

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

In the Matter of Tim Hadley)
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Filing Date: September 15, 2016) Case No.: FIA-16-0051
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Issued: December 15, 2016

Decision and Order

On September 15, 2016, Mr. Tim Hadley (Appellant) filed an Appeal from a determination issued to him by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2015-00243-F). In that determination, OIR responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. On appeal, the Appellant requests that OIR be required to release information that it withheld in its determination pursuant to Exemption 5 of the FOIA. As explained below, we have determined that the appeal should be granted.

I. Background

On November 25, 2014, the Appellant filed a FOIA request for “[a]ll emails either sent or received . . . during the month of November 2013 for Debbie Haught and Carol Painter.” Request from Appellant to DOE (November 24, 2014) at 1. OIR assigned the request to the Office of Electricity Delivery and Energy Reliability (OE), where Ms. Haught is an employee, and to the National Energy Technology Laboratory (NETL), where Ms. Painter is employed.

OE conducted a search for emails sent or received in November 2013 by Ms. Haught. In 2015, OIR issued three partial responses on OE’s behalf, releasing 97 total documents. On September 12, 2016, OIR issued a final determination with respect to records held by OE, releasing 93 more documents. Determination Letter from Alexander Morris, OIR, to Appellant (September 12, 2016) (Determination) at 1.¹ OIR redacted information in the fourth and final release pursuant to Exemptions 4, 5, 6 and 7(C) of the FOIA. *Id.*

In his Appeal, the Appellant challenges OIR’s decision to withhold information in the final release under Exemption 5. Appeal from Appellant to Office of Hearings and Appeals (September 15,

¹ NETL issued its own final response on July 16, 2015. Determination at 1.

2016). His main arguments are that OIR should not have redacted factual material, such as dollar amounts, and that OIR's redactions are inconsistent. *Id.*

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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA's goal of broad disclosure. *See Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (*Klamath*). The agency has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

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 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 Exemption 5: 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, OIR withheld information pursuant to the deliberative process privilege of Exemption 5. Determination at 2.

Under the deliberative process privilege, agencies are permitted 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. The privilege 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 (1958)). The ultimate purpose of Exemption 5's deliberative process privilege is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by the 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.

A. OIR's Determination

OIR withheld portions of 32 documents pursuant to Exemption 5 of the FOIA. Determination at 5-6. In its determination, OIR explained its reasoning as follows:

The materials being withheld as deliberative include exchanges between government employees and government representatives and reflect the representatives' impressions or opinions regarding decisions not yet made. DOE may consider these preliminary views as part of the process that will lead to the agency's final policy decision about these matters. The withheld information does not represent a final agency position, and its release would compromise the

deliberative process by which the government makes its decisions. Thus, the information is being withheld under Exemption 5 of the FOIA as pre-decisional material that is part of the agency's deliberative process.

Determination at 2.

The initial question we must consider is whether OIR's determination letter is sufficient to enable us to conduct a review. Determination letters must fulfill certain requirements so as to allow the requester to decide whether the agency's response to its request was adequate and proper and to provide this office with a record upon which to base its consideration of an administrative appeal. *See, e.g., The Oregonian*, Office of Hearings and Appeals (OHA) Case No. VFA-0467 (1999). Determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld and (3) specify the exemption or exemptions under which information was withheld. *See, e.g., Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Tom Marks*, OHA Case No. TFA-0288 (2009); *F.A.C.T.S.*, OHA Case No. VFA-0339 (1997).

In addition, determination letters must provide requesters with an explanation of why material was withheld. A determination letter must "specifically indicate which exemptions . . . are being applied to each withholding." *The Oregonian*, OHA Case No. VFA-0467 (1999). The letter must also adequately justify the withholding of information by explaining briefly how the claimed exemption applies to the withheld document. *See, e.g., State of New York*, OHA Case No. TFA-0269 (2008); 10 C.F.R. § 1004.7(b)(1) (responses denying a request for a record must include "a brief explanation of how the exemption applies to the record withheld"). Moreover, with respect to Exemption 5 withholdings, we have required determination letters to specify or explain "which decision making process or matters would be compromised by release of the documents." *National Security Archive*, OHA Case No. FIA-13-0069 (2013); *see also Citizens for Responsibility and Ethics in Washington*, OHA Case No. FIA-13-0010 (2013). We also have required determination letters to "identify . . . the specific role played by the [withheld] information in the course of that deliberative process within DOE." *Hanford Atomic Metals Trades Council*, OHA Case No. FIA-13-0030 (2013). "The need to describe each withheld document when Exemption 5 is at issue is particularly acute because 'the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.'" *Animal Legal Defense Fund, Inc. v. The Department of the Air Force*. 44 F.Supp.2d 295, 299 (D.D.C. 1999) (quoting *Coastal States*, 617 F.2d at 867).

OIR's determination letter adequately describes the results of its searches. Further, the redacted documents provided to the Appellant clearly indicate where information was withheld under Exemption 5. However, OIR's determination letter does not identify the decision-making processes at issue, or explain the role played by the withheld information in those decision-making processes. In cases where we determine that an office did not provide an adequate determination in response to a FOIA request, we usually remand the request with instructions to issue a new determination. *See, e.g., Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Idaho Conservation League*, OHA Case No. FIA-12-0040 (2012). Accordingly, we will remand this matter to the OIR so that it can identify, for each Exemption 5 withholding, the decision-making process at issue and the role played by the withheld information in that decision-making process. OIR may choose to group together records sharing common characteristics when explaining its

Exemption 5 withholdings. *See Michael Ravnitzky*, Case. No. FIA-16-0039 (2016) (finding that a determination letter may provide a single explanation where the same withholding rationale applies to groups of records sharing common elements).

B. Segregability and Discretionary Release

The FOIA also requires that “any reasonably segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester. Before issuing a revised determination, OIR should review each record to determine whether additional information can be segregated and released.

Finally, pursuant to the FOIA Improvement Act of 2016, the FOIA provides that an agency may withhold information only if it “reasonably foresees that disclosure would harm an interest protected by . . . [the relevant] exemption” or if disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A); FOIA Improvement Act of 2016, Pub. L. 114-185. DOE’s FOIA regulations similarly provide that the DOE should release material exempt from mandatory disclosure if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. OIR concluded that discretionary disclosure would not be in the public interest because the knowledge that deliberative discussions might be shared publicly could inhibit “frank, written discussion of policy matters” and thus harm the quality of agency decisions. Determination at 2. OIR should re-examine whether any additional Exemption 5 material could be released without inhibiting the frank, written discussion of policy matters.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 15, 2016 by Mr. Tim Hadley, Case No. FIA-16-0051, is hereby granted as specified in Paragraph (2) below.
- (2) This matter is hereby remanded to the Department of Energy’s Office of Information Resources, 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 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.

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