United States Department of Energy
Office of Hearings and Appeals

In the Matter of Avery R. Webster	)		
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Filing Date: March 28, 2013	)	Case No.:	FIA-13-0020
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Issued: April 25, 2013

Decision and Order

On March 28, 2013, Avery R. Webster ("Appellant") filed an Appeal from a determination issued to her on March 8, 2013, by the Department of Energy (DOE) Office of Information Resources (OIR) (FOIA Request Number HQ-2013-00584-F). In its determination, the OIR responded to the Appellant's 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. The OIR also noted that it processed a portion of the Appellant's request under the Privacy Act, 5 U.S.C. § 552a, as implemented by DOE in 10 C.F.R. Part 1008. In response to the Appellant's request, the OIR located and produced three documents. The OIR withheld portions of two documents pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). The OIR released the third document in full pursuant to the Privacy Act, 5 U.S.C. § 552a(d)(1). Specifically, the Appellant contends that there should be additional responsive documents that the OIR has not produced. Further, the Appellant appeals the applicability of Exemption 5 to the withheld material. This Appeal, if granted, would require the OIR to conduct another search for documents that the Appellant requested as well as require OIR to release the information it withheld pursuant to Exemption 5.

I. Background

On February 22, 2013, the Appellant submitted a FOIA request seeking a copy of a "[l]etter from the White House to the [DOE] (EXEC-2012-008798) dated October 10, 2012, regarding allegations of fraud and corruption, along with any and all responses to this inquiry from the White House, including but not limited to all emails, notes and drafts." FOIA request from Avery R. Webster (Feb. 22, 2013). On February 27, 2013, the Appellant amended the request to clarify that she was seeking "any and all responses to this inquiry from the Department of Energy (NOT the White House), including but not limited to all emails, notes and drafts." The amendment also requested "all documents (e-mails, faxes, notes, drafts, memoranda or other correspondence, etc.) generated in response to or regarding the White House inquiry dated October 12, 2012 (EXEC-2012-008798). Please check all systems of records, including those in the possession of each employee at the DOE offices to which you have assigned this request."

See Correction and Amendment to FOIA Request from Avery Webster (Feb. 27, 2013). The OIR assigned the request to the Office of the Executive Secretariat, the Office of the General Counsel, and the Office of Hearings and Appeals to conduct a search for responsive records. Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Avery Webster, at 1 (Mar. 8, 2013).

On March 8, 2013, the OIR issued a Determination Letter and provided the Appellant with three documents. In two of those documents, communications involving DOE attorneys were redacted pursuant to Exemption 5 of the FOIA. *Id.* at 2. Subsequently, on March 28, 2013, OHA electronically received the Appellant's Appeal of the OIR's determination, wherein she challenges the applicability of Exemption 5 and challenges the adequacy of the search for responsive records.

The Director, Office of Hearings and Appeals, referred this appeal to my office pursuant to a memorandum dated April 10, 2013, which delegated his authority, in cases that he would refer to me, to issue appellate decisions, as appropriate, under the FOIA and the Privacy Act, consistent with the purposes of the relevant Acts, as implemented by DOE FOIA and Privacy Act regulations, 10 C.F.R. Parts 1004 and 1008.

II. Analysis

In its appeal, Appellant challenges the OIR's application of Exemption 5 of the FOIA to documents 1 and 2. Appellant also appeals the adequacy of the search for responsive records. Upon review of the unredacted versions of those two documents and the facts of OIR's search, we conclude that the OIR properly invoked Exemption 5 in support of its withholdings. We are also satisfied that the search for responsive documents was adequate. Accordingly, we will deny the Appeal.

A. Exemption 5

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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). 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. 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). In

withholding portions of the released documents, the OIR relied upon the attorney-client privilege and the "deliberative process" privilege.

1. Attorney-client privilege

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Subpoena of Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); 8 J. Wigmore, *Evidence*, § 2291, p. 590 (McNaughton Rev. Ed. 1961); McCormack, *Law of Evidence*, Sec. 87, p.175 (2d ed. E. Cleary 1972). Not all communications between attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

In its Determination Letter, the OIR states that the withheld information in documents 1 and 2 consists of "confidential communications between DOE attorneys and the staff of the program office to which they provide legal advice." *See* Determination Letter, at 2.

Upon review of the unredacted documents, we conclude that OIR properly invoked the attorney-client privilege of Exemption 5. The information withheld from document 2, dated October 10, 2012, consists of a communication from Susan Beard, Assistant General Counsel for General Law, to three other DOE attorneys, in which Ms. Beard recommended legal advice to be communicated to a DOE program office. The information withheld from document 1, dated October 11, 2012, consists of a communication of legal advice from DOE's attorneys to a DOE program office. Therefore, the withheld information in each document falls within the attorney-client privilege of Exemption 5.

