

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

In the Matter of Citizens for Responsibility and Ethics)
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Filing Date: January 22, 2015) Case No.: FIA-15-0004
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Issued: February 18, 2015

Decision and Order

On January 22, 2015, Citizens for Responsibility and Ethics (“CREW” or “Appellant”) filed an Appeal from a determination issued to it on January 9, 2015, by the Department of Energy’s Office of Information Resources (OIR) (FOIA Request No. HQ-2011-01847-F). In its determination, the OIR responded to a request for documents submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to release the information it withheld pursuant to Exemption 5 of the FOIA.¹

I. BACKGROUND

On September 12, 2011, the Appellant submitted a FOIA Request (Request) seeking:

[A]ll records of communications between any individual employed by or acting on behalf of the Obama White House, including all Executive Office of the President and non-agency components, and any individual at DOE regarding or referring to Solyndra, a California-based manufacturer of solar panels, from January 1, 2009, to the present.

Letter from Alexander C. Morris, FOIA Officer, OIR, to Anne Weismann, CREW (January 9, 2015) (Determination Letter).²

¹ OIR also withheld information under Exemption 6 of the FOIA but the Appellant did not challenge the application of that Exemption to the documents at issue in the present case.

² OIR coordinated the searches for responsive documents made in DOE’s Loan Guarantee Program Office (LGPO) and the DOE’s Executive Secretariat (ES). On September 6, 2012, ES provided the Appellant with its final determination letter regarding the Appellant’s Request. However, during ES’s search, it uncovered five documents which it transferred to LGPO for review. LGPO completed its review and OIR provided redacted versions of these documents, which are the subject of the present Appeal, to the Appellant.

With the Determination Letter, OIR provided the Appellant with five records. These five records, each consisting of several documents, were provided in one package in which each page was consecutively numbered from 1 to 125. In Document No. 2009-013219, OIR redacted information in 15 pages pursuant to Exemption 5. Specifically, the withholdings at issue in this Appeal appear on pages 87, 89, 92, 94, 96, 98, 100-01, 104-05, 107-08, and 110-11. OIR stated that it withheld all of the redacted information pursuant to Exemption 5 because the material was withholdable under the deliberative process and attorney-client privileges. Determination Letter at 2.

II. ANALYSIS

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 to show that information is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B). The DOE regulations provide that documents 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.

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are “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 an 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” or “pre-decisional” privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In its determination, OIR withheld information pursuant to Exemption 5's deliberative process and attorney-client privileges.³

Exemption 5's deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. 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

³ Because, as discussed below, we find that OIR properly applied the deliberative process privilege to the material withheld in the documents at issue, we need not consider OIR's application of the attorney-client privilege to the withheld material.

information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (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 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.

In our review of OIR’s determination regarding the Appellant’s FOIA Request, we will reference the documents using the assigned page numbers.

A. Pages 86-91

Pages 86 to 91 contain a copy of a document entitled “Project Summary and Closing Update” (Project Summary). The Project Summary was provided to the then-Secretary of Energy, Steven Chu, by LGPO to assist him in making the decision whether to approve the Solyndra loan guarantee. Memorandum of Telephone Conversation between Roman Vaynor, OIR, and Richard Cronin, Attorney-Advisor, OHA (February 6, 2015). The withheld material reflects financial analysis made by the LGPO assessing the financial merits of the proposed loan guarantee. As such this document is a deliberative, pre-decisional document and is protected by the deliberative process privilege. Therefore, OIR properly redacted segments of the Project Summary pursuant to Exemption 5.

Pursuant to our inquiry regarding this Appeal, OIR has informed us that it believes two of the withheld segments on page 89 relating to the “LGPO/OU Final Internal Risk Assessment” and the “Credit Subsidy Amount” can be released to the Appellant. Consequently, we will remand this matter to OIR to release these withheld segments to the Appellant.

B. Pages 93-100

Pages 93-100 contain a draft version of the Project Summary. The redacted portions of the draft Project Summary reflect edits made to the draft Project Summary as well as other financial assessments made by the Loan Program Office. As such the withheld materials are predecisional and deliberative in nature and subject to the deliberative process privilege and thus protected by Exemption 5.

C. Pages 101-105

Pages 101-105 contain copies of two draft memoranda for the Secretary of Energy regarding his concurrence to authorize, among other actions, the DOE Solyndra loan guarantee. Memorandum of Telephone Conversation between Roman Vaynor, OIR, and Richard Cronin, Attorney-Advisor, OHA (January 29, 2015). The redacted portions of these memoranda contain proposed recommendations for action to the Secretary of Energy. As such the redacted portions in pages 101-105 are predecisional and deliberative in nature. Consequently, we find that OIR properly concluded that the withheld information from these pages was protected by the deliberative process privilege and thus Exemption 5.

D. Pages 107-111

Pages 107-111 contain a number of E-mails sent between DOE employees regarding which documents are required to be placed before the Deputy Secretary of Energy for his consideration regarding the Solyndra loan guarantee application. The E-mails also discuss procedural requirements to permit the then-Secretary of Energy to authorize the Solyndra loan guarantee. Our review of the withheld material in the E-mails supports OIR's finding that the withheld materials consist of deliberations regarding what materials are needed to obtain various concurrences from the Secretary and Deputy Secretary of Energy regarding the finalization of the DOE loan guarantee agreement with Solyndra. We find that the withheld material in pages 107-111 are deliberative and predecisional in nature and that OIR properly found that the deliberative process privilege and Exemption 5 applied to the this information.

E. Public Interest in Disclosure

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. 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. In this case, OIR concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the agency's ongoing decision-making process by discouraging frank and candid recommendations by agency officials. Therefore, discretionary release of the redacted material at issue would not be in the public interest.

F. Segregability

Notwithstanding the above, the FOIA requires that "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." 5 U.S.C. § 552(b). In all of the documents at issue in this Appeal, OIR has withheld a limited amount of information in each document. We have examined the documents at issue in this case and find that OIR has reasonably segregated all non-exempt material contained in the documents.

It Is Therefore Ordered That:

- (1) The Appeal filed on January 22, 2015, by Citizens for Responsibility and Ethics, OHA Case No. FIA-15-0004, is denied in part and granted in part, as described in the above Decision.
- (2) This matter is hereby remanded to the Office of Information Resources in accordance with the instructions set forth above.

- (3) 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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Date: February 18, 2015