

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

In the Matter of Kevin Bogardus)
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Filing Date: April 20, 2026)
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_____)

Case No.: FIA-26-0034

Issued: April 28, 2026

Decision and Order

On April 20, 2026, Kevin Bogardus (Appellant) appealed a final determination letter dated April 13, 2026, issued by the Department of Energy’s (DOE) Office of General Counsel (GC). The letter responded to Request No. HQ-2025-03746-F, a request filed by Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The final determination letter was accompanied by four pages of responsive records, which were partially redacted pursuant to FOIA Exemption 5. Appellant challenges the adequacy of DOE’s search, the adequacy of the determination letter, and the decision to withhold information from the responsive records pursuant to Exemption 5. In this Decision, we deny the appeal.

I. Background

On July 11, 2025, Appellant submitted the FOIA request to DOE. FOIA Request from Kevin Bogardus at 1 (July 11, 2025). The request stated as follows:

I request emails sent to and from the following individuals at the Department of Energy related to President Trump’s announcement of reciprocal tariffs, which he called “Liberation Day,” from April 1 to April 3, 2025: Chris Wright James Danly Carl Coe Audrey Barrios Mike Kopp John LaValle Andrea Woods Please consider emails containing one or more of the following search terms as responsive records to my request: “tariff” OR “tariffs” OR “import duty” OR “import duties” OR “trade deficit” OR “trade deficits” OR “trade practice” OR “trade practices” OR “reciprocal” OR “Liberation Day” OR “50 U.S.C. 1701” OR “50 U.S.C. 1601” OR “19 U.S.C. 2483” OR “14257” OR “https://www.whitehouse.gov/presidentialactions/2025/04/regulating-imports-with-a-reciprocal-tariff-to-rectify-trade-practices-that-contribute-to-large-and-persistent-annual-united-states-goods-trade-deficits/” Responsive records to my request are likely to be found in DOE’s Office of the Secretary. Please do not consider responsive records to my request as already publicly-released material, such as correspondence sent by members of the general public, email newsletters, email news alerts, news clippings and press releases, unless this material was

emailed with commentary to and/or from one of the named individuals in this request.

Id. at 2.

On April 13, 2026, DOE issued a final determination letter and provided Appellant with one four-page responsive document that contained several redactions pursuant to FOIA Exemption 5. Final Determination Letter from DOE to Kevin Bogardus (Apr. 13, 2026). The letter explained that certain information was redacted pursuant to the deliberative process privilege incorporated under to Exemption 5 because it contained “discussion of public relations strategy.” *Id.* at 1–2. The letter also explained that the agency would not discretionarily release the deliberative information because “the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public.” *Id.* at 2.

Appellant timely appealed the determination letter on April 20, 2026. Appeal Letter Email from Kevin Bogardus to OHA at 1 (Apr. 19, 2026).¹ In his appeal, Appellant challenges the redactions made pursuant to Exemption 5, the adequacy of the search, and the adequacy of the determination letter. *Id.* at 1–4. Appellant argues (1) DOE has redacted communications planning that may not be withheld pursuant to Exemption 5; (2) the fact that DOE only located one responsive document indicates that the search conducted was not adequate; (3) DOE did not provide adequate justification for its redactions pursuant to Exemption 5; (4) DOE did not provide an adequate description of its search; (5) DOE did not provide adequate justification of the foreseeable harm; and (6) DOE did not provide adequate information to prove it released all reasonably segregable information. *Id.*

II. Analysis

A. 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).

For a document to be withheld under the deliberative process privilege, the information in the document must 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). In order to be deliberative, a communication must “reflect[] the give-and-take of the consultive process.” *Id.* at 866. Deliberative documents include subjective information like

¹ Appellant emailed his appeal to OHA on April 19, 2026, a Sunday. Accordingly, his appeal is considered to be filed on the next business day, Monday, April 20, 2026. 10 C.F.R. § 1004.8(c) (indicating that “[d]ocuments delivered after the regular business hours of [OHA] are considered received on the next regular business day”).

personal opinions or recommendations that do not necessarily reflect a current agency position or policy. *Id.* at 866–67. Federal courts have found that Exemption 5 includes deliberations about public relations. *See ICM Registry, LLC v. Dep’t of Com.*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008) (holding that “deliberations regarding public relations policy are deliberations about policy, even if they involve ‘massaging’ the agency’s public image”).

Appellant contends that the information redacted pursuant to Exemption 5 cannot be withheld if it is “routine communications planning or post-hoc messaging coordination” and provides a list of specific types of communications that he believes may not be withheld. Appeal at 3. Our review of the responsive documents make clear that the withholdings are proper. DOE has withheld communications that would reveal the back and forth between several DOE employees who were in the process of determining the best way to share information about a media appearance by the Secretary of Energy with the public. These kinds of discussions are clearly deliberative and pre-decisional. Therefore, the withholdings pursuant to Exemption 5 were appropriate.

