans at 1 (September 20, 2023). The Appellant specifically requested the "qualifications, notice of results, referral lists, interview notices, the evaluator disposition, and resume notes." *Id*. The Appellant later notified DOE that he sought records "specific to successful job applicants" only. Email from Al Evans to DOE FOIA Analyst at 1 (October 13, 2023).

DOE assigned the Appellant's request to its Office of the Chief Human Capital Officer (HC)[1] to conduct a search of its files for responsive records. Determination Letter at 1. On November 21, 2023, DOE notified the Appellant that it identified three responsive records, consisting of forty-

[1] HC is the office within DOE responsible for the recruitment, hiring, onboarding, and training of DOE workforce. *See*. About Us, Office of the Chief Human Capital Officer, https://www.energy.gov/hc/about-us (last visited Dec. 7, 2023).

two pages. *Id*. at 1. Pages one through ten of the released records consist of a redacted copy of the selected candidate's resume, and pages eleven through forty-two consist of interview records from three DOE personnel who interviewed the selected candidate, including handwritten notes, and a certificate of eligibles for the vacancy.

DOE withheld portions of the responsive records pursuant to Exemptions 5 and 6 of the FOIA. *Id.* at 1-2. Regarding Exemption 5, DOE determined the withheld information was "both pre-decisional because it was developed before the agency adopted a final position, and deliberative, in that it reflects the opinions of individuals who were consulted as part of a decision-making process." *Id*. at 2. Regarding Exemption 6, DOE indicated the withheld information included "personal observations about private individuals, answers to interview questions about individuals, notes about interviews conducted, and the name of an interview panel reviewer." *Id*. DOE also indicated release of this information could "subject the individuals to unwarranted or unsolicited communications" and no public interest would be served by disclosing the information. *Id*. Finally, DOE determined foreseeable harm would result from disclosure of the withheld portions of the released records and that reasonable steps were taken to segregate non-exempt information from the records. *Id*. at 2–3.

On November 22, 2023, the Appellant filed an appeal, in which he challenged the adequacy of DOE's search. Appeal Email at 1–3. The Appellant claimed the disclosed records did not "accurately reflect all successful job applicants" because the date shown on page eleven of the disclosed records, August 17, 2023, "predates the posting of the vacancy announcement which was August 25, 2023." *Id*. at 2. The Appellant also claimed the disclosed records did not include all the documents he requested.[2] *Id*. The Appellant also challenged DOE's decision to redact "the answers [to interview questions] provided by all successful applicants" from the disclosed records under Exemptions 5 and 6 of the FOIA. *Id*. at 2. Lastly, the Appellant indicated he disagreed with DOE's finding that foreseeable harm would result from disclosure of the exempt portions of the records, and he argued that DOE failed to segregate and release non-exempt information from the released records. *Id*.

II. Analysis

A. Adequacy of the Search

The FOIA requires agencies to make publicly available records that are reasonably described in a written request, so long as those records are not exempt from disclosure. 5 U.S.C. § 552(a)(3)(A). When responding to a FOIA request, an agency's search must be "reasonably calculated to uncover

[2] In his appeal, the Appellant claimed DOE did not provide him with all the documents he requested, including documents related to his own "referral and evaluation" for the vacancy. Appeal Email at 1–2. After contacting the DOE FOIA Analyst involved in this request, OHA learned that the Appellant initially sought records for the successful applicant only, but he was expecting records from his own application for the vacancy. *Id*. Because the Appellant's FOIA request sought records of "successful job applicants" only, records related to his own unsuccessful application for the vacancy are not responsive to his FOIA request. FOIA Request at 1; Email from Al Evans to DOE FOIA Analyst at 1 (October 13, 2023). Nonetheless, DOE is working on a supplemental response to the Appellant's FOIA Request, which will include records related to his application for the vacancy. Memorandum of Telephone Conversations between DOE FOIA Analyst and OHA at 1 (November 18, 2023, and November 24, 2023).

all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The reasonableness of an agency's search is generally determined by reviewing the methods used to conduct a search, not by the results of the search. *Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). An agency is not required to conduct an exhaustive search of each of its record systems, it need only conduct a reasonable search of systems that are likely to uncover responsive records. *Ryan v. FBI*, 113 F. Supp. 3d 356, 362 (D.D.C. 2015) (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). In conducting a search, an agency must search in locations where responsive records are likely to be found. *Powell v. IRS*, 280 F. Supp. 3d 155, 162–63 (D.D.C. 2017). OHA will remand a case where it determines that the search conducted was inadequate, after reviewing the facts of the case. *See, e.g.*, *Ayyakkannu Manivannan*, OHA Case No. FIA-17-0035 (2017).

