

United States Department of Energy  
Office of Hearings and Appeals

In the Matter of Alon Refining )  
Krotz Springs, Inc. )  
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Filing Date: January 9, 2015 )  
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Case No.: FIA-15-0002

Issued: February 10, 2015

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**Decision and Order**  
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This Decision concerns an Appeal that Alon Refining Krotz Springs, Inc. (Alon) filed in response to a determination that was issued to it by the Department of Energy’s (DOE) Office of Information Resources (OIR). In that determination, the OIR replied to a request for documents that Alon submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the OIR release certain information that it withheld under the FOIA.<sup>1</sup>

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA’s goal of broad disclosure. *Dep’t of the Interior v. Klamath Water Users Prot. Ass’n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden of showing that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents that are exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

**I. BACKGROUND**

On July 11, 2014, Alon requested documents relating to its “July 19, 2011, and April 3, 2013, petitions for hardship relief under 40 C.F.R. § 80.1441 of the renewable fuel standard (RFS).”<sup>2</sup>

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<sup>1</sup>Decisions issued by the OHA are available on the OHA website located at <http://www.energy.gov/oha>.

<sup>2</sup>The RFS requires refiners, blenders, distributors and importers of refined petroleum products to add a certain amount of renewable fuels to the fuels that they produce or sell in the United States.

July 11, 2014, FOIA request at 1. Specifically, Alon asked for scoring sheets for each petition for Alon's responses to the RFS2 Small Refinery Survey, and all correspondence between the Environmental Protection Agency (EPA) and the DOE related to their review of Alon's score on the RFS2 Small Refinery Survey. *Id.*

On December 12, 2014, the OIR issued its final response to Alon's request. In that response, the OIR identified 29 documents as being responsive to Alon's request. Of those 29 documents, 12 documents originated in their entirety with the EPA and were referred to that agency for a direct response to Alon. The remaining 17 documents consist of e-mail chains and attachments. Of those 17 documents, eight contain information that was withheld from release pursuant to Exemption 5 of the FOIA. Other portions of those 17 documents were either referred to the EPA for a direct response to Alon, or were withheld as being non-responsive to Alon's FOIA request. In its Appeal, Alon challenges the OIR's application of Exemption 5.

## II. ANALYSIS

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 the 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) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: 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) (*Coastal States*).

In its determination, the OIR concluded that portions of the responsive documents were protected from mandatory disclosure pursuant to the deliberative process privilege. That privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 149. The ultimate purpose of the exemption is to protect the quality of agency decisions. *Id.* at 151. In order to be shielded by this 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 deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id.* The deliberative process privilege routinely protects certain

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Congress established the RFS program through the Clean Air Act (CAA), giving the EPA the primary role in its implementation. Volume 40 of the Code of Federal Regulations, section 80.1441, exempted small refiners from the RFS during the 2010 calendar year. That section also permits small refiners to petition the EPA Administrator for an extension of the exemption, based upon a showing of disproportionate economic hardship. The CAA requires the EPA to coordinate with the DOE in making many decisions under the RFS.

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.” *Coastal States*, 617 F.2d at 866. 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 privilege also “protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted” to avoid “misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency’s action.” *Id.* (citation omitted).

In its Appeal, Alon contends that the withheld material cannot be considered “pre-decisional,” because Alon sought information relating to how the DOE applied its policy for granting hardship relief under the RFS program, and not information regarding the DOE’s adoption of the policy for evaluating petitions. Alon argues that communications “promulgating or implementing an established policy are not privileged,” citing *Jordan v. United States Dept. of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*). Alon also contends that portions of the withheld material are post-decisional, *i.e.*, generated after a decision on Alon’s petitions was made, and that the withheld material includes factual information that must be released under Exemption 5.

As an initial matter, Alon has apparently mistaken the deliberative process that the OIR is seeking to protect. That deliberative process concerns the specific question of whether Alon’s petitions for hardship relief should be granted, and not questions surrounding the DOE’s adoption of its policy concerning such petitions. Therefore, Alon’s statement that communications implementing an established policy are not privileged, though correct, is inapplicable in this case.

Furthermore, in order to determine whether the OIR properly applied Exemption 5, we have examined the withheld material. We conclude that it was generated prior to a decision on Alon’s petitions, and that it consists primarily of advisory opinions and deliberations by DOE personnel provided to the EPA to assist that agency in making its decision concerning those petitions. Although the OIR withheld some factual material, we find that it is inextricably intertwined with exempt material, such that release of the factual information would reveal the deliberative process. The OIR correctly applied Exemption 5 in withholding the material in question.

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and that disclosure is in the public interest. 10 C.F.R. § 1004.1; *see also, e.g., Hanford Atomic Metal Trades Council*, OHA Case No. FIA-13-0058 (2013). The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2.

We have determined that discretionary release of the information withheld under Exemption 5 would cause harm to the DOE’s ongoing decision-making process. We find that release of such

information could have a chilling effect on the agency's ability to obtain frank opinions and recommendations from its employees in the future. Therefore, discretionary release of the withheld information would not be in the public interest. *See, e.g., Judicial Watch*, OHA Case No. FIA-13-0002 (2013).

### III. CONCLUSION

The OIR properly applied Exemption 5 in making its determination, and Alon received all reasonably segregable, non-exempt material. We further find that discretionary release of the withheld information would not be in the public interest. Accordingly, we will deny Alon's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on January 9, 2015, by Alon Refining Krotz Springs, Inc., OHA Case No. FIA-15-0002, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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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