

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

In the Matter of Russell Carollo)	
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Filing Date: May 8, 2015)	Case No.: FIA-15-0026
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Issued: June 1, 2015

Decision and Order

On May 8, 2015, Mr. Russell Carollo filed an appeal from a determination issued to him on May 5, 2015, by the Office of Headquarters Procurement Services (Procurement Services) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2015-00523-F). In its determination, Procurement Services responded to Mr. Carollo’s request for information 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. In response to Mr. Carollo’s request, Procurement Services released four documents that it withheld in part pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). This Appeal, if granted, would require Procurement Services to release withheld material.

I. Background

On January 20, 2015, the DOE received a FOIA request from Mr. Carollo seeking “copies of all records since June 19, 2010, related in any way to Google, Inc., including, but not limited to, communications with Google employees and/or with any other individuals or entities acting on behalf of Google and all communications with federal entities regarding Google, Inc.” FOIA Request from Russell Carollo to Alexander Morris, Office of Information Resources (OIR) (January 19, 2015). Mr. Carollo submitted a revised request on February 3, 2015, that limited the scope of the request in some ways while also stating that he sought “communication related in any way to contracts or agreements involving the company Google” Revised FOIA Request from Russell Carollo to Omer Pervaiz, OIR (February 3, 2015).

On February 12, 2015, OIR informed Mr. Carollo that it would handle part of his request internally and refer other elements of his request to various DOE offices. Letter from Alexander Morris, OIR, to Russell Carollo (February 12, 2015). Accordingly, OIR sent Mr. Carollo’s request for communication related to contracts involving Google to two offices: Procurement Services and the Office of the Chief Information Officer (CIO). *Id.* Procurement Services, on May 5, 2015, issued a determination in which it released four documents but redacted them in part pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Determination Letter from Frederick Dann, Procurement Services, to Russell Carollo (May 5, 2015) (Determination Letter). Mr. Carollo filed an appeal on May 8, 2015. Appeal Letter from Russell Carollo to OHA (May 6, 2015). In his appeal, he contends that purely factual information should not have been redacted from the documents and that reasonably segregable portions must be released. *Id.*

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). The agency has the burden of showing that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). 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 "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 Exemption 5: the attorney-client privilege, the attorney work-product 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) (*Coastal States*). In its determination, Procurement Services withheld information pursuant to the deliberative process privilege. Determination Letter.

Under the deliberative process privilege of Exemption 5, agencies are permitted to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. The privilege 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 (1958)). The ultimate purpose of Exemption 5's deliberative process privilege is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by the 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*, 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*, 617 F.2d at 866.

In the instant matter, we will refer to the four documents released to Mr. Carollo as Document #1, Document #2, Document #3 and Document #4. The documents consist entirely of e-mails

and contain significant redactions. Documents #2, #3 and #4 reflect e-mail communication between individuals at DOE, both agency employees and at least one contractor employee. In each of the documents, which are nearly identical, the earliest e-mail is a February 11, 2015, message from Alan Andon, the acting acquisitions director in CIO, titled, “Apple iOS apps and Google Play.” One of the recipients of the e-mail (Andon E-mail) was Arness Harris, a DOE official in Procurement Services. The redacted documents indicate that Mr. Harris forwarded the Andon E-mail to four of his Procurement Services colleagues, asking, “Do you know anything about this?” Subsequent e-mails were exchanged between Procurement Services employees.

When we contacted Procurement Services to understand the redactions made pursuant to Exemption 5, Procurement Services provided us with un-redacted versions of the documents. We received additional context regarding the e-mails from Donald Insley, one of the Procurement Services employees to whom Mr. Harris forwarded the Andon E-mail. Based on our review, we have determined that the Andon E-mail discussed an early-stage effort to establish certain contractual guidelines related to DOE purchasing of Google and Apple software products. *See* E-mail from Donald Insley to Gregory Krauss, OHA, and Frederick Dann, Procurement Services (May 20, 2015). Communication by agency officials in Procurement Services after Mr. Harris forwarded the Andon E-mail sought to understand the objective of the decision-making process and determine how Procurement Services should approach the matter. *Id.*

The remaining document, Document #1, consists of two unrelated documents that Procurement Services unintentionally treated as a single document when making its determination¹: (1) an e-mail announcement from the *Richmond Times-Dispatch* notifying the recipient, Mr. Harris, of an April 10, 2015, event in Richmond at which Google Vice President John Woolard would speak and (2) the Andon E-mail along with subsequent e-mail communication similar to that found in Documents #2, #3 and #4, and with similar redactions.

Because Procurement Services provided Mr. Carollo with the e-mail from the *Richmond Times-Dispatch* in full, without redactions, Exemption 5 is not at issue for the first portion of Document #1. As to the redactions in the second portion of Document #1, as well as in Documents #2, #3 and #4, we find that Exemption 5 was properly applied. To begin, the relevant e-mails all meet the threshold requirement of being “inter-agency memorandums.” The fact that one or more contractor employees were included in the e-mail chain does not alter the character of the e-mails as memorandums transmitted within an agency. *See Klamath*, 532 U.S. at 11 (stating that outside consultants are part of an agency’s deliberative process when “the consultant functions just as an [agency] employee would be expected to do”).

Furthermore, the e-mails are pre-decisional in that they relate to an ongoing decision-making process regarding the establishment of purchasing procedures for Google and Apple software products. The redacted portions of the documents are deliberative because they express thoughts and opinions on an initiative to develop agency contracting guidelines. Although some of the redacted sections do contain background information that could be considered factual in form, that background information is descriptive of steps taken in the policymaking process itself and

¹ Frederick Dann, who handled the request for Procurement Services, verified that Document #1 consists of “a pair of e-mails.” E-mail from Frederick Dann, Procurement Services, to Gregory Krauss, OHA (May 26, 2015).

is thus the very sort of communication that the deliberative process privilege is designed to shield. *See Petroleum Info. Corp.*, 976 F.2d at 1435 (“The deliberative process privilege, we underscore, is centrally concerned with protecting the process by which *policy* is formulated.”).

As a final matter, we see no other basis for altering the redactions made by Procurement Services. The FOIA requires that “[a]ny 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 Procurement Services released all reasonably segregable information. We further find that any discretionary release of the redacted portions of the documents would harm an ongoing decision-making process by discouraging frank and candid recommendations by agency officials. Consequently, a discretionary release would not be in the public interest.

It Is Therefore Ordered That:

- (1) The Appeal filed on May 8, 2015, by Russell Carollo, Case No. FIA-15-0026, 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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