As part of its review on appeal, OHA obtained the search certification from HC. The search certificate indicates HC conducted a manual search of USA Staffing[3] and Lever[4] for responsive records. HC FOIA Search Certification Form at 1 (October 3, 2023) A representative of OHA also contacted HC for additional information concerning the search performed. A representative of HC explained to OHA that neither an interview notice, nor an "evaluator disposition," as requested by the Appellant, exists. Memorandum of Telephone Conversation between HC and OHA at 1 (November 18, 2023). The representative also explained why the date shown on page eleven of the released records pre-dates the posting of the vacancy announcement,[5] and explained that the disclosed records reflect all of the responsive records for the successful applicant, as requested by the Appellant in his FOIA request. *Id*.

Based upon HC's search certification and the description of the search provided by a representative of HC, we find that DOE's search was reasonably calculated to uncover responsive records. We find HC properly confined its search to systems in which responsive records were most likely to be located. We also find that, given HC's explanation, the date shown on the responsive records is not sufficient information to support the Appellant's assertion that additional records related to successful applicants exist. As to the notice of results, interview notice, and evaluator disposition requested by the Appellant, HC determined that those records did not exist, and DOE is not required to create records that otherwise do not exist to satisfy a FOIA request. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 161–162 (1975). Accordingly, we conclude DOE's search was

[3] USA Staffing is a U.S. Government information system used by federal agencies to assess, certify, select, and onboard qualified candidates for jobs within the federal government. *See* https://www.opm.gov/services-for-agencies/technology-systems/usa-staffing (last visited Dec. 13, 2023).

[4] Lever is a resume repository used by DOE to identify potential candidates in the execution of large-scale hiring efforts. Email from DOE HC to OHA at 1 (December 11, 2023). It permits advanced searching of resumes, and it is used as a tracking mechanism for hiring statistics. *Id*.

[5] According to the HC representative, DOE filled this vacancy pursuant to its direct hiring authority. Memorandum of Telephone Conversation between HC and OHA at 1 (November 18, 2023). The applications reviewed by DOE HC included those received for a different vacancy announcement. *Id*. DOE HC was not required to conduct new interviews of applicants for the Personnel Security Specialist vacancy that was the subject of the Appellant's FOIA request. *Id*.

reasonably calculated to locate records responsive to the Appellant's FOIA request and was therefore adequately conducted.

B. Exemption 5

In this case, DOE identified three records, consisting of forty-two pages, responsive to the Appellant's FOIA request. Determination Letter at 1. Pages 13–20, 31, and 34–41 of the released records contain redactions of interview records from three DOE personnel who interviewed the selected candidate. The Appellant challenges DOE's decision to redact the interviewers' notes of the selected candidate's interview responses, from pages thirteen to forty-one of the records, under Exemption 5 of the FOIA. Appeal Email at 2.

Under Exemption 5, "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" are protected from disclosure. 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The U.S. Supreme Court has interpreted this exemption to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Courts have held that Exemption 5 applies to records that would be protected under three civil discovery privileges: 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).

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*, 617 F.2d at 866.

After reviewing an unredacted copy of interviewers' notes of the selected candidate's interview responses, we find the redacted information is pre-decisional in nature. The redacted records were made before the hiring official decided whether the selected candidate would be hired to fill the vacancy. Memorandum of Telephone Conversation between HC and OHA at 1 (December 5, 2023). Therefore, the records are pre-decisional.

We also find the redacted portions of the records containing interviewers' notes regarding the candidate's answers to interview questions to be deliberative in nature. The redacted material does not consist of mere summaries of the candidate's interview responses. The redacted material also reflects each interviewer's judgment and opinion regarding the quality of the candidate's responses to the interview questions and their qualifications for the position. These notes served as recommendations to the hiring official, who made the final decision as to the candidate's qualifications for the vacancy. The interview notes reflect deliberative statements by the interviewers and are not merely a recitation of the candidate's interview responses. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (finding that "the selection of facts thought to be relevant" to "assist the making of a discretionary decision" requires the exercise of judgment

and can be properly withheld under Exemption 5 of the FOIA). Therefore, we find the material redacted from these records is both pre-decisional and deliberative, and the deliberative process privilege incorporated in Exemption 5 was properly asserted by DOE.

C. Foreseeable Harm

After an agency determines whether records are exempt from disclosure under a FOIA exemption, it must determine whether it is reasonably foreseeable that "disclosure would harm an interest protected by [the] exemption." 5 U.S.C. § 552(a)(8)(A)(i); 10 C.F.R. § 1004.10(c)(1). "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 front-page news." The privilege is meant to protect the quality of agency decisions by ensuring "open and frank discussion" among agency officials. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001).

In reviewing withholdings made under the deliberative process privilege, agencies must "concretely explain how disclosure 'would' – not 'could' – adversely impair internal deliberations." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369-379 (D.C. Cir. 2021) (*citing Amadis v. Dep't of State*, 971 F.3d 364, 370, (D.C. Cir. 2020)). The agency must put forth "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Id.* at 370.

