United States Department of Energy
Office of Hearings and Appeals

In the Matter of Judicial Watch	)	
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Filing Date: October 9, 2012	)	Case No.: FIA-12-0062
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Issued: November 8, 2012

Decision and Order

On October 9, 2012, Judicial Watch (Appellant) filed an Appeal from a partial determination issued to it on September 26, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2010-00739-F). In that determination, OIR released documents responsive to the request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIR withheld 10 documents in full, released 13 documents in their entirety, and released 35 documents, in part, withholding portions of those documents under Exemptions 5 and 6 of the FOIA.[1/] This Appeal, if granted, would require OIR to release additional information.

I. Background

On January 8, 2010, the Appellant filed a request with OIR for:

- Any and all request for papers pertaining to geoengineering;
- Any and all presentations of geoengineering papers/research/findings/reports; and
- Any and all communications (including email) pertaining to geoengineering between the DOE and the White House[2/]

Request dated January 8, 2010, from Jenny Small, Appellant, to DOE. OIR sent the request to a six different offices within DOE.[3/] On September 26, 2012, OIR responded on behalf of the Office of Science. *Id.*

[1/] Information was withheld from 26 documents under Exemption 5 and from 9 documents under Exemption 6.

[2/] In its original request, the Appellant asked for any and all communications about geoengineering, but on April 14, 2010, the Appellant amended its request to only ask for communications between DOE and the White House.

[3/] OIR assigned the request to the Office of Policy and International Affairs, the Office of Energy

On October 9, 2012, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging the adequacy of DOE's search for responsive documents and the OIR's withholdings under Exemptions 5 and 6. Appeal Letter dated September 28, 2012, from Appellant to Secretary Steven Chu, DOE.

II. Analysis

A. Adequacy of the Search

The Appellant asserts that OIR's response, which located 58 responsive documents relating to the subject of geoengineering, is insufficient. The Appellant alleges that more documents must exist at DOE, stating "there has been no dearth of press coverage in the last two years regarding geoengineering." Appeal Letter at 3. Therefore, the Appellant is challenging the adequacy of DOE's search for responsive documents. The Office of Policy and International Affairs (OPI) has not yet responded to the Appellant's request. OIR informed us that OPI is diligently working on the request and that most of the responsive material resides with that office. Memorandum of November 5, 2012, Telephone Conversation between Alexander Morris, OIR, and Janet Fishman, OHA. Therefore, we will not consider the Appellant's argument concerning the adequacy of DOE's search as it is not yet ripe for review. Once a determination is issued by OPI, the Appellant may file an appeal of that determination with OHA.

B. Withholdings under Exemptions 5 and 6.

1. Documents 35 to 44

In order to determine whether OIR properly withheld the information from the documents in question, we requested unredacted copies of the 45 documents, either withheld in their entirety or with portions redacted. OIR provided us with unredacted copies of only 35 of the 45 documents from which they withheld information. Therefore, we are unable to determine whether OIR properly invoked exemptions with regard to the other ten documents. After OIR locates the originals of these ten documents, OIR must send these documents to our office for review.

We will, however, consider the 35 documents that OIR provided to us to determine if their claimed withholdings are justified.

2. Documents 1 to 34 and 45 to 58[4/]

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

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Efficiency and Renewable Energy, the Office of Fossil Energy, the Office of Nuclear Energy, the Office of Science, and the Office of Electricity Delivery and Energy Reliability. Determination letter dated September 26, 2012, from Alexander C. Morris, FOIA Officer, OIR, to Appellant. On March 25, 2010, the Office of Nuclear Energy sent a response to the Appellant. *Id.* Neither the Office of Energy Efficiency and Renewable Energy nor the Office of Electricity Delivery and Energy Reliability had any involvement in the geoengineering program, and OIR, therefore, determined that these offices would have no responsive documents. *Id.* The Office of Policy and International Affairs has not yet responded to the request. *Id.* The Office of Fossil Energy did not have any responsive documents. Memorandum of November 8, 2012, Telephone Conversation between Joan Ogbazghi, OIR, and Janet Fishman, OHA.

[4/] Although this totals 48 documents, 13 of these documents were released in their entirety.

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). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemptions 5 and 6 are at issue in this Appeal.

a. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "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) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). Only the deliberative process privilege is at issue here.

i. Deliberative Process Privilege

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*, 617 F.2d at 866. 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 privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted). Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id.* at 866.

