

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Natural Resources)
Defense Council)
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Filing Date: November 19, 2018) Case No.: FIA-18-0037
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Issued: December 3, 2018

Decision and Order

On November 19, 2018, the Natural Resources Defense Council (Appellant), appealed a determination letter issued by the United States Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-00417-F. In that letter, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations set forth at Part 1004 of Title 10 of the Code of Federal Regulations. OPI provided two documents to Appellant: (1) interim guidance concerning long-term storage of elemental mercury; and (2) a document titled “Mercury storage schedule” (Schedule). OPI redacted the entirety of the contents of the Schedule, citing Exemption 5 of FOIA. Appellant submitted an eight-page appeal (Appeal) challenging OPI’s redactions to the Schedule. This appeal, if granted, would release the Schedule, in whole or in segregable part.

I. Background

Appellant’s FOIA request sought records related to: (1) DOE guidance concerning short-term storage of elemental mercury; (2) resources devoted to the development of such guidance; (3) consultations between DOE and the U.S. EPA or state agencies; and (4) OMB review of such guidance. *See* Appeal at 5. On August 20, 2018, OPI issued a response to Appellant’s FOIA request in which it provided guidance concerning long-term mercury storage and the Schedule. *See id.* at 2. OPI redacted the entirety of the Schedule, except for the title of the document at the top of the first page. OPI indicated that it made the redactions pursuant to Exemption 5 of FOIA because the redacted information “ha[d] been deemed pre-decisional and/or deliberative in nature” *Id.* at 6.

On November 19, 2018, Appellant submitted the Appeal to DOE’s Office of Hearings and Appeals (OHA). Appellant asserted that OPI’s response was conclusory and failed to provide an explanation as to how Exemption 5 applied to the redacted information, the information was

factual and therefore not protected under Exemption 5,¹ and that even if Exemption 5 applied to some of the contents of the Schedule that OPI should have disclosed any segregable nonexempt portions of the record. *Id.* at 2–3.

On November 28, 2018, an OHA staff attorney conducted a telephone conversation with the engineer who prepared the Schedule (Author). According to the Author, he prepared the Schedule in late 2016 for DOE’s Deputy Assistant Secretary for Waste and Materials to summarize the steps and estimated time required to pursue one potential approach to managing the storage of mercury. The Author reported that DOE did not adopt this approach, most of the actions outlined in the Schedule never took place, and of those that did occur, the majority pertained to his own professional training.

II. Analysis

FOIA requires that documents held by federal agencies generally be released to the public upon request. However, FOIA lists nine exemptions pursuant to which agencies may withhold information at their discretion. 5 U.S.C. § 552(b)(1)–(9). Those nine exemptions are repeated in the DOE regulations implementing FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). We must construe the FOIA exemptions narrowly to maintain FOIA’s goal of broad disclosure. *Dep’t of the Interior v. Klamath Water Users Prot. Ass’n*, 532 U.S. 1, 8 (2001). The agency has the burden to show that withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Exemption 5

The Appeal asserts that OPI did not adequately establish the applicability of Exemption 5 to the contents of the Schedule, and that the contents are factual and therefore not protected under Exemption 5. Exemption 5 of FOIA exempts from mandatory disclosure “inter-agency or intra-agency memorandums or letters that 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 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). OPI asserted Exemption 5 under the deliberative process privilege.

The deliberative process privilege under Exemption 5 of FOIA is applicable only to those records, or portions of records, that are both pre-decisional and deliberative. *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). Courts deem a record pre-decisional if “it was generated before the adoption of an agency policy.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States*, 617 F.2d at 866). A record does not lose its pre-decisional status even after a final decision has been made on the matter to which the record pertains so “that a decisionmaker will receive the unimpeded advice of his associates.” *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340,

¹ According to Appellant, an individual in OPI described the Schedule over the phone to representatives of Appellant as “a ‘bare bones’ schedule with dates.” Appeal at 2.

359–60 (1979). The Schedule is a summary of the steps and time required for DOE to pursue one approach to managing mercury storage from a subordinate to a superior; a course of action DOE subsequently chose not to pursue. The Schedule is pre-decisional since it was prepared prior to DOE’s decision not to pursue the policy.

A record, or portion thereof, is deliberative under Exemption 5 if it “reflects the give-and-take of the consultative process, . . . [and] thus covers 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. An agency’s interest in protecting deliberative documents is particularly strong when they contain recommendations from a subordinate to a superior. *See Wolfe v. HHS*, 839 F.2d 768, 776 (D.C. Cir. 1988). The Schedule is not a factual catalog of events that were to occur following its preparation, but rather lists steps that the Author believed DOE should have taken if it pursued a policy under consideration and dates reflecting the Author’s estimation of how long each step would take to complete. The Author expressly indicated in the Schedule that some of the steps were contingent upon policy decisions the Author anticipated that DOE would make shortly after he drafted the document in late 2016. Other proposed steps in the Schedule are followed by question marks, indicating the Author’s uncertainty as to the applicability of the steps for various reasons. Still other steps are inherently non-factual, such as the Author’s accounting of gaps in his training and stakeholders with whom the Author believed that DOE should consult were it to pursue the proposed policy. Since the Schedule reflects non-factual recommendations and opinions concerning a potential policy approach from a subordinate to a superior, the Schedule is deliberative in nature.

Since the Schedule is both pre-decisional and deliberative in nature, it falls under the deliberative process privilege. Accordingly, OPI properly concluded that the Schedule was exempt from disclosure under FOIA Exemption 5.

B. Segregability

An agency is required to provide any “reasonably segregable portion of a record” otherwise exempted from disclosure under FOIA. 5 U.S.C. § 552(b) (sentence immediately following exemptions). The extent to which factual and non-factual information are “reasonably segregable” is a case-specific inquiry. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). One consideration in assessing the reasonableness of such segregation is whether the result would be an essentially meaningless set of words and phrases . . .” *Id.* In this case, were OPI to release the factual elements of the Schedule, the Appellant would receive nothing more than a four-character entry indicating that no decision on the proposed policy had been made as of late 2016, several entries pertaining to the Author’s credentials, and two lines indicating trainings the Author had been approved to take which were not specific to the subject matter of the policy under consideration. This factual information has no independent meaning, and would shed no light on the workings of DOE if disclosed. Accordingly, OPI properly concluded that the factual information in the Schedule was not reasonably segregable.

III. Order

It is hereby ordered that the Appeal filed by Appellant on November 19, 2018, No. FIA-18-0037, 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: archives.gov/ogis
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

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