

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

In the matter of Emily Meredith)
)
Filing Date: April 8, 2013) Case No.: FIA-13-0019
_____)

Issued: April 26, 2013

Decision and Order

On April 8, 2013,¹ Emily Meredith (the Appellant) filed an Appeal from a determination issued on February 19, 2013, by the Office of Information Resources (OIR) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2013-00233-F). In its determination, OIR informed the Appellant that the DOE Office of Nuclear Energy (NE) conducted a search for documents responsive to her request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. OIR stated that NE located one responsive document, but that it withheld that document in its entirety pursuant to Exemption 5, 5 U.S.C. § 552(b)(5). This Appeal, if granted, would require OIR and NE to provide a new determination regarding the withheld document and to conduct another search for responsive documents.

I. Background

The Appellant requested records “related to details on the quantity of uranium released under various programs by DOE since the most recent GAO report disclosed volumes,” and for information related to the projected releases. *See* Initial Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Emily Meredith, Energy Intelligence (Feb. 19, 2013). On February 19, 2013, OIR provided an initial response to the Appellant’s FOIA Request, stating that it assigned her FOIA Request to NE. *Id.* NE located one responsive document, which is a draft plan, entitled “Excess Uranium Inventory Management Plan.” *Id.* NE withheld the draft plan in its entirety pursuant to Exemption 5, stating that it is deliberative and does not reflect a final, official DOE policy. *Id.*

¹While the Appellant attempted to file an appeal on March 22, 2013, she failed to provide a copy of the determination letter with her appeal letter, and accordingly, her appeal was not deemed filed then. The Office of Hearings and Appeals granted her an extension, until April 9, 2013, to properly file an appeal. *See* Letter from Shiwali Patel, Attorney-Examiner, OHA, to Emily Meredith (Mar. 25, 2013). Subsequently, on April 8, 2013, after submitting her signed Appeal letter and determination letter to the Office of Hearings and Appeals, the Appellant’s Appeal was deemed filed.

In her Appeal, the Appellant asserts that the draft plan should not be withheld pursuant to Exemption 5, arguing that it would “have the effect of keeping accurate details of historical information out of public sight.” *See Appeal*. The Appellant also appeals the adequacy of the search; however, she also acknowledges that she spoke to a FOIA officer at OIR who agreed to conduct another search for more responsive documents. *See id.*

II. Analysis

We will deny as moot the Appellant’s argument concerning OIR’s adequacy of the search. As the Appellant acknowledged, and as later confirmed by OIR, after issuing the Initial Determination Letter, DOE conducted another search for responsive documents through its Office of Environmental Management (EM) and the National Nuclear Security Administration (NNSA).² Hence, we will proceed with an analysis as to whether or not OIR properly withheld the draft plan pursuant to Exemption 5.

OIR indicated in its Initial Determination Letter that the draft plan is deliberative because it is a “draft of the policy document requested and does not reflect final, official DOE policy or guidance.” Initial Determination Letter at 1. Furthermore, OIR stated that the document “includes information provided to government personnel regarding official decisions not yet made and remains the subject of intra-governmental negotiations.” *Id.* 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 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). Nonetheless, the FOIA exemptions must be narrowly construed in order to maintain its 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 responding to the FOIA request has the burden to show that any withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

Exemption 5 protects from 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 the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” or “predecisional” privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

Here, OIR and NE relied on the deliberative process privilege in withholding the draft plan. The “deliberative process” privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). This privilege does not exempt purely factual information from

² OIR informed us that NNSA located responsive documents and that it was issuing a response to the Appellant regarding its FOIA Request. Memorandum of Telephone Conversation between Joan Ogbazghi, FOIA Analyst, OIR, and Shiwali Patel, Attorney-Examiner, OHA (Apr. 16, 2013). Hence, once the Appellant receives the response from NNSA, she will have an opportunity to appeal NNSA’s determination, including the adequacy of its search.

disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Rather, it is intended to promote frank and independent discussions among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). In order to be shielded by this 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 Gas Corp.*, 617 F.2d at 866. “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. Documents which are protected by the privilege are those *which would inaccurately reflect or prematurely disclose the views of the agency. . . .*” *Id.* (emphasis added).

The United States Court of Appeals for the District of Columbia Circuit, however, clarified that designation of documents as drafts “does not end the inquiry” with regards to the deliberative process privilege because drafts are not per se exempt. *Anderson & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982). The court explained that “[e]ven if a document is a ‘draft of what will become a final document,’ the court must ascertain ‘whether the document is deliberative in nature.’” *Id.* at 258. Even still, “[d]raft documents, by their very nature, are typically predecisional and deliberative,” because drafts often “reflect only the tentative view of their authors; views that may be altered or rejected upon further deliberation either by their authors or by superiors.” *See Exxon Corp. v. DOE*, 585 F.Supp. 690, 698 (D.D.C. 1983).

In withholding the draft plan, OIR and NE cited the “deliberative process” privilege of Exemption 5, stating that because it is in draft form awaiting approval from DOE leadership, it is predecisional and deliberative. *See* Email from Katelyn Clementson, NE, to Shiwali Patel, OHA (Apr. 18, 2013). Accordingly, disclosure of the document may “inaccurately reflect or prematurely disclose the views of the agency.” *See Coastal States Gas Corp.*, 617 F.2d at 866. Thus, we conclude that the draft plan is predecisional and deliberative.

However, we find that there are portions of the draft plan that are factual and may therefore be releasable to the Appellant. OIR and NE have failed to reasonably segregate releasable portions of the draft plan, which they shall do unless the exempt material is so inextricably intertwined that disclosure of it would reveal “only essentially meaningless words and phrases.” *See* 5 U.S.C. § 552(b) (the FOIA requires that “any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.”). Accordingly, we will remand this matter to OIR and NE to release segregable factual portions of the draft plan and to issue a new determination letter.

Finally, the DOE regulations provide that DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Thus, to the extent that OIR and NE continue to withhold the entire draft plan or portions of it, they shall explain in their new determination letter how there is no public interest in the release of that information.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Emily Meredith on April 8, 2013, OHA Case Number FIA-13-0019, is hereby remanded in accordance with Paragraph (2) set forth below.

(2) This matter is hereby remanded to the Department of Energy's Office of Information Resources and Office of Nuclear Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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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Director
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