

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

In the Matter of Natural Resources )  
Defense Council )  
Filing Date: September 18, 2017 ) Case No.: FIA-17-0032  
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Issued: October 31, 2017  
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**Decision and Order**  
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On September 18, 2017, the Natural Resources Defense Council (Appellant) appealed a determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) on June 20, 2017 (Request No. HQ-2017-00575-F). In that determination, OPI responded to a request filed 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. The Appellant challenges the decision by OPI to withhold information under the deliberative process privilege and the attorney-client privilege of Exemption 5. As explained below, we will grant this Appeal in part.

**I. Background**

Prior to publishing final versions of energy conservation rules in the Federal Register, the DOE posts pre-publication drafts of those rules on its web site, for the purposes of error correction. 10 C.F.R. § 430.5. On February 17, 2017, the Appellant filed a FOIA request for the following records related to the pre-publication drafts of five energy conservation rules<sup>1</sup>:

- a) any communications received by DOE on or before February 13, 2017, including e-mails to ApplianceStandardsQuestions@ee.doe.gov and ErrorCorrectionInfo@ee.doe.gov, identifying an error or errors in the rule;
- b) any records reflecting DOE’s discovery, on its own initiative, of an error or errors in the rule; and

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<sup>1</sup> The request sought information related to the energy conservations standards for: (1) air compressors (Docket Number EERE-2013-BT-STD-0040); (2) commercial packaged boilers (Docket Number EERE-2013-BT-STD-0030); (3) portable air conditioners (Docket Number EERE-2013-BT-STD-0033); (4) uninterruptible power supplies (Docket Number EERE-2013-BT-STD-0022); and (5) walk-in cooler and freezer refrigeration systems (Docket Number EERE-2015-BT-STD-0016). On Document 5, 2016, DOE posted on its web site the pre-publication draft rule for air compressors. On December 28, 2016, DOE published pre-publication draft rules for the other products.

- c) any communications between DOE and any other party regarding an error or errors in the rule, regardless of whether the error was identified by DOE or another party, and regardless of whether DOE has determined that the error should be corrected.

FOIA Request from Appellant to DOE (February 16, 2017) at 1.

OPI assigned the request to the DOE's Office of Energy Efficiency and Renewable Energy (EERE) and the Office of General Counsel (GC). Determination Letter from Alexander C. Morris, FOIA Officer, OPI, to Jen Sorenson, Natural Resources Defense Council (June 20, 2017) (Determination) at 2. A search for records in those offices located seven responsive documents, all email chains. *Id.* On June 20, 2017, OPI issued a determination in which it released one of those documents in full, but withheld information in six documents pursuant to Exemption 5 of the FOIA. *Id.* at 6. Specifically, OPI determined that information was exempt from withholding under the deliberative process privilege and the attorney-client privilege of Exemption 5.

With respect to its withholdings under the deliberative process privilege, OPI stated that the material included "draft documents and inter-office memoranda, including the recommendations and opinions of DOE personnel, as well as exchanges between government employees and government representatives that do not reflect DOE's final policies and/or decisions." *Id.* at 2. Regarding its withholdings under the attorney-client privilege, OPI stated that "the information in these documents includes confidential communications between DOE attorneys and staff of the program office to which they provide legal advice." *Id.*

In its Appeal to the Office of Hearings and Appeals (OHA), the Appellant cites the legal standards for withholding material under the deliberative process privilege and the attorney-client privilege. Appeal from Appellant to OHA (September 18, 2017) (Appeal) at 2. The Appellant argues that the DOE has not provided an adequate justification for its withholdings or provided a sufficient description of how the privileges apply. *Id.* at 1-2.

## 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 exemptions are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We 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).

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*).

As noted above, one of the privileges that OPI used to withhold information was the deliberative process privilege. 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.

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*, 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.*

OPI also withheld information in the documents under the attorney-client privilege. An agency may withhold information under the attorney-client privilege if it is a "confidential communication . . . between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney may be an agency lawyer and the client may be the agency. *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). Although the attorney-client privilege applies to facts divulged by a client to his attorney, the privilege also "protects communications from attorney to client to avoid the risk of inadvertent, indirect disclosure of the client's confidences." *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983). The privilege also encompasses communications between attorneys that reflect client-supplied information. *Judicial Watch v. Dep't of the Army*, 466 F. Supp. 2d 112, 121 (D.D.C. 2006). Not all communications between attorney and client are privileged, however. *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 144-45 (D.D.C. 2013) (*Judicial Watch*). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976).

