United States Department of Energy
Office of Hearings and Appeals

| | | |
|---|---|---|
| In the Matter of Avery R. Webster | ) | |
| | ) | |
| Filing Date: May 22, 2013 | ) | Case No.: FIA-13-0031 |
| | ) | |
| | ) | |

Issued: June 19, 2013

**Decision and Order**

On May 22, 2013, Avery R. Webster ("Appellant") filed an Appeal from a determination issued to her on April 18, 2013, by the Department of Energy (DOE) Office of Information Resources (OIR) (FOIA Request Number HQ-2013-00680-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, and 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 eight documents. The OIR withheld portions of each document pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Specifically, the Appellant contends that the searches conducted were inadequate and requests that additional searches be conducted. 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 March 9, 2013, the Appellant submitted her request seeking copies of "any and all 'sign-off sheets' for the following Office of Hearings and Appeals Whistleblower cases: In the Matter of Billy Joe Baptist . . . [and] In the Matter of Vinod Chudgar." Appellant's request included a non-exhaustive list of case numbers. The request explained that the requested documents "contain the initials of the employees that handled the case and the managers that reviewed the case, and are located in each case file." FOIA Request from Avery R. Webster (Mar. 9, 2013). On March 14, 2013, the Appellant amended the request to clarify that she was seeking "any and all 'sign-off sheets' or 'concurrence forms' as described in my original request. Amendment to FOIA Request from Avery Webster (Mar. 14, 2013). The OIR assigned the request to the Office of Hearings and Appeals (OHA) to conduct a search for responsive records. Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Avery Webster, at 1 (Apr. 18, 2013).

On April 18, 2013, the OIR issued a Determination Letter and provided the Appellant with eight documents. In each document, communications involving DOE employees were redacted pursuant to Exemption 5 of the FOIA. *Id.* at 1–2. Subsequently, on May 22, 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, OHA, 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 her appeal, Appellant challenges the OIR's application of Exemption 5 of the FOIA to each document. Appellant also appeals the adequacy of the search for responsive records. Upon review of the unredacted versions of those eight documents, we conclude that the OIR properly invoked Exemption 5 in support of its withholdings. In response to our inquiries, the office that conducted the initial search—OHA—discovered three additional documents that may be responsive. Accordingly, we will grant the Appeal in part and deny it in part. We will remand the case back to the OIR to make a new determination with respect to the three additional documents

### 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 "deliberative process" privilege.

1. 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 the eight documents reflect the "personal opinion[s]" and "approval" of DOE employees with respect to the contents of the rest of the documents. Determination Letter, at 1. The OIR asserts that these withheld portions are pre-decisional because "the signatory of the document reviews the concurrence ladder before signing the final decision," and deliberative because "the signatory relies on the approval of those who signed the ladder in reaching his or her decision." *Id.* The OIR further asserts that "disclosing the contents of the concurrence ladders in these documents would harm the deliberative process by compromising the ability and willingness of those in the concurrence chain to make honest and open recommendations to the decision-maker." *Id.*

Upon review of the unredacted documents, we conclude that the OIR properly invoked the deliberative process privilege as to the eight documents. In seven documents, the withheld information consists of the name, signature, or initials and date of concurrence for each OHA employee in the concurrence ladder for each document. By applying his/her signature or initials to a document, the employee indicates that he/she has reviewed and recommends approval of the text of the document. In the eighth document, the withheld information consists of the names of DOE attorneys that reviewed and concurred with a certain document. The listing of the names indicates that those attorneys reviewed and recommended approval of the text of the document referred to. The sending out of a document for concurrence on the text is a quintessential part of

the process by which decisions relating to that document are made. The concurrence signatures/initials are generated before the adoption of agency policy, and they are reflective of the give-and-take of the consultative process because they reflect the personal opinions of the employee recommending approval, rather than the official position of the agency. The number and identify of reviewers also reflects the agency's deliberative process in that they indicate the level of review a particular document received. As such, the withheld information 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 the final texts of the documents referred to. *See Sears, Roebuck & Co.*, 421 U.S. at 150.

**B. Public Interest in Disclosure**

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 harm the deliberative process by compromising the ability and willingness of those in the concurrence chain to make honest and open recommendations to the decision-maker." *See* Determination Letter, at 1. Accordingly, the OIR contends 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 deliberative process privilege would not be in the public interest because it would discourage DOE employees from being open and candid with each other, and it would inhibit DOE employees from freely exchanging advice and recommendations 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 the Office of Hearings and Appeals. Upon examination of the FOIA record related to the search conducted by OHA, we determined that additional information was necessary to evaluate the reasonableness of the search. In response to our inquiries, OHA provided us with additional information. OHA informed us that it conducted

a search of physical case files where responsive documents would most likely be located. Email from William M. Schwartz, OHA, to K.C. Michaels, Office of the General Counsel (May 29, 2013, 11:06AM EDT). As part of the initial search, all current OHA employees assigned to any of the identified cases were also approached to determine if they had any responsive documents that were not located in the paper case files. They answered that they had no responsive documents that had not been placed in the paper files. *Id.* Although the requester only identified five case numbers, OHA also searched the case files for five additional case numbers related to the identified cases. *Id.* OHA further informed us that upon receiving our inquiry, it searched the same ten paper files again and discovered three additional documents that may be responsive. *Id.*

Since OHA has discovered additional documents, we will remand the matter to OIR to issue a new determination with respect to the three documents. In so doing, we do not decide whether the search as initially conducted was adequate. The adequacy of the search must be determined "not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *see also Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). "[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate. . . . After all, particular documents may have been accidentally lost or destroyed or a reasonable and thorough search may have missed them." 315 F.3d at 315 (citations omitted). As such, OHA's discovery of additional documents that may be responsive does not necessarily indicate that the initial search was not reasonably calculated to uncover all relevant documents. Since we are remanding to OIR for further proceedings, we need not decide this issue.

Accordingly, we will remand this matter in part to OIR for a new determination with respect to the three additional documents. We will deny the Appeal in all other respects.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on May 22, 2013, OHA Case Number FIA-13-0031, is hereby granted as specified in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Office of Information Resources for additional proceedings consistent with the directions set forth in this 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.

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 your right to pursue litigation. You may contact OGIS 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: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

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

Date: June 19, 2013