

United States Department of Energy  
Office of Hearings and Appeals

In the Matter of Christopher Fischahs )  
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Filing Date: April 26, 2019 ) Case No.: FIA-19-0015  
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Issued: May 3, 2019

**Decision and Order**

On April 26, 2019, Mr. Christopher Fischahs (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) regarding Request No. FOIA-18-00277-M. In that letter, the NNSA responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought an investigative report (Report) prepared by an NNSA contracted-investigator concerning alleged misconduct by the Appellant. The NNSA withheld the Report under Exemption 5 of the FOIA. Appellant asserts that the Report was not predecisional, and therefore that the NNSA improperly withheld the Report under Exemption 5. As explained below, we deny Appellant’s appeal.

**I. Background**

On September 12, 2018, Appellant submitted a FOIA request in which he stated that the NNSA had “contracted for an investigative report of alleged misconduct” and requested that the NNSA “provide a copy of this report and its available supporting documentation/evidence file.” *See* Determination Letter from John E. Weckerle, Authorizing and Denying Official, NNSA, to Mr. Christopher Fischahs at 1 (April 9, 2019) (Determination Letter). On April 9, 2019, the NNSA issued a response to Appellant’s FOIA request in which it stated that it was withholding the Report under Exemption 5 because the Report “reflects observations, discussion and analysis, comments, and recommendations of a fact-finding investigation into [a] grievance. DOE considers these preliminary views as part of the process that will lead to DOE’s final decision about these matters. The document being withheld does not represent a final agency position, and its release would compromise the deliberative process by which the government makes its decision.” *Id.* The NNSA further determined that factual information in the Report was “so inextricably intertwined with the deliberative content [] that it cannot be reasonably segregated.” *Id.*

On April 26, 2019, DOE’s Office of Hearings and Appeals (OHA) received Appellant’s appeal. Christopher Fischahs FOIA Appeal (April 26, 2019) (Appeal). In the Appeal, Appellant provided a copy of a letter of counseling he had received from the NNSA based on the findings of the Report. Appellant asserted that, since the NNSA had relied on the Report to issue him the letter of

counseling, the Report was no longer pre-decisional, and therefore that NNSA could not rely on Exemption 5 of the FOIA to withhold it from him. Appeal at 1.

## II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA].” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B). An agency is also required to “consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

### A. Applicability of Exemption 5 to the Report

Exemption 5 applies to “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). The U.S. Supreme Court has interpreted this provision to “exempt those documents, and only those documents that are normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The NNSA invoked the deliberative process privilege in the Determination Letter to withhold the Report. Determination Letter at 1.

The deliberative process privilege protects records which are both predecisional and deliberative. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014). A document is predecisional if it is “generated before the adoption of an agency policy.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is deliberative if “it reflects the give-and-take of the consultative process. The exemption 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 Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). The Appeal does not address the deliberative nature of the Report, but asserts that the Report is not “predecisional” because the NNSA decided to issue Appellant a letter of counseling based upon the findings in the Report. Appeal at 1.

Exemption 5 exempts records from disclosure based upon their role in the decision-making process, not the status of the decision which the records concern. *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 34 F. Supp.2d 100 at 112–13 (D.D.C. 2005). Therefore, if a record is predecisional based upon its role in the decision-making process, it does not lose its exemption from disclosure under Exemption 5 after a decision has been made on the issue which the record concerns. *Id.* The Report indicates that the contractor that prepared the Report was retained to gather information concerning whether the Appellant had engaged in certain alleged misconduct to inform the NNSA’s analysis as to how to proceed. Report at 4. The significant majority of the contents of the Report are summaries of the contractor’s interviews with cooperating individuals and the contractor’s analysis of the information provided by the cooperating individuals. *Id.* at 5–15. The OHA has previously found investigative summaries like the Report to be predecisional,

and thus exempt from disclosure under Exemption 5. *See Matter of Carlos Blanco*, OHA Case No. VFA-0248 at 4 (1997) (finding that a fact-finding report concerning allegations of harassment was predecisional because it was prepared to assist management in determining whether an employee had violated an anti-harassment policy).

The Report is predecisional because it was prepared to inform NNSA management prior to making a decision concerning how to address the Appellant's alleged misconduct. There is no indication, other than the Appellant's assertion in the Appeal, that the letter of counseling constituted the NNSA's final decision concerning this matter. Even if the letter of counseling was the NNSA's final decision concerning this matter, the issuance of the letter does not transform the predecisional Report into a post-decisional record. *See Elec. Privacy Info. Ctr.*, 34 F. Supp.2d at 112–13. Accordingly, we conclude that the NNSA properly asserted Exemption 5 in withholding the Report.

### **B. Segregability of Factual Information in the Report**

The FOIA requires agencies to take reasonable steps to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). The FOIA does not require perfection, and segregability may be unreasonable when there is a relatively small amount of non-exempt material and “the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases.” *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

As described above, the significant majority of the Report is devoted to summarizing the contractor's interviews of cooperating individuals. While the interviewees provided both factual information and non-factual opinions and recommendations, the contractor's distillation of the factual information provided by the numerous interviewees into succinct summaries is itself deliberative activity protected under Exemption 5. *See Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (finding that a record produced by “cull[ing] the relevant [sources], extract[ing] pertinent facts, organiz[ing] them to suit a specific purpose, and [] identify[ing] the significant issues” is deliberative, and exempt from disclosure under Exemption 5 even if it is factual in nature). Thus, in evaluating whether the Report contains reasonably segregable factual information, we omit from our analysis the summarized information that reflects the culling, extracting, organizing, and identifying that *Mapother* deemed part of the deliberative process.

What little factual information would remain in the Report after redacting the contractor's interview summaries and analysis would be disconnected sentences separated by entire pages of redacted material. Accordingly, we conclude that the factual information contained in the Report is not reasonably segregable.

### **III. Order**

It is hereby ordered that the appeal filed by Mr. Christopher Fischahs on April 26, 2019, No. FIA-19-0015, 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:

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