2. Deliberative process privilege

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). It is intended to promote frank and independent discussion 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)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears, Roebuck & Co.*, 421 U.S. at 151. 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 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 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 Gas Corp.*, 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).

In its Determination Letter, the OIR states that the withheld portions of document 2 are pre-decisional and "reflect deliberations, comments, assessments, and proposals." The OIR further asserts that "[t]he DOE considered these preliminary views as part of the process that will lead to the agency's final policy decision about these matters. The redacted portions do not represent a final agency position, and their release would compromise the deliberative process by which the government makes its decision." *See* Determination Letter, at 2.

Upon review of the unredacted documents, we conclude that OIR properly invoked the deliberative process privilege as to document 2. The withheld information consists of a DOE attorney's recommendation of what legal advice should be provided to a DOE program office regarding a particular executive correspondence document. It therefore falls within the deliberative process privilege of Exemption 5 because it reflects recommendations, opinions, and deliberations comprising part of the process by which government decisions were made regarding EXEC-2012-008798. *See Sears, Roebuck & Co.*, 421 U.S. at 150.

B. <u>Public Interest in Disclosure</u>

The DOE regulations provide that the DOE should nonetheless 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 against 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) (Mar. 19, 2009) at 2. The OIR states that disclosure of the information "would compromise the deliberative process by which the government makes it decision [sic]." *See* Determination Letter, at 2. Accordingly, the OIR contends that that release of the information would not be in the public interest. We agree, and conclude that discretionary release of the information withheld under the attorney-client privilege and deliberative process privilege would not be in the public interest, because it would discourage DOE attorneys and their clients from being open and candid with each other, and it would inhibit DOE attorneys and other employees from freely exchanging advice and comments during DOE's deliberative process.

C. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Project on Government Oversight*, Case No. TFA-0489 (2011).

The request was initially assigned for search to three offices: the Office of the Executive Secretariat, the Office of the General Counsel (OGC), and the Office of Hearings and Appeals (OHA).

In the Determination Letter, OIR stated that the Office of the Executive Secretariat conducted a search of the Electronic Document Online Correspondence and Concurrence System. On February 28, 2013, the Office of the Executive Secretariat certified that it searched its records using the control number provided by the Appellant (EXEC-2012-008798). Since search by control number would be expected to turn up related documents, including correspondence and concurrence, we conclude that the Office of the Executive Secretariat conducted a reasonable search.

Upon examination of the FOIA record related to the searches conducted by OGC and OHA, we determined that additional information was necessary to evaluate the reasonableness of these searches. In response to our inquiries, the Office of General Counsel provided us with additional information. Email from Susan Beard, Assistant General Counsel for General Law, to K.C. Michaels, Office of the Assistant General Counsel for Litigation (Apr. 24, 2013, 9:51AM EDT). OGC informed us that it conducted an electronic search of emails using the control number provided by the Appellant (EXEC-2012-008798). OGC searched the emails of the person most likely to have responsive documents. OGC did not have any hardcopy documents on this matter. Based on the foregoing, we are satisfied that OGC conducted an adequate search for documents that are responsive to the FOIA request.

On February 27, 2013, the Office of Hearings and Appeals certified that it searched staff records and email accounts. In response to our inquiries, the Office of Hearings and Appeals provided us with additional information. OHA informed us that it conducted a search of the physical file where responsive documents would likely be located. Email from Fred Brown, OHA, to K.C. Michaels, Office of the Assistant General Counsel for Litigation (Apr. 22, 2013, 8:36AM EDT). OHA further explained that its search was broad enough to turn up documents responsive to both the initial and amended request. Email from Fred Brown, OHA, to K.C. Michaels, Office of the Assistant General Counsel for Litigation (Apr. 23, 2013, 9:15AM EDT). Based on the foregoing, we are satisfied that OHA conducted an adequate search for responsive documents.

As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384–85. Here, the Office of the Executive Secretariat searched its correspondence database, the Office of the General Counsel searched the email account of the person most likely to have responsive documents, and the Office of Hearings and Appeals consulted both physical files and email accounts. As such, we conclude that a reasonable search for responsive documents was conducted.

Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on March 28, 2012, OHA Case Number FIA-13-0020, is hereby denied.

(2) 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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Robert F. Brese
Chief Information Officer
U.S. Department of Energy

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