

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

In the Matter of Ayyakkannu Manivannan)
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Filing Date: March 5, 2018)
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_____) Case Nos.: FIA-18-0014

Issued: March 29, 2018

Decision and Order

On March 5, 2018, Dr. Ayyakkannu Manivannan (Appellant) appealed a Redetermination Letter issued to him from the Department of Energy’s (DOE) National Energy Technology Laboratory (NETL) (Request Nos. HQ-2017-01070-F/NETL-2017-01080-F). In the Redetermination Letter, NETL responded to a Request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. NETL released responsive documents, but redacted portions of some documents pursuant to Exemptions (b)(5) and (b)(6) of the FOIA. The Appellant appealed, asserting that NETL did not perform an adequate search and improperly invoked Exemptions 5 and 6. This Appeal, if granted, would require an additional search for responsive information and require NETL to reexamine some or all of the redacted information.

I. Background

The Appellant submitted a FOIA Request on May 11, 2017, seeking several different categories of information. FOIA Request (May 11, 2017). In the response, NETL issued a determination letter which segregated the request into eleven individual requests and provided a response for each one. Determination Letter (October 24, 2017). After conducting a search, NETL issued various responsive records and withheld particular information pursuant to Exemptions 5 and 6 of the FOIA. *Id.* The Appellant appealed this determination to our office in *Ayyakkannu Manivannan*, Case No. FIA-17-0038 (2017) (*Manivannan I*).¹ On appeal, we determined that NETL did not conduct an adequate search in response to enumerated requests 1 and 2. *Id.* We further determined that NETL’s Determination Letter did not appropriately explain or justify its use of Exemptions 5 and 6 to withhold redacted information. *Id.* Accordingly, we remanded the matter to NETL for further processing. *Id.*

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

On January 4, 2018, NETL issued a Redetermination Letter on this matter. Redetermination Letter (January 4, 2018). On January 18, 2018, the Office of Hearings and Appeals (OHA) received the Appellant's challenge to NETL's Redetermination. FOIA Appeal (January 18, 2018). However, on January 29, 2018, NETL withdrew its January 4, 2018, Redetermination Letter, and OHA dismissed the Appeal (FIA-18-0006) as moot.

On February 27, 2018, NETL issued a revised Redetermination Letter. Redetermination Letter (February 27, 2018). With regard to enumerated item 1, NETL released 46 pages of responsive records in their entirety, and in response to enumerated item 2, NETL released 89 pages² of responsive records, making 19 redactions pursuant to Exemptions 5 and 6 of the FOIA. *Id.*

On March 5, 2018, OHA received the Appellant's challenge to NETL's newest Redetermination. FOIA Appeal (FIA-18-0014). In the Appeal, the Appellant contends that NETL has not yet conducted an adequate search with regard to items 1 and 2, and has improperly redacted the released documents. *Id.*

II. Analysis

A. Adequacy of the 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." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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., Ralph Sletager*, Case No. FIA-14-0030 (2014).

1. Item 1

Enumerated item 1 sought "information on the names of all the NETL personnel who initiated and were involved with his internal investigation." FOIA Request (May 11, 2017). In *Manivannan I*, we noted that NETL solely searched for the names of the individuals responsible for both requesting and making a determination that the investigation be conducted, but did not search for "information on the names." *Manivannan I* at 3. Thus, we determined that NETL's search was too narrow and remanded the matter to NETL to conduct an additional search. *Id.*

In its Redetermination Letter, NETL explained that it conducted a broader search and there was "no document that list[ed] the names of NETL personnel who initiated and were involved in the internal investigation." Redetermination Letter (February 27, 2018). NETL explained that the released documents, however, show an outline of the investigation and discuss the Management Directed Inquiry (MDI). *Id.* NETL additionally provided our office with information regarding the additional search it conducted. NETL explained that on remand, it broadened the search of its electronic database

² NETL indicated that although it previously released 91 pages in the January 4, 2018, Redetermination, in issuing the February 27, 2018, Redetermination, it removed two blank pages.

to include the terms “MDI,³” “investigation,” and “Manivannan.” Telephone Memorandum (January 19, 2018). This search revealed 46 pages of documents that were released to the Appellant in their entirety. Redetermination Letter (February 27, 2018).

