

United States Department of Energy  
Office of Hearings and Appeals

In the Matter of Hanford Atomic Metals Trades Council )  
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Filing Date: August 30, 2013 ) Case No.: FIA-13-0058  
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Issued: October 29, 2013

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**Decision and Order**  
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On August 30, 2013, Hanford Atomic Metals Trades Council (“Appellant”) filed an Appeal from a determination issued to it on July 31, 2013, by the Office of Information Resources (OIR) of the United States Department of Energy (DOE) (FOIA Request Number 2012-00582-F). In its determination, OIR responded to the Appellant’s request for information (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. In its response, OIR provided the Appellant with documents in which some information was withheld pursuant to Exemptions 5 and 6. The Appeal, if granted, would require OIR to release the information withheld pursuant to Exemption 5.

**I. Background**

On February 22, 2013, the Appellant, a union, submitted a FOIA Request to OIR seeking copies of communications between DOE employees and DOE-contractor employees at the DOE’s Hanford facility regarding collective bargaining, desired changes in wages, terms and conditions of employment, potential strikes, or closures.<sup>1</sup> *See* Appeal, Attachment 1. On July 31, 2013, OIR issued its response (Determination Letter) to the Appellant’s Request and identified 33 documents responsive to the Appellant’s Request, 28 of which contained material withheld pursuant to Exemption 5.<sup>2</sup> OIR justified its Exemption 5 withholdings on the basis that the material was protected by virtue of the attorney-client and the deliberative process privileges.

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<sup>1</sup> At the time of the Request, the Appellant was negotiating a labor agreement with a number of DOE contractors at the Hanford facility.

<sup>2</sup> OIR assigned each document a number for identification. Additionally, OIR informed the Appellant that its request had also been referred to the DOE’s Offices of the Executive Secretariat and General Counsel, and to its Richland Operations Office.

Additionally, OIR withheld material pursuant to Exemption 6 or because it was non-responsive to the Appellant's Request.<sup>3</sup>

In its Appeal, the Appellant argues that material withheld pursuant to Exemption 5 does not contain any information that reveals DOE's deliberative process. Specifically, it asserts that the DOE has claimed in various documents that it has no involvement in formulating labor negotiation strategy and policy. Consequently, given the subject matter of its Request regarding collective bargaining issues, none of the withheld information could be predecisional in nature. Further, to the extent that material was withheld pursuant to the attorney-client privilege, the subject matter of the documents indicates that the withheld material "must merely reflect factual material or state[s] a legal position" and thus cannot be protected by this privilege. Appeal at 4-5. The Appellant also argues that OIR excessively redacted the documents and thus failed to provide it with the maximum amount of releasable information.

## II. Analysis

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). 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 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.

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). In its determination, OIR withheld information pursuant to Exemption 5's deliberative process and attorney-client privileges.

As an initial matter, we reject the Appellant's argument that Exemption 5 cannot apply to any of the information withheld because DOE has no involvement in formulating labor negotiation strategy and policy. The fact that DOE does not involve itself in the actual labor negotiations between contractors and the Appellant does not necessarily mean that DOE could not have predecisional or attorney-client protected discussions arising from these negotiations.

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<sup>3</sup> The Appellant did not challenge the propriety of OIR's Exemption 6 withholdings or OIR's determination that some material withheld in the documents was non-responsive to its Request.

Nonetheless, we have reviewed unredacted versions of the documents at issue to determine if OIR properly applied Exemption 5.

### ***A. Deliberative Process Privilege***

A portion of the withheld material was withheld under Exemption 5's deliberative process privilege. Exemption 5's deliberative process privilege 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 material withheld by OIR pursuant to the deliberative process privilege consists of E-mails where DOE employees are sharing their opinions and assessments regarding the status of the negotiations, general economic issues regarding any labor agreement resulting from the negotiations, and discussions regarding options in responding to inquiries about the negotiations. Accordingly, given the predecisional nature of this material, we find that this material was properly withheld pursuant to Exemption 5's deliberative process privilege.

### ***B. 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.

We find that those portions of the documents withheld pursuant to the attorney-client privilege were properly withheld by OIR. The material withheld pursuant to this Exemption 5 privilege consists of legal opinions and advice rendered by DOE attorneys regarding proposed responses

to inquiries about the negotiations. Thus, we find that OIR properly applied the attorney-client privilege to the withheld information.

### ***C. Public Interest Determination***

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

Upon our review of the documents at issue, we conclude that discretionary release of the information withheld under the attorney-client and deliberative process privileges 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 processes. *See Judicial Watch*, Case No. FIA-13-0002 (2013).

### **III. Conclusion**

Because we find that DOE properly applied Exemption 5's deliberative process and attorney-client privileges to the Exemption 5 material it withheld from the Appellant, we must deny its Appeal.<sup>4</sup>

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on August 30, 2013, OHA Case Number FIA-13-0058, is 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.

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:

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E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)

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<sup>4</sup> With regard to the Appellant's argument that OIR excessively redacted the documents at issue, our examination of the documents at issue indicates that OIR's redactions were appropriate and not overly inclusive. Consequently, we reject the Appellant's argument regarding the extent of OIR's redactions.

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