

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

In the Matter of Allegheny Defense Project )  
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Filing Date: December 15, 2014 ) Case No.: FIA-14-0085  
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Issued: January 21, 2015

**Decision and Order**

On December 15, 2014, Allegheny Defense Project (Appellant) filed an Appeal from a determination issued to it by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-00851-F). In that determination, OIR responded to a request 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 released 16 documents but redacted portions of those released documents under Exemptions 4, 5, and 6 of the FOIA. This Appeal, if granted, would release the information withheld under Exemptions 4 and 5 from the redacted documents.

**I. Background**

On April 13, 2014, the Appellant filed a request with OIR for:

All documents, records, files (and their contents), photographs, video tapes, surveys, reports, memorandum, notes (electronic, handwritten, or otherwise), meeting minutes, media publications, implementation guidelines, graphs, charts, maps, spreadsheets, phone notes, correspondence with the public, correspondence with other local, state, and federal agencies, correspondence with private parties, and all other documents related to “Sustainable Shale Gas Growth Zones” in the United States.

Request Letter dated April 13, 2014, from Appellant, to FOIA Officer, OIR, DOE. In response to the request, NNSA released 16 documents with redactions taken. Determination Letter dated November 14, 2014, from Alexander C. Morris, FOIA Officer, OIR, DOE, to Appellant. The Appellant challenges only the Exemptions 4 and 5 withholdings, claiming that OIR erred in withholding the information under both exemptions. Appeal Letter dated December 12, 2014, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

## II. Analysis

The FOIA requires that documents which are deemed to be agency records and 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).

### A. Exemption 4 Documents

The information withheld under Exemption 4 was information submitted under subscription agreements with POLITICO Pro and the Energy Guardian. The information is copyrighted and the information from POLITICO Pro contains a warning that “[f]orwarding or reproducing the alert without the express, written permission of POLITICO Pro is a violation of federal law and the POLITICO Pro subscription agreement.” Determination Letter dated November 14, 2014, from Alexander C. Morris, OIR, to Appellant. The documents from Energy Guardian contain a copyright sign. *Id.*

We agree with OIR's determination that the documents may be withheld under Exemption 4. Exemption 4 exempts from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is “commercial” or “financial,” “obtained from a person,” and “privileged or confidential.” *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). The November 14, 2014, determination letter does not claim that the release of the withheld information would reveal a trade secret or that the withheld information is “privileged,” but contends that the information it withheld under Exemption 4 is “confidential.”

In order to determine whether the information is “confidential,” the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, OIR indicated that the information it withheld was voluntarily submitted. The information withheld by OIR consists of articles acquired by subscription from POLITICO Pro and Energy Guardian. Both of these entities copyright their work. The commercial nature of copyrighted works is fully recognized in the Copyright Act, in

which the copyright holder is given the exclusive right to disseminate its work by sale, lease, or rental. *See* 17 U.S.C. § 106. The need for protection of the holder's potential market is specifically included as one of the factors governing the "fair use" doctrine. *See* 17 U.S.C. § 107(4). The withheld information, which is copyrighted, is held in confidence by POLITICO Pro and Energy Guardian.

We agree with OIR that the information is voluntarily submitted. Therefore, *Critical Mass* applies. Since the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. Based on the foregoing, we have concluded that the information may be withheld under Exemption 4 as it is confidential information, not customarily made available to the general public.

## **B. Exemption 5 Documents**

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 are incorporated into Exemption 5: the attorney work-product privilege, the attorney-client privilege, and the executive "deliberative process" 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 pursuant to FOIA Exemption 5, OIR relied upon the deliberative process privilege.

### **1. The Deliberative Process Privilege**

Exemption 5 permits the withholding of responsive material that reflects 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). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Id.* 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. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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). 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 (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.*

In this case, the material withheld by OIR pursuant to the deliberative process consists of emails among DOE employees in which they shared their opinions, assessments, and recommendations regarding a pending matter. The Appellant argues that “although DOE claims that only ‘portions’ of the documents are being withheld, the fact is that in many instances, most or all a document withheld under Exemption 5 was redacted.” Appeal Letter at 7. After reviewing the documents, we have concluded that OIR carefully considered its Exemption 5 redactions. Further, we conclude that the withheld information was predecisional and contains material that reflects the DOE’s deliberative process. Thus, we find that OIR properly withheld the information pursuant to Exemption 5.

## **2. 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 that disclosure is in the public interest. 10 C.F.R. § 1004.1; *see also, e.g., Hanford Atomic Metal Trades Council*, OHA Case No. FIA-13-0058 (2013).<sup>\*/</sup> 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.

In its determination, OIR concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the DOE’s ongoing decision-making process. We find that release of such information could have a chilling effect on the Agency’s ability to obtain frank opinions and recommendations from its employees in the future. Therefore, discretionary release of the withheld information would not be in the public interest. *See, e.g., Judicial Watch*, OHA Case No. FIA-13-0002 (2013).

## **3. Segregability**

Notwithstanding the above, 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). After reviewing the responsive documents, we find that OIR complied with the FOIA by releasing to the Appellant all reasonably segregable information.

## **III. Conclusion**

After considering the Appellant’s arguments, we have determined that correctly applied Exemptions 4 and 5 to the information at issue. Accordingly, the Appeal should be denied.

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<sup>\*/</sup> OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/foia-cases>.

It Is Therefore Ordered That:

(1) The Appeal filed by Allegheny Defense Project, Case No. FIA-14-0085, 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 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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Date: January 21, 2015