After reviewing the withheld information, when read within the context of DOE's hiring processes, we find that disclosure of the interview notes would have a chilling effect on the ability of DOE personnel to assess the qualifications of job candidates during the hiring process without fear that the information will become public. Therefore, we find it is reasonably foreseeable that disclosure of the withheld information would harm an interest protected by Exemption 5.

D. Exemption 6

As explained above, DOE identified three records, consisting of forty-two pages of responsive records. Determination Letter at 1. The Appellant challenges DOE's decision to redact the interviewers' notes of the selected candidate's interview responses, from pages thirteen to forty-one of the records, under Exemption 6 of the FOIA. Appeal Email at 2.

Exemption 6 of the FOIA shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The exemption is intended to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). As a threshold matter, the withheld information must be a personnel, medical, or similar file. 5 U.S.C. § 552(b)(6). If the withheld record falls into one of those categories, the agency must determine whether the record may be withheld by using a three-step analysis. *Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 2-3 (D.C. Cir. 1984). First, the agency must determine whether the disclosure of the record would compromise a substantial privacy interest. *Id.* at 3. If no such privacy interest exists,

then the agency may not withhold the record based on this exemption. *Id*. Second, if the agency determines that a privacy interest does exist in the record, the agency must decide if the release of the record would serve the interest of the public by shedding "light on an agency's performance of its statutory duties[.]" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must determine whether "the potential harm to privacy interests from disclosure outweigh the public interest in disclosure of the requested information." *Ripskis*, 746 F.2d at 3.

Applying the standards above to this case, the records released to the Appellant are "similar files" under Exemption 6 of the FOIA. A record is a "similar file" if it contains information about a particular individual. *Washington Post Co*., 456 U.S. at 602; *see also Telematch, Inc. v. U.S. Dep't of Agric*., 45 F.4th 343, 351 (D.C. Cir. 2022). Here, the redacted material includes notes pertaining to the selected candidate. Therefore, the records are similar files under Exemption 6.

i. The Privacy Interest

Although the name of the successful candidate was disclosed among the records released to the Appellant, a substantial privacy interest exists in the interviewers' notes of the candidate's interview responses. As explained above, the redacted material contains abstracts of the candidate's responses to interview questions and other personal information about the candidate. The redacted material also includes each interviewer's reflections and opinions as to the quality of the candidate's responses and qualifications for the position. The interviewers' assessments of the candidate's interview responses and qualifications, may, if disclosed, embarrass the successful candidate and subject them to ridicule. The purpose of this exemption is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. *Washington Post Co*., 456 U.S. at 599. Therefore, we find that there is a substantial privacy interest in the interview notes withheld by DOE.

ii. The Public's Interest in Disclosure

The public has an interest in "the competence of people" federal agencies employ and an agency's "adherence to regulations governing hiring." *Am. Oversight v. U.S. Postal Service*, No. 20-2580 (RC), 2021 U.S. Dist. LEXIS 18204 at 36 (D.C. Cir. Sept. 23, 2021) (citing *Core v. U.S. Postal Serv*., 730 F.2d 945, 948 (4th Cir. 1984)). In his appeal, the Appellant claims that disclosure of the withheld information would serve a public interest because "internal and external job applicants" have a "common concern" that the federal hiring process is fair and transparent. Appeal Email at 2. However, the Appellant did not demonstrate how disclosure of the withheld interview notes would assist the public in evaluating DOE's general hiring practices. Furthermore, the public's interest in the interview notes is minimal at best because the notes reflect the subjective views of the interviewers, and do not reveal information about the internal hiring processes that were used in filling this vacancy. Therefore, we find that there is a minimal public interest in the release of the withheld notes of the candidate's interview responses.

iii. Balancing Test

We have concluded that there is a substantial privacy interest in the interview notes withheld by DOE. Furthermore, we have determined there is only a minimal public interest in the release of the interview notes withheld by DOE. Therefore, pursuant to a balancing of the interests, we find that release of the interview notes would constitute a clearly unwarranted invasion of personal privacy.

Accordingly, we find DOE properly withheld the interview notes pursuant to Exemption 6.

E. Segregability

If an agency determines that full disclosure of a requested record is not possible, the FOIA requires that the agency determine whether "partial disclosure" of a record is possible and "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii); 10 C.F.R. § 1004.10(c)(2). However, an agency may withhold otherwise non-exempt portions of a record if those portions are "inextricably intertwined with exempt portions" of the record. *Mead Data Ctr., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

After reviewing the redacted records, we find that the redacted material does not include non-exempt information. Accordingly, DOE properly concluded that all reasonably segregable portions of the records were released to the Appellant.

III. Order

It is hereby ordered that the appeal filed by Al Evans, on November 22, 2023, Case No. FIA-24-0008, 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.

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