B. Adequacy of the Search

A FOIA request requires an agency to “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The applicable standard of reasonableness “does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384–85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. “The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Jennings v. Dep’t of Justice*, 230 F. App’x 1, 1 (D.C. Cir. 2007) (internal quotation marks omitted). OHA has not hesitated to remand a case where it is evident that the search conducted was in fact inadequate, and whether the search conducted was reasonable depends on the facts of each case. *See, e.g., Ayyakkannu Manivannan*, OHA Case No. FIA-17-0035 (2017); *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (citing *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

On September 19, 2025, GC sent the Office of the Chief Information Officer (OCIO) a memorandum asking OCIO to conduct a search of the following employee email accounts: Chris Wright, James Danly, Carl Coe, Audrey Barrios, Dana “Mike” Kopp, John LaValle, and Andrea Woods. Memorandum from GC to OCIO at 1 (Sept. 19, 2025). That memorandum further specified that OCIO should search those email accounts from “April 1 – 3, 2025” for the following terms: “tariff” OR “tariffs” OR “import duty” OR “import duties” OR “trade deficit” OR “trade deficits” OR “trade practice” OR “trade practices” OR “reciprocal” OR “Liberation Day” OR “50 U.S.C. 1701” OR “50 U.S.C. 1601” OR “19 U.S.C. 2483” OR “14257” OR “<https://www.whitehouse.gov/presidentialactions/2025/04/regulating-imports-with-a-reciprocaltariff-to-rectify-trade-practices-that-contribute-to-largeand-persistent-annual-united-states-goods-tradedeficits/>.” *Id.* at 1–2. OCIO confirmed that it ran the search as specified in GC’s memorandum. Email from OCIO to GC (Apr. 21, 2026). OCIO’s search returned 142 results, and after removing messages that Appellant asked to be considered non-responsive, messages not sent “to and from” the individuals noted in the request, and messages mentioning tariffs not in relation to “Liberation Day,” one document remained. *Id.*; Email from GC to OHA (Apr. 21, 2026). This search meets the requirement to “conduct a search reasonably calculated to uncover all relevant

documents.” *Truitt*, 897 F.2d at 542. DOE searched for the specific terms that the requester suggested, in the specific email accounts he mentioned, on the specific dates he mentioned, and subsequently narrowed the results based on the language in his request. Therefore, we find that the search was adequate.

C. Adequacy of the Determination

In responding to requests for records under the 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). Additionally, DOE regulations lay out certain requirements that determination letters must meet to allow requesters to determine whether a response is adequate. 10 C.F.R. § 1004.7. A determination letter must: (1) describe the results of searches; (2) indicate which information was withheld; and (3) specify the exemption under which information was withheld and why that exemption applies. *Id.* § 1004.7(c)(1); *see, e.g., Center for Biological Diversity*, OHA Case No. FIA-17-0053 at 4 (2017) (explaining the required elements of a determination letter); *Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 at 4 (2014).

Appellant contends that DOE “bears the burden of showing that each withheld portion qualifies [for redaction pursuant to Exemption 5].” Appeal at 2–3. Neither the FOIA nor DOE’s regulations implementing the FOIA require the agency to make any such showing. Our precedent, and that of the federal courts, makes it clear that agencies are not required to produce a list justifying each withheld portion of a document, or, as it is typically known, a Vaughn index, until a requestor has exhausted the administrative process. *See, e.g., 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. 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.”). Therefore, the absence of this justification has no bearing on the adequacy of the determination here. To the extent that DOE’s regulations impose a burden to provide “a brief explanation of how the exemption applies to the record withheld,” DOE met that obligation by indicating that the withheld information was pre-decisional conversation reflecting the opinions of individuals involved in the decision-making process related to the agency’s public relations strategy. 10 C.F.R. § 1004.7(c)(1); Determination Letter at 2.

Appellant further argues that DOE must provide a “meaningful accounting” of its search. Appeal at 2. Appellant cites no case law to support this contention, and we find nothing to support his claim. In its determination letter, DOE described where it searched in response to Appellant’s request and the results of that search. That description meets the requirements laid out by the FOIA.

Appellant alleges that “DOE’s foreseeable-harm discussion is also deficient” because the “boilerplate statements do not satisfy 5 U.S.C. § 552(a)(8)(A), which requires a concrete and specific showing of reasonably foreseeable harm from disclosure of the particular information withheld.” Appeal at 3. He argues that “DOE must articulate a non-speculative harm tied to the specific redactions at issue here.” *Id.* The statute states, “An agency shall – [] withhold information under this section only if – [] the agency reasonably foresees that disclosure would harm an interest

protected by an exemption described in subsection (b).” 5 U.S.C. § 552(a)(8)(A). A plain language reading of this provision does not indicate that there is any requirement that DOE provide a specific justification that its determination would not cause foreseeable harm in its determination letters, and Appellant does not cite any case indicating otherwise. Even if this were not the case, DOE’s stated rationale, that “the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public,” comports with level of specificity required by the federal courts. Determination Letter at 2; *see Amadis v. Dep’t of State*, 971 F.3d 364, 371 (D.D.C. 2020) (finding that an affidavit that explained disclosure of responsive documents would impair federal employees from candidly discussing ideas and recommendations was sufficient to show foreseeable harm).

Finally, Appellant argues that “DOE must do more than recite the segregability standard, citing 5 U.S.C. § 552(b). Appeal at 4. The pertinent portion of that statute reads as follows:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). Again, there is no indication that this statute imposes a requirement that an agency provide a justification for its segregability analysis in its determination letter, and Appellant cites no cases or regulations that support that assertion. To the extent that Appellant argues that DOE did not properly segregate non-exempt material here, our review indicates that DOE met its obligations.

Based on the foregoing, we find that the determination letter was adequate.

III. Order

It is hereby ordered that the appeal filed on April 20, 2026, by Kevin Bogardus, FIA-26-0034, 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. § 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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