

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

In the Matter of Cecil D. Andrus)		
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Filing Date: August 10, 2015)	Case No.:	FIA-15-0046
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_____)		

Issued: August 20, 2015

Decision and Order

On August 10, 2015, Cecil D. Andrus (Appellant) filed an Appeal from a determination issued to him on July 10, 2015, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request HQ-2015-00734-F). In its determination, OIR responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by DOE in 10 C.F.R. Part 1004. OIR released 41 documents but redacted some in part pursuant to FOIA Exemption 5,¹ which the Appellant challenges in this Appeal. If granted, this Appeal would require OIR to release the material withheld pursuant to Exemption 5.

I. Background

In his original request, the Appellant requested the following:

“[C]opies of all communication between any officials of the [DOE] and any official in the state of Idaho that is in any way related to a ‘waiver’ of the state of Idaho’s 1995 settlement agreement (the so called Batt Agreement) with the [DOE].

It is also my intent to include in this request any communication—email, letters, facsimile transmissions, etc.—from any DOE official at the department’s headquarters or at its Idaho Operations Office. I also respectfully request any communication related to this matter from DOE contractors in Idaho or elsewhere. Furthermore, I formally request any communication from private commercial utilities to the department, its contractors or the state of Idaho that relates in any way to the request for a ‘waiver’ or exception to the 1995 settlement agreement.

I further request any supporting materials from the department, its contractors or from private commercial utilities related to the ‘waiver’ request, including but not

¹ OIR also redacted some information pursuant to Exemption 4 and Exemption 6, but the Appellant did not appeal those redactions.

necessarily limited to memorandums, talking points, press statements, written or electronic presentations such as PowerPoint or overhead slides or any other material that deals with the request for a ‘waiver.’ Please include any legal memorandum that addresses the department’s interpretation of the 1995 settlement agreement with the state of Idaho and any department, contractor or private commercial utility analysis of whether the action the department contemplates under the ‘waiver’ is covered by the requirements of the National Environmental Policy Act (NEPA). Finally, I respectfully request any communication originated by the department or directed to the department regarding the planned or anticipated transportation of commercial spent nuclear fuel (SNF) from any private commercial utility to the Idaho National Laboratory.”

FOIA Request from Cecil D. Andrus to Alexander Morris, FOIA Officer, DOE (February 25, 2015). The FOIA Request was later limited to documents from January 1, 2012 to January 22, 2015 relating to “the December 2014 request from [DOE]...for a ‘waiver’ of paragraph D.2.e of the 1995 Settlement Agreement between DOE and the State of Idaho regarding storage and cleanup of nuclear materials at Idaho National Laboratory (INL).” Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Cecil D. Andrus (July 10, 2015).

The request was assigned to DOE’s Office of the General Counsel (GC), Office of Nuclear Energy (NE), Office of the Executive Secretariat (ES), Office of Congressional and Intergovernmental Affairs (CI), and Idaho Office of Operations (ID) to conduct a search of their files for responsive documents. On July 10, 2015, OIR issued a determination concerning 41 documents from ID, NE, and CI.² Of the 41 documents released, 30 had redactions pursuant to Exemption 5. On August 10, 2015, the Appellant appealed OIR’s determination, asserting that the use of redactions under Exemption 5 was excessive and challenges whether reasonable steps were taken to segregate releasable information. Appeal Letter from Cecil D. Andrus to Director Poli A. Marmolejos, OHA (August 10, 2015).

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 further 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 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). Exemption 5 permits the withholding of

² ES located no responsive documents during its search. The Determination Letter indicated that GC would respond separately.

responsive material that, *inter alia*, 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). In order to be shielded by this privilege – generally referred to as the “deliberative process 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).

A. Deliberative Process Privilege

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. 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 this case, OIR withheld parts of documents which included “deliberations that reflect DOE’s internal, deliberative policies concerning proposed shipments of commercial spent nuclear fuel to Idaho National Lab” and “confidential attorney-client communications and legal advice provided by DOE attorneys.”³ Determination Letter from Alexander C. Morris, FOIA Officer, OIR to Cecil D. Andrus (July 10, 2015). The Appellant challenges these withholdings stating that this reason was “generic and circular” and “hardly a ‘detailed justification’ for withholding specific information.” Appeal Letter from Cecil D. Andrus to Director Poli A. Marmolejos, OHA (August 10, 2015). Furthermore, the Appellant asserts that OIR failed to reference a pending decision under deliberation. *Id.*

We have reviewed the documents, mostly emails, portions of which OIR withheld pursuant to Exemption 5. A majority of the documents consist of emails asking for opinions and feedback. Each time a new message was sent, the entire email chain was included as part of that document with the appropriate information redacted. Although we reviewed 30 documents, there were many duplicates of the same email chains. For example, NE documents 15, 16, 21, and 22 are all from the same email chain, with the same information being redacted in each document. After a review of all of the documents, we have determined that the withheld information was properly redacted under Exemption 5. We further find that the description of the withheld information in the Determination Letter adequately identifies what type of information was redacted and what was being deliberated.

³ Because, as discussed below, we find that OIR properly applied the deliberative process privilege to the withheld material, we need not consider OIR’s application of the attorney-client privilege to the same withheld material.

The Appellant also claims that OIR's *Vaughn* index is insufficient as it "serves only to identify the number of documents and redactions for each office within the DOE." *Id.* We find that the included index was adequate. A *Vaughn* index is recognized in the context of FOIA as an index identifying each responsive document, the exemption under which it is being withheld, and an explanation of why that exemption is applicable, or in the alternative a similar document describing each withholding. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. *See, e.g., Missouri River Energy Services*, 27 DOE ¶ 80,165 (1998); OHA Case No. TFA-0013. Here, because no documents were withheld in their entirety, enough information was provided to allow the Appellant to formulate the basis for his Appeal and to allow OHA to understand why Exemption 5 was asserted.

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 that disclosure 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 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 this case, OIR concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause the harm of chilling open and frank discussion, limit government personnel's range of options to consider, and detract from the quality of Agency decisions. Therefore, discretionary release of the withheld information would not be in the public interest.

C. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). After reviewing the withheld documents, we find that OIR released all reasonably segregable information contained in the documents.

III. Conclusion

It Is Therefore Ordered That:

- (1) The Appeal filed on August 10, 2015, by Cecil D. Andrus, Case No. FIA-15-0046, 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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