

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Matthew Fox)
) Case No.: FIA-15-0025
Filing Date: May 4, 2015)
_____)

Issued: May 26, 2015

Decision and Order

On May 4, 2015, Matthew Fox (“Appellant”) filed an Appeal from a partial determination issued to him on January 29, 2015, and a final determination issued to him on April 13, 2015, by the Bonneville Power Administration (BPA) of the United States Department of Energy (DOE) (FOIA Request Number BPA-2015-00016-FP). In its partial and final determinations, the BPA responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In response to the Appellant’s request, the BPA released documents that it redacted in part pursuant to FOIA Exemptions 5 and 6. 5 U.S.C. § 552(b) (5), (6). The Appellant claims that the BPA did not properly invoke Exemption 5, requests all documents to be released in their entirety and argues that the BPA’s search was inadequate. This Appeal, if granted, would require the BPA to produce the information that it withheld and to conduct another search for documents.

I. Background

On October 27, 2014, the Appellant submitted a FOIA Request, seeking the following:

All documents relating to Matthew (or Matt) Fox and Fifteenmile Creek and Seufert Falls and Warms Springs and Pacific Lamprey; to include memos, emails, video, pictures, notes, correspondence from OHSA [sic], etc. All documents relating to BPA Project 2011-014-00, from May 1, 2014 to October 27, 2014.

See Final Determination Letter from C.M. Frost, FOIA Officer, BPA, to Matthew Fox (Apr. 13, 2015) (“Final Determination Letter”). On January 26, 2015, the BPA provided its partial response to the Appellant, releasing 224 pages of the 244 pages of responsive documents it located. *See* Partial Response Letter from C.M. Frost, FOIA Officer, BPA, to Matthew Fox (Jan. 26, 2015) (“Partial Response Letter”). The BPA redacted portions of the released documents pursuant to FOIA Exemption 5, citing the deliberative process privilege, and pursuant to Exemption 6 because of the privacy interests at stake. *See id.* Subsequently, on April 13, 2015,

the BPA issued its final response to the Appellant's FOIA Request, releasing the remaining 20 pages of documents, redacting some of the documents partially and in full pursuant to Exemption 5's deliberative process privilege. *See* Final Determination Letter.

The Appellant filed the instant Appeal on May 4, 2015, challenging all redactions and specifically, the BPA's application of Exemption 5 to withhold information. *See* Appeal. Further, the Appellant claims that the BPA's search for the requested documents was inadequate.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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. 5 U.S.C. § 552(a)(4)(B).

A. Exemption 5

Exemption 5 protects from 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 courts have identified three traditional privileges that fall under this definition of exclusion under Exemption 5: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The BPA relied on the deliberative process privilege in withholding portions of the released documents.

The "deliberative process" privilege of Exemption 5 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. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). 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 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears, Roebuck & Co.*, 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 Gas Corp.*, 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, 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 Gas Corp.*, 617 F.2d at 866.

As a preliminary issue, in its response to OHA regarding the FOIA Appeal, the BPA acknowledged that some of the information in the released documents was redacted even though it already released the same exact information in its partial response without any redactions. *See* Email Response from Paul Mautner, Office of General Counsel, BPA, to Shiwali Patel, Attorney Advisor, OHA (May 13, 2015) (“BPA Email Response”). Thus, the BPA indicated that it “withdraws any redactions in the internal emails that can be identified because of their [previous] release to the requestor.” *See id.* To that end, we are remanding in part this Appeal for the BPA to provide those documents without redactions, which are found on pages BPA-2015-00016-FP_0085 and FP_0175. While, for all intents and purposes, the Appellant has already received the information it seeks from those emails, we will nonetheless remand this to the BPA to provide those documents to the Appellant without those redactions.

