

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

In the Matter of: Michael Ravnitzky)	
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Filing Date: June 1, 2020)	Case No.: FIA-20-0032
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Issued: June 15, 2020

Decision and Order

On June 1, 2020, Michael Ravnitzky (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2020-00059-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 the responsive documents pursuant to FOIA Exemption (b)(5). Appellant challenged the decision to withhold information under that exemption. In this Decision, we grant the appeal.

I. BACKGROUND

On October 10, 2019, Appellant filed a request under the FOIA, requesting “[a] copy of each Presentation (pdf or ppt file) for each Administrator Presentation during 2013 through 2019 which would be found on the Inside EIA internal website under “Presentations”, and the 2010 archived Administrator presentation from 2010.” OPI assigned the request to EIA, which returned 218 pages of responsive documents. The responsive documents were transmitted to Appellant, with a small number of pages redacted under Exemption 5 of the FOIA. Appellant appealed the redactions, arguing that information flowing from a superior to a subordinate is rarely appropriate for redaction under Exemption 5 and that OPI had not properly applied the foreseeable harm test.

II. ANALYSIS

An informed citizenry is a crucial element of a functioning democracy. The FOIA is intended to ensure such a citizenry, which is “needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). When an agency denies a FOIA request, it is the agency’s burden to justify its decision, showing that: (1) the responsive records are not agency records; (2) responsive agency records were not

withheld; or (3) responsive agency records were withheld properly. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980)).

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). OPI invoked Exemption 5 under the deliberative process privilege.

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *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 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.” *Id.* 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.* The D.C. Circuit recognizes a “general principle that action taken by the responsible decision-maker in an agency’s decision-making process which has the practical effect of disposing of a matter before the agency is ‘final’ for purposes of FOIA.” *Rockwell Int’l Corp. v. DOJ*, 235 F.3d 598, 602 (D.C. Cir. 2001).

The responsive documents consist of Power Point presentations from the EIA Administrator to the EIA staff. The information redacted in the documents released to Appellant is not deliberative in nature, nor is it predecisional. Rather, it informs EIA staff of decisions that have already been made, including budgetary information, lists of ongoing projects and initiatives, and lists of internal agency goals. The documents appear to be in their final format and not subject to the back-and-forth of opinions and recommendations that Exemption 5 is meant to protect. Absent further justification from EIA showing the deliberative and predecisional nature of the documents, the withheld information appears to be outside the scope of Exemption 5.

Even if Exemption 5 applied to the redacted information, there does not appear to be any foreseeable harm in its release. Though OPI properly stated that disclosure of deliberative information could foreseeably harm the quality of agency decision-making, the redacted information does not appear to reveal the opinions, recommendations, proposals, or suggestions of the drafters. It is, therefore, unclear how release of the redacted information could harm agency decision-making in the future.

III. ORDER

For the foregoing reasons, we find that the redactions made under FOIA Exemption (b)(5) were not adequately justified. It is hereby ordered that the Appeal filed on June 1, 2020, by Michael Ravnitzky, No. FIA-20-0032, is granted. This matter is remanded to OPI for additional processing consistent with this opinion.

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 one's right to pursue litigation. OGIS may be contacted in any of the following ways:

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