After reviewing the information that OIR withheld under Exemption 5, we find that OIR properly invoked the deliberative process privilege. The information that OIR withheld under Exemption 5 consists of email communications among individuals working on a "White Paper" about geoengineering. The email messages contain notes of meetings held about the paper and opinions of the authors regarding what should be contained in the paper. The withheld information also includes drafts of the white paper. This information is clearly predecisional. Each draft represents the author's recommendation as to what the text should be regarding the final paper. Therefore, these documents are predecisional, deliberative documents. Moreover, the withheld information is deliberative because it is part of an internal DOE process used to evaluate and analyze the various issues in this paper. Releasing such information could well

compromise the ability and willingness of DOE employees to make honest and open recommendations regarding similar projects in the future. Accordingly, we find that OIR properly applied Exemption 5 in withholding the 10 documents in their entirety and certain portions of 26 other documents that it released to the Appellant.

ii. Segregability

Notwithstanding the above, 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 FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). We reviewed the withheld information and did not find any non-exempt, segregable information.

iii. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. OIR concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to DOE's ongoing decision-making process. Therefore, release of the withheld information would not be in the public interest.

b. Exemption 6

Exemption 6 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 order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not the release of the

document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, 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. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

i. Privacy Interest

OIR invoked FOIA Exemption 6 to redact personal email addresses and conference call telephone numbers from nine documents it released to the Appellant. The Appellant contends that the OIR improperly withheld information under Exemption 6, contending, that it "only applies to human resource-type files." Appeal Letter at 4.

The Appellant is incorrect that Exemption 6 only applies to "human resource-type files." The privacy interests protected by the exemptions to FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. The Supreme Court stated in regard to the term "similar files," "we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. . . . When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy." *Washington Post Co.*, 456 U.S. at 602.[5/]

The Supreme Court has stated that "information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct" is not the type of information to which FOIA permits access. *Reporters Committee*, 489 U.S. 773. This protection has been extended to e-mail addresses as well. "[W]e can easily envision possible privacy invasions resulting from public disclosure of the e-mail addresses." *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010). In this case, the e-mail addresses that were withheld by OIR are personal e-mail addresses, not official e-mail addresses of federal government employees. Therefore, OIR correctly concluded that the holders of the personal e-mail addresses have a legitimate expectation of privacy under the FOIA.

However, we do not find a privacy interest in the conference call telephone numbers that are assigned on a daily and, in some cases, hourly basis. These numbers do not belong to a "person." There is no privacy interest in a telephone number that is not assigned to a specific person because release of that information would not lead to an unwarranted invasion of

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[5/] The idea that Exemption 6 applies to more than just personnel and medical files was adopted by the Attorney General shortly after enactment of the FOIA in a memorandum explaining the meaning of the Act to various federal agencies: "It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, *and all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person." *Washington Post Co.* at n. 3, *citing* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967) (emphasis added).

"personal privacy." Therefore, OIR incorrectly concluded that there is a privacy interest in these telephone numbers.

ii. Public Interest

Having identified a privacy interest in some of the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Comm.*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of information, its disclosure is not "affected with the public interest." *Id*.; *see also Nat'l Ass'n of Retired Employees v. Horner*, 879 F.2d at 879.

It is clear that release of the personal e-mail addresses would not further the public interest by shedding light on the operations and activities of the government. Release of the personal e-mail addresses would contribute little, if any, to public understanding of the issues surrounding geoengineering or any other matter of public concern. In no way does the information withheld under Exemption 6 shed light on the operations and activities of the DOE. In the present case, we find that the public interest in the withheld information at issue here is minimal at best. The Appellant has not established how release of these personal e-mail addresses would serve any public interest. To the contrary, we find that release of the information would reveal little, if anything, to the public about the workings of the government. *Electronic Frontier Foundation*, 639 F.3d at 888.

iii. Balancing Test

Because we have found a privacy interest in the personal e-mail addresses and no public interest in their disclosure, we find that release of the personal e-mail addresses would constitute a clearly unwarranted invasion of personal privacy. Therefore, OIR properly withheld the personal e-mail addresses under Exemption 6. However, because we see no privacy interest in the conference call telephone numbers, OIR should release those conference call telephone numbers to the Appellant.

III. Conclusion

After considering the Appellant's arguments, we are convinced that OIR properly withheld the information under Exemption 5. In addition, OIR properly withheld the personal e-mail addresses under Exemption 6. However, OIR should not have withheld the conference call telephone numbers as there is no privacy interest in that information. We therefore will remand this case to OIR with instruction to release the conference call telephone numbers contained in two documents. We also remand the matter to OIR in regard to the ten documents of which it could not locate unredacted copies. Accordingly, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Judicial Watch, Case No. FIA-12-0062, is hereby granted in part, as described in Paragraph (2) below, and denied in all other respects.

(2) The matter is remanded to the Office of Information Resources so that it may (a) locate unredacted copies of the ten documents that it found that were responsive to the request and (b) release the conference call telephone numbers.

(3) 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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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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