### **A. Adequacy of Determination**

Before addressing whether the attorney-client privilege and the deliberative process privilege apply to the withheld material, we first address the Appellant's argument that OPI did not provide a sufficient explanation for its redactions in its determination letter. The Appellant cites *Chesapeake Bay Found., Inc. vs. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 105 (D.D.C. 2009) (*Chesapeake Bay*) for the proposition that agencies must provide a relatively detailed justification for the exemptions they apply. Appeal at 1. *Chesapeake Bay*, however, was referring to the detailed justification that an agency must provide when a FOIA requester appeals the denial of a request to federal court. See *Chesapeake Bay*, 677 F. Supp. 2d 105-06. That justification

usually takes the form of a “Vaughn index,” affidavits or declarations, or both. *Id.* at 105. With respect to agency response letters, agencies are not required to produce a Vaughn index or detailed declarations or affidavits when initially responding to FOIA requests. *Schwarz v. U.S. 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.”) *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide Vaughn indices until ordered by a court after plaintiff has exhausted the administrative process).

On the other hand, we have found that DOE determination letters must fulfill certain requirements to enable the FOIA requester to decide whether the agency’s response to the 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*, OHA Case No. VFA-0467 (1999). Accordingly, 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). In addition, DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing “a brief explanation of how the exemption applies to the record withheld.” 10 C.F.R. § 1004.7(b)(1); *see also State of New York*, OHA Case No. TFA-0269 (2008). Moreover, with respect to Exemption 5 withholdings under the deliberative process privilege, we have in some cases required determination letters to specify “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).

OPI’s determination letter describes the results of its searches, clearly indicates the information withheld, and specifies the exemption that applies to the redactions. It also provides brief, although somewhat imprecise, explanations of how the deliberative process privilege and the attorney-client privilege apply to the withheld material.<sup>2</sup> Although OPI has not identified in its letter the decision-making processes at issue for the purposes of its deliberative process analysis, we find that the released material combined with the nature of the request provided the Appellant with information about those decision-making processes. Specifically, all of the records involve internal DOE discussions about error correction requests received from outside parties on the energy conservation rules identified in the Appellant’s FOIA request. We therefore find that OPI’s response letter was sufficient. To the extent that the Appellant seeks more information about each of the documents, we will provide that below. In addition, we are remanding this matter to OPI for the reasons indicated in the following section. On remand, OPI may choose to provide additional detail in a revised determination letter.

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<sup>2</sup> One ambiguity in OPI’s response is that neither the determination letter nor the redacted documents state whether certain material was withheld under either the deliberative process privilege or the attorney-client privilege, or whether all the redacted material was withheld under both privileges. Given that no material is identified as redacted under one privilege only, we interpret the letter as finding that both privileges apply to all the redacted material.

## B. Exemption 5 Withholdings

OPI labeled the seven documents numerically, releasing Document 2 in full and withholding information in Documents 1, 3, 4, 5, 6, and 7. We reviewed unredacted versions of the documents to assess whether Exemption 5 applies to the withheld material.

### 1. Document 1

Document 1 consists of an email exchange about an error correction request from Sullivan-Palatek, Inc. regarding DOE's proposed standard for air compressors. In the document, a program manager from the DOE's Building Technology Office (BTO) poses a legal question about the error correction request to a DOE attorney in the Office of the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency (GC-33). GC-33 acts as legal counsel to the BTO. Memorandum of Telephone Conversation between Peter Cochran, GC-33, and Gregory Krauss, OHA (October 12, 2017) (Cochran Memo). One of GC-33's responsibilities is to advise the BTO on rulemakings for energy conservation rules. *Id.* In Document 1, the BTO program manager copies into the email some relevant text from the pre-publication draft of the air compressor rule. The attorney responds to the BTO program manager with analysis and advice. OPI redacted most of the email exchange, including the text quoted from the proposed rule.

We find that the redacted material is predecisional and deliberative, and therefore protected by the deliberative process privilege, because it reveals the thoughts and opinions of DOE officials in the process of deciding how to respond to an error correction request. With respect to the text from the proposed rule that the BTO manager quoted in his email, we conclude that this material may be protected by the deliberative process privilege as well. Although the entirety of this pre-publication draft of the rule has been released by DOE and is in the public domain, releasing the quoted portions of the rule would reveal the nature of the deliberations between the BTO manager and the attorney. Agencies are not required to release factual material that is so “inextricably intertwined” with material protected by deliberative process privilege that it “would ‘compromise the confidentiality of the deliberative information that is entitled to protection under Exemption 5.’” *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F.2d 81, 85 (2nd Cir. 1991) (quoting *EPA v. Mink*, 410 U.S. 73, 92 (1973)).

Finally, given that the redacted material in Document 1 may be withheld under the deliberative process privilege of Exemption 5, we need not reach whether it could also be withheld under the attorney-client privilege. *See Judicial Watch*, 926 F. Supp. 2d at 145 (concluding that it was unnecessary to address an agency's assertion of the attorney-client privilege after a finding that the same information was properly withheld under the deliberative process privilege).

