

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

In the Matter of Robert Crease)

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Filing Date: March 13, 2025)

Case No.: FIA-25-0023

Issued: April 4, 2025

Decision and Order

Robert Crease (the Appellant) appeals a final determination letter (Determination Letter) issued to him from the Department of Energy (DOE), Office of Science (SC), concerning Request No. CH-2024-01963-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 after conducting a search, the DOE SC located 163 records responsive to his FOIA request. Determination Letter from DOE SC to Robert Crease at 2 (February 5, 2025). The Determination Letter also informed the Appellant that portions of one record were redacted under Exemptions 5 of the FOIA. *Id.* In this appeal, the Appellant challenges the redactions made under Exemption 5. Appeal Letter Email from Robert Crease to OHA at 1–2 (March 13, 2025). As explained below, we deny the appeal.

I. Background

On May 22, 2024, the Appellant submitted a FOIA request to the DOE SC, which sought the following records:

Any notebooks, emails, memorandums, documents, or communications from Steve Holmes from November 15, 2005, to December 2005 relating to the tritium leak at [Neutrinos at the Main Injector (NuMI)] at [Fermilab National Accelerator Laboratory (FNAL)]. In particular, any notebooks from Holmes labeled “Tritium” or “Committees” or “Task Force.”

FOIA Request from Robert Crease at 1 (May 22, 2024).

The DOE SC requested that the Fermi Site Office (FSO) and the Fermi Research Alliance (FRA), management and operations contractor for FNAL at the time the request was made, conducted a search for responsive records. Determination Letter at 1. As a result of its search, the FSO located two records, and the FRA located 161 records, responsive to the Appellant’s FOIA request. *Id.* at 2.

The DOE SC withheld portions of an email thread contained in a document titled: “2005.12.05 Status – in confidence,” pursuant to deliberative process privilege of Exemption 5 of the FOIA. Determination Letter at 2. The DOE SC determined that portions of the email contained “the

personal opinions of persons being asked for advice regarding the FNAL tritium issue, rather than the final policy of DOE,” and therefore, the information could be withheld under Exemption 5 of the FOIA. *Id.* at 3. The DOE SC also determined that foreseeable harm would result from disclosing the redacted portions of the email because “employees may not be willing to engage in frank discussion in the future if such information was released.” *Id.*

On March 13, 2025, the Appellant filed an appeal, in which he challenged the DOE SC’s redactions made to one email, found on page two of the document titled: “2005.12.05 Status – in confidence.” Appeal at 1. The Appellant asserts that because the email from a DOE SC employee began with the phrase, “Based on our experience with the [Brookhaven National Laboratory (BNL)] tritium leak . . . ,” the redacted material consists of a DOE employee “conveying the experience of [the DOE SC], not his own,” and therefore, the material is not deliberative in nature. *Id.*

II. Analysis

A. Exemption 5

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 the email message at issue, we find the redacted material is deliberative in nature.¹ The DOE SC redacted a portion of an email exchange, between a DOE SC employee and a manager of FNAL, in which the DOE SC employee offered his viewpoint regarding FNAL’s handling of the tritium leak. Although the DOE SC employee began his email with “Based on our experience with the BNL tritium leak . . . ,” the DOE SC employee is not reciting the DOE SC’s policy related to the leak at FNAL in his email. Rather, the DOE SC employee is indicating to the manager of FNAL, that his opinion has been informed by the

¹ The Appellant does not dispute the email’s status as an inter-agency or intra-agency document, or its predecisional nature. Appeal Email at 1-2. Therefore, we need not discuss those elements of Exemption 5 in this decision.

knowledge he has gained from his experience addressing a tritium leak at a different DOE laboratory, BNL. Therefore, we find the material redacted from the email on page two of a document titled: “2005.12.05 Status – in confidence,” is deliberative in nature, and the deliberative process privilege incorporated in Exemption 5 was properly asserted by DOE.

B. 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” or is “prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i); 10 C.F.R. § 1004.10(c)(1). While no law prohibits the disclosure of the material redacted from the email message at issue, “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.

The existence of a leak at a DOE laboratory and how it is handled, is a very sensitive topic, that benefits from an open discussion between personnel at the DOE SC and its laboratories. This discourse benefits from candid and varying viewpoints. After reviewing the withheld information, when read within this context, we find that disclosure of the redacted material to the public would have a chilling effect on the ability of DOE personnel to candidly discuss the handling of a leak of material from a DOE laboratory, or a similar event, in the future. Therefore, we find it is reasonably foreseeable that disclosure of the withheld information would harm an interest protected by Exemption 5.

III. Order

It is hereby ordered that the appeal filed by Robert Crease, on March 13, 2025, OHA Case No. FIA-25-0023, 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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448

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