In *Manivannan I*, NETL solely searched for “the names of those responsible for both requesting and making a determination that the investigation be conducted.” *Manivannan I* at 3. Based upon this narrow interpretation of the request, NETL was unable to locate any responsive records. However, in expanding its search to the above listed search terms, we conclude that NETL conducted a search reasonably calculated to uncover the records sought by the Appellant, and that the search was therefore adequate.

2. Item 2

Turning to enumerated item 2, the Appellant sought information on all NETL correspondence with an investigator (the investigator) contracted by NETL, “including the written instruction given to her, [and] her official contract document with NETL regarding” the investigation of the Appellant. FOIA Request (May 11, 2017). NETL explained that the Appellant has already received “a copy of the purchase requisition for the hiring of” the investigator, without redaction, in a previous release of documents, and NETL disclosed to the Appellant previously that no “written instructions” to the investigator exist. Email from NETL to OHA, RE: Manivannan Appeal (January 23, 2018).

Nonetheless, in order to ensure a thorough search, NETL searched its electronic database for the terms “Manivannan” and the first and last name of the investigator. Telephone Memorandum (January 19, 2018). NETL stated that it noticed that its files utilized two different spellings of the investigator’s first name. *Id.* As such, NETL utilized both spellings in its search. *Id.* NETL additionally searched the Equal Employment Opportunity (EEO) Office. Redetermination Letter (February 27, 2018). NETL clarified that “there is nowhere else to look.” Telephone Memorandum (January 19, 2018). This search produced 89 pages of documents.⁴

Based on NETL’s description of its search with regard to enumerated item 2, we conclude that NETL conducted a search reasonably calculated to uncover the records sought by the Appellant, and that the search was therefore adequate.

B. Item 2 Exemptions

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). An agency

³ “MDI” is an acronym for Management Directed Inquiry.

⁴ As previously noted, although the search originally produced 91 pages of documents, two of the pages were blank, and NETL removed the blank pages from it February 27, 2018, Redetermination.

is also required to “consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of the requested records is not possible.” 5 U.S.C. § 552(a)(8)(A). DOE must “take reasonable steps necessary to segregate and release nonexempt information.” *Id.*

The Appellant challenges NETL’s use of Exemptions (b)(5) and (b)(6) to redact the item 2 documents that it provided to him on February 27, 2018. FOIA Appeal (March 5, 2018).

1. Exemption (b) 5

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). 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).⁵

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 the Exemption 5 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, generated before the adoption of agency policy, and deliberative, 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 Gas Corp.*, 617 F.2d at 866.

The attorney work-product privilege protects from disclosure documents which reveal “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). This privilege is limited, however, as it does not extend to every written document generated by an attorney. In order to be afforded protection under the attorney work-product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g., Coastal States*, 617 F.2d at 865.

⁵ In the Redetermination Letter, NETL stated that it solely relied on the deliberative process and attorney work product privileges. Redetermination Letter (February 27, 2018). Therefore, we will only address those privileges herein.

In response to item 2, NETL released 89 pages of emails to the Appellant and made eight redactions pursuant to Exemption (b)(5), claiming both the deliberative process privilege and the attorney work-product privilege. Of the eight redactions, however, five are duplicative. Therefore, we will solely examine the three redactions made pursuant to Exemption 5. These three redactions are contained within emails between the investigator and a NETL attorney.

With regard to these email exchanges, we note that the threshold requirement of Exemption 5 is that the protected documents must be “inter-agency or intra-agency records.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). OHA has already determined that the opinions and recommendations of the investigator contracted by NETL to conduct the investigation into the conduct of the Appellant qualified as “intra-agency” for the purposes of the FOIA. *See Ayyakkannu Manivannan*, Case No. FIA-17-0035 at 6 (2017); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec.*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (“when an agency solicits opinions from and recommendations by temporary, outside consultants, those materials are considered “intra-agency” for FOIA purposes”).

The first two emails are entitled Subject: MDI and Re: MDI, and were sent by the NETL attorney to the investigator on February 18, 2016 at 10:19 a.m. and February 18, 2016 at 1:50 p.m.⁶, respectively. NETL redacted portions of these emails pursuant to the attorney work-product and deliberative process privileges. Upon examining the redactions, it is clear that, in both emails, the NETL attorney is sharing with the investigator his plan for moving forward with regard to the Appellant, his theories of the case, and his proposed communications with the Appellant. Therefore, this communication is predecisional, as it was generated prior to NETL adopting a final decision on the matter, and it is deliberative, as it reflects the give-and-take of the consultative process. Accordingly, NETL properly invoked the deliberative process privilege of Exemption 5 with regard to these emails.