### 2. Documents 3, 4, and 5

Documents 3 and 4 are nearly identical and consist of an email chain regarding the pre-publication draft of the energy conservation standard for commercial packaged boilers. In the documents, DOE officials discuss an error correction request regarding that rule that DOE received from Spire, Inc., and the American Public Gas Association (APGA).<sup>3</sup> In the first redacted email within the chain, a BTO program manager forwards the error correction request to a DOE attorney. In that email, he

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<sup>3</sup> The text of that error correction request was provided as an attachment to Document 3 and has been released in its entirety.

provides his thoughts on the submission. In both documents, discussion ensues between GC-33 attorneys on the content of the submitted material, as well as on legal questions related to that submission. OPI withheld most of the email correspondence beginning with the email from the program manager.

Document 5 is an email chain regarding an error correction request submitted by the American Gas Association (AGA) to two attorneys in GC-33. In its error correction request, which is attached to Document 5 and released in its entirety, the AGA comments on the proposed energy conservation standards for commercial packaged boilers. One of the attorneys forwards the error correction request to colleagues in GC-33 while also providing his own analysis. In subsequent emails, the attorneys offer opinions on the error correction request and on legal issues regarding the rulemakings. OPI redacted the text of most of the emails between GC-33 attorneys.

After a review of the redacted material in Documents 3, 4, and 5, we find that the deliberative process privilege applies to all of it. The redacted material is predecisional, because it consists of discussions between DOE officials on how to respond to error correction requests and how to handle rulemakings for energy conservation standards. It is deliberative because in each email the individuals share thoughts and opinions on the error correction requests and related legal issues. Because we find that these materials are protected by deliberative process privilege of Exemption 5, we do not reach whether they could also be withheld under the attorney-client privilege.

### 3. Documents 6 and 7

Documents 6 and 7 consist of nearly identical email chains regarding the error correction request process for the five energy conservation rules. In the initial email within the chain, a BTO program manager poses a question to a GC-33 attorney, while copying another BTO program manager and several attorneys in GC-33. The BTO program manager offers his own analysis on the actions that DOE should take in response to the error correction requests. The program manager and the attorney then exchange additional emails discussing the error correction request process. OPI redacted most of the material in the email chains.

In each of these emails, DOE officials exchange viewpoints and analysis on matters related to error correction requests. We therefore find that, for the most part, the redacted material is predecisional and deliberative and exempt from disclosure under the deliberative process privilege of Exemption 5. Given that this material may be withheld under the deliberative process privilege, we need not reach whether it may also be withheld under the attorney-client privilege.

In Document 7, however, it appears that material in a February 15, 2017, email from the DOE attorney to the BTO program manager is not the type of material that may be withheld under the deliberative process privilege. In the email, the DOE attorney asks a simple question in which he seeks information; this question is not of a deliberative nature. Moreover, because the email communication is informational and does not contain legal advice or reveal any client confidences, we do not believe that the material may be withheld under the attorney-client privilege. On remand, OPI should review this email and release any portions of it that are not exempt from disclosure under the FOIA.

Furthermore, an agency “may not rely on an otherwise valid exemption to justify withholding information that is already in the public domain.” *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (citation and quotation omitted). The earliest email in the email

chain in Documents 6 and 7 is a communication from the BTO program manager dated February 13, 2017. OPI redacted information in this email in Document 6 but released some of the same information in Document 7. On remand, OPI should review whether to release information in Document 6 that it has released already.

### **C. Public Interest and Segregable Portions**

The FOIA states that an agency is justified in not releasing material that the agency reasonably foresees would harm an interest protected by one of the statutory exemptions. 5 U.S.C. § 552(a)(8)(A)(i)(I). As observed, the purpose of the deliberative process privilege of Exemption 5 is to promote frank discussion of policy matters. With respect to the redacted material, OPI concluded, and we agree, that it is reasonably foreseeable that “release of the information could chill open and frank discussions, limit government personnel’s range of options, and thus detract from the quality of agency decisions.” Determination at 2. DOE regulations further provide that the DOE should 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. Again, we conclude that release of the material is not in the public interest due to the possibility that it could restrict the ability of DOE officials to share opinions without fear of disclosure, and thereby harm the quality of agency decisions.

The FOIA also 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). After reviewing the withheld material in the six documents, we find that, notwithstanding the portions of Documents 6 and 7 that we identified above, OPI properly released the segregable portions of the responsive documents.

### **III. Conclusion**

Based on the foregoing, we find that OPI properly withheld most of the redacted material under the deliberative process privilege of Exemption 5. We have found, however, that some redacted material in Document 6 has already been released, and that some material in Document 7 does not appear to fall within either the deliberative process privilege or the attorney-client privilege. We will remand this matter so that OPI can review this material and release any information that is exempt from disclosure under the FOIA. Additionally, OPI may wish to revise its determination letter to provide a more detailed description of the reasons for its withholdings.

### **IV. Order**

It is hereby ordered that the Appeal filed on September 18, 2017, by the Natural Resources Defense Council, Case No. FIA-17-0032, is granted in part as set forth in the Decision above.

This matter is hereby remanded to the Department of Energy’s Office of Public Information, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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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Date: October 31, 2017