

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

In the Matter of: William L. Dam)	
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Filing Date: December 4, 2019)	Case No.: FIA-20-0011
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Issued: December 15, 2019

Decision and Order

On December 4, 2019, William Dam (Appellant), appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-01699-F (formerly HQ-2018-01374-F). In that determination, OPI 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. OPI withheld portions of responsive records pursuant to FOIA Exemptions 5 and 6. The Appellant’s appeal challenges OPI’s withholding of information in the responsive records. In this Decision, we deny the appeal.

I. BACKGROUND

In 2018 the Appellant filed a request with OPI for “all agency records, including communications, created or obtained after January 2012 by DOE or on behalf of DOE by its employees, attorneys, contractors, agents, etc. involving current DOE Office of Legacy Management (LM) employee William L. Dam’s personnel actions[.]” Determination Letter from Alexander C. Morris to William L. Dam at 1 (November 1, 2019). The Appellant’s request also included a very specific list of ten (10) types of documents he was seeking. *Id* at 1-2. In an August 31, 2018 phone call with OPI that was later memorialized in an email, the Appellant agreed to amend the list of ten (10) requested types of documents by agreeing to specific search terms. Email from Danielle Blevins, OPI, to William L. Dam at 1 (August 31, 2018). The Appellant also agreed to waive attachments as well as emails on which he was included. Determination Letter at 2. Further, the Appellant agreed to withdraw request number ten (10), which asked for documents regarding invitations to employees to be considered for specific positions made available after several people retired. Email from William L. Dam to Danielle Blevins (September 10, 2018). A September 17, 2018 email indicates that the initial request number was closed and the processing of the request

would continue under a new case number. Email from Danielle Blevins to William L. Dam (September 17, 2018).

In the first partial response to the Appellant, OPI produced seventeen (17) documents that were withheld in part pursuant to Exemptions 5 and 6. Partial Response Letter 1 from Alexander C. Morris at 3 (April 2, 2019). In a second partial response, OPI produced one (1) document that was responsive to his request and withheld in part pursuant to Exemptions 5 and 6. Partial Response Letter 2 from Alexander C. Morris at 3 (August 15, 2019). On November 1, 2019, in a final response letter, OPI indicated it found five (5) responsive documents that were withheld in part pursuant to exemptions 5 and 6. Determination Letter at 3. In his appeal, the Appellant asserts that the final November 1, 2019 response “provid[ed] minimal, heavily redacted responses that also did not respond to several requested items.” Appeal at 1. The Appellant further clarifies his objections by indicating he “appeal[s] the decision to withhold documents and information that relates to violations of federal laws and agency policies including [his] position for protecting public health, safety and the environment.” Appeal at 1.

II. ANALYSIS

A. Exemption 5

Exemption 5 protects “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 agency[.]” 5 U.S.C. § 552(b)(5). Prior case law on Exemption 5 provides that one of the purposes of this exemption is to protect the deliberative process within an agency. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975). To be considered deliberative, the document must be one which was created before the agency’s final decision was made, and it “reflects the give-and-take of the consultative process.” (*Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 35, 43 (D.D.C. 2012) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). As the Supreme Court has stated “the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” *Id.* at 151. The concern is that the disclosure of the deliberative process will hinder the open discussion of agency policies and related matters within the agency. *Id.* at 150.

In this case, we reviewed the information OPI redacted pursuant to Exemption 5. Many of the documents clearly contain information that is pre-decisional and deliberative in nature, as these documents discussed possible responses to problematic personnel behavior.

Further, the Appellant makes clear in his appeal that he is seeking these documents for the purpose of “resolv[ing] EEO and other issues.” Appeal at 1. The possibility that redacted information may be contained in documents subject to the discovery process is not relevant for the purposes of FOIA. “Regardless of the requested information’s usefulness in a separate civil proceeding, the FOIA does not supplant discovery or enlarge discovery rights. Being a private litigant neither diminishes nor enhances the merits of a FOIA request.” *Barvick v. Cisneros*, 941 F. Supp. 1015, 1022 (D. Kan. 1996) (citing *Sears Roebuck & Co.*, 421 U.S. at 144 n.10). Having concluded that

the portions of records redacted by OPI are both pre-decisional and deliberative, we conclude that OPI properly asserted Exemption 5 in this case.

B. Exemption 6

Exemption 6 of the FOIA exempts from disclosure “personnel 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). As a threshold matter, the record must be personnel, medical, or other similar files. *Id.* After it is determined that the information falls into one of those categories, the agency must determine whether the record may be withheld based on an application of a three-part test. In applying this test, the agency must first determine whether the disclosure of the record would compromise a significant privacy interest. *Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If no such privacy interest exists, then the agency may not withhold the record based on this exemption. *Id.* If the agency determines that a privacy interest does exist in the record, the agency must then decide if the release of the record would serve the interest of the public by shedding “light on an agency’s performance of its statutory duties” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The agency must then determine whether “the potential harm to privacy interests from disclosure [would] outweigh the public interest in disclosure of the requested information” *Ripskis*, 746 F.2d at 3.

Pursuant to exemption 6, OPI withheld third-party information from the documents provided to the Appellant, including such information as names, personnel actions, medical information, and cell phone numbers. Third-party information is information in which an individual has a privacy interest, and as a threshold matter, is a “similar file” to which Exemption 6 refers. *U.S. Dep’t of State v. Wash. Post. Co.* 456 U.S. 595, 602 (1982). Accordingly, the question is whether the release of this information would constitute an invasion of privacy. The Court of Appeals for the D.C. Circuit determined that this concept of privacy protects “the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing.” *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991). Therefore, given the nature of the information withheld, we find that it was appropriately redacted, and the release of this information would not serve the interest of the public by providing insight into the agency’s performance of its duties.

In sum, we find that OPI properly withheld the information redacted pursuant to Exemptions 5 and 6.*

III. ORDER

It is hereby ordered that the Appeal filed on December 4, 2019 by William L. Dam, FIA-20-0011, is denied.

* It should be noted that some of the documents identified as a result of the specific search terms agreed to by the Appellant were not responsive to the Appellant’s request. Therefore, we do not address these unresponsive documents which OPI was not required to produce.

This is a final order of the Department of Energy from which an 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 one's right to pursue litigation. OIGS 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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