The third email is entitled RE: MDI and was sent by the NETL attorney to the investigator on February 23, 2016 at 8:27 a.m. In an unredacted portion of the email, the NETL attorney asks where in the investigation certain records may be found; he then states where he thinks they would be found. NETL redacted the attorney’s thoughts regarding where in the investigation the records may be found. We spoke with NETL regarding this redaction. NETL explained that, if released, the redacted information would disclose the identity of an employee being evaluated for disciplinary action. Telephone Memorandum (March 26, 2018). NETL clarified that it believes the redaction is also justified by Exemption 6. *Id.* NETL, therefore, invoked Exemptions 5 and 6 to justify its redaction. As explained further below, the redaction is appropriate pursuant to Exemption 6.

2. Exemption (b) 6

NETL made 12 redactions of the 89 released pages pursuant to Exemption 6 of the FOIA.⁷ However, we will only address four redactions, as eight of the redactions are duplicates. These redactions are

⁶ As some of these duplicative emails reoccur in a chain of exchanged emails, occasionally the time stamp is reflected as 11:50 a.m.; however the content of the email is identical.

⁷ This total includes the single Exemption 5 redaction contained in the February 23, 2016 at 8:27 a.m. email. This redaction is included in the total because, as explained above, NETL described its reasoning for the redaction and its belief that the withholding was additionally justified by Exemption 6.

contained in two emails sent by the NETL attorney to the investigator. The first email is entitled RE: MDI and was sent on February 23, 2016 at 8:27 a.m. The second email, entitled Re: MDI, was sent on November 12, 2015 at 4:17 a.m.⁸

Exemption 6 of the FOIA 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 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 determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989); *see also Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If the agency cannot find a significant privacy interest, the information may not be withheld. *Horner*, 879 F.2d at 874. Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *Id.*; *Reporters Comm. for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 749, 773 (1989). Lastly, 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. *Horner*, 879 F.2d at 874.

The information contained in the four redactions made pursuant to Exemption 6 contain both information discussing potential disciplinary action to be taken against a NETL employee and information regarding the personal background and family of the NETL attorney. As the redacted information applies to particular individuals (the NETL employee, the NETL attorney, the individual family members of the NETL attorney), we determine that the information meets the threshold requirement of qualifying as a “similar file” pursuant to Exemption 6 of the FOIA. *See Pierce v. U.S. Air Force*, 512 F.3d 184, 191 (5th Cir. 2007) (“To qualify as a ‘similar file’ under Exemption 6 . . . the information need only ‘appl[y]’ to the individual.”); *New York Times Co. v. Nat’l Aeronautics and Space Admin.*, 920 F.2d 1002, 1006 (D.C.Cir.1990) (threshold for application of Exemption 6 is that information “applies to a particular individual”).

After determining that the redacted information meets the threshold requirement, we must next consider whether significant privacy interests would be compromised by the disclosure of the redacted information. The Supreme Court has indicated that there is a privacy interest in one’s identity being associated with a disciplinary action and in one’s “personal data,” including one’s personal history or familial information. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 377 (1976); *Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) (finding that “[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information . . . would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy”). As such, we conclude that the redacted information would constitute a significant privacy interest of both the NETL employee and the NETL attorney, the release of which would compromise that interest. However, neither the

⁸ As some of these duplicative emails reoccur in a chain of exchanged emails, occasionally the time stamp is reflected as 6:26 a.m. with regard to the first email and 6:17 a.m. with regard to the second email; however the content of the emails is identical.

disclosure of the identity of a NETL employee potentially subject to a disciplinary action, nor the disclosure of personal or familial details of the NETL attorney, would shed light on the operations and activities of the government. Thus, the privacy interest of both the NETL employee and the NETL attorney outweighs any public interest in the disclosure of the redacted information. We, therefore, find that NETL appropriately invoked Exemption 6.

III. Conclusion

For the reasons stated above, we conclude that NETL conducted an adequate search for responsive records and properly redacted information pursuant to Exemptions 5 and 6. We will therefore deny the appeal.

IV. Order

It is hereby ordered that the Appeal filed on March 5, 2018, by Dr. Ayyakkannu Manivannan, No. FIA-18-0014, is denied.

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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