The BPA withheld additional information in the released documents pursuant to Exemption 5’s deliberative process privilege, stating that the withheld material contained “discussions with the legal department regarding various issues surrounding the contract with the Warm Springs Tribe.” *See* Partial Response Letter, Final Determination Letter. It explained that the discussions in the redacted portions of the release documents were internal and predecisional as a decision was not yet made on the issue discussed. *See* BPA Email Response. Even today, that issue has not been resolved and “internal BPA discussions on this topic will likely resume in the future.” *See id.* The BPA “also redacted some communications with the Tribes contained in the internal emails” because “they were selected by BPA staff to circulate internally for purposes of focusing discussions on various aspects of the alleged site safety problem,” the release of which may reveal the “content and direction of BPA’s deliberations.” *Id.*

Indeed, upon our review of the redacted information that consists mostly of email discussions, it is apparent that the withheld material involves the give and take of a deliberative process. As the BPA stated, the discussions contained in these redacted documents concern issues that have not yet been decided, and are therefore, predecisional. *See Judicial Watch, Inc. v. Fed. Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006). Moreover, it contains discussions, opinions and recommendations on the issues surrounding the contract with the Warm Springs Tribe. Any factual material in the redactions reflects the BPA’s ruminations about how to exercise discretion and disclosure of that information may expose the BPA’s deliberative process. *See Petroleum Info. Corp.*, 976 F.2d at 1435. In fact, it is protecting these types of discussions that constitute the very reasons why the deliberative process privilege exists: (1) to encourage open and frank discussions on matters of policy within an agency; (2) to protect against premature disclosure of decisions and policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of discussions and opinions that were not ultimately the grounds for an agency’s action or decision. *See, e.g., Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp.*, 617 F.2d at 866; *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). Hence, we find that the BPA properly invoked Exemption 5’s deliberative process privilege.

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 it is in the public interest. 10 C.F.R. § 1004.1. As to the information that we deemed properly withheld that revealed a deliberative process, we conclude that it should remain withheld. Discretionary disclosure of that information is not in the public interest because the quality of agency decisions would be adversely affected if frank, written discussions of such matters were inhibited by the knowledge that the content of such discussions might be made public.

B. Exemption 6

Exemption 6 shields from disclosure “[p]ersonnel 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 purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep’t of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 769, 773 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

With its Partial Response Letter, the BPA released records wherein it redacted mobile phone numbers located on a few pages, stating that its release “would constitute a clearly unwarranted invasion of personal privacy.” *See* Partial Response Letter. We agree. The redactions on pages BPA-2015-00016-FP_0145, FP_0146, and FP_0187 contain mobile phone numbers, which generally are not released to the public and, more importantly, there is a significant privacy interest connected with that information. Release of a mobile phone number could subject an individual to unwanted intrusion. Further, we find that little, if any, light would be shed on the operations and activities of the BPA by revelation of this information. Consequently, this material was properly withheld pursuant to Exemption 6.

C. Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). “[T]he standard of reasonableness which we apply to agency search procedures 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. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Project on Government Oversight*, Case No. TFA-0489 (2011).

In describing its search for responsive records, the BPA stated that the staff in the Fish and Wildlife section searched the BPA Asset Suite System, the Pisces system, and the work drives of the BPA employees connected with the contract and the project, which are the subject of the FOIA Request. *See* BPA Email Response. The Asset Suite system “is the system of records for BPA’s official procurement and contract files. All procurement contracts issued through BPA’s Supply Chain office are created and stored in this system.” Also, the BPA explained that the “Pisces system is a BPA Fish and Wildlife system that the various Fish and Wildlife contractors, who work with BPA biologists and project managers, use to create a statement of work, to submit and to accept contract status and progress reports, and to maintain communications between BPA and the contractor’s technical staff.” *Id.* In addition to searching these electronic files, the BPA searched hard copies of records. *Id.* After searching these files, the BPA stated that “there are no other files or systems within BPA to search for responsive records.” *Id.*

Accordingly, taking into consideration that agency search procedures of requested documents under FOIA do not require absolute exhaustion, but only “a search reasonably calculated to uncover the sought materials,” we conclude that the BPA conducted an adequate search for records. *See Miller*, 779 F.2d at 1384-85.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Matthew Fox on May 4, 2015, OHA Case Number FIA-15-0025, is hereby denied in part and remanded in part, as set forth in Paragraph (2) below.

(2) This matter is hereby remanded in part to the Department of Energy’s Bonneville Power Administration which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(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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