United States Department of Energy
Office of Hearings and Appeals

In the Matter of R. James Valvo, III	)	
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Filing Date: October 23, 2015	)	Case No.: FIA-15-0060
	)	
	)	

Issued: November 12, 2015

Decision and Order

On October 23, 2015, R. James Valvo, III ("Appellant"), on behalf of Cause of Action, filed an Appeal from a determination issued to him on September 26, 2015, by the Department of Energy's Office of Information Resources (OIR). In its determination, OIR responded to a request for documents (FOIA Request No. HQ-2014-00389-F) submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to release the information it withheld pursuant to Exemptions 5 and 6 of the FOIA.

I. BACKGROUND

On September 23, 2013, the Appellant submitted a FOIA Request (Request) to the DOE regarding information relating to "documents reflecting attempts by the White House or Congress to influence discretionary grant making." October 22, 2015 FOIA Appeal (Appeal) from R. James Valvo, III, to Poli A. Marmolejos, Director, Office of Hearings and Appeals. After a discussion with OIR officials, the Appellant narrowed his Request to "communications to or from former Chief of Staff Brandon Hurlbut and White House Liaison Mackey Dykes from September 1, 2010 to November 2, 2010 and September 1, 2012 to November 2, 2012." Appeal at Ex. 2.

On September 26, 2015, OIR sent a determination letter (Determination Letter) to the Appellant in which it provided the Appellant with five responsive documents with information redacted from the documents pursuant to Exemptions 5 and 6. Appeal at Ex. 3. [1]

In its present Appeal, the Appellant asserts that OIR failed to describe in sufficient detail how any Exemption 5 privilege applied to the withheld information and that OIR failed to segregate any

[1] The five documents at issue are five E-mail chains sent by various DOE and Executive Office of the President (EOP) officials. For the purposes of this Decision, we will identify each document by the date in 2010 in which the last e-mail in the chain was sent: September 11 E-mail, October 7 Email, October 17 E-mail, October 20 E-mail, and October 25 E-mail.

non-withholdable material from the documents. Appeal at 2. The Appellant also alleges that Exemption 6 was inappropriately applied to information withheld under Exemption 6. As an example of OIR's alleged failure to correctly apply Exemption 6, Appellant points us to the September 11 E-mail chain where biographical information concerning the Chief Executive Officer (CEO) of A123 Systems (A123) was released but similar information was withheld with respect to two other A123 employees. Appeal at 3.

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) (*Klamath*). 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.

A. Material Withheld Under Exemption 5

OIR withheld information in four of the five documents pursuant to Exemption 5. In the Determination Letter, OIR asserts that the Exemption 5 withheld material consists of information that is "pre-decisional" and reflect "deliberations, comments, assessments, and proposals." Appeal Ex. 3 at 2. OIR states that such information would be protected by the predecisional privilege in civil litigation and as such is protected from release pursuant to Exemption 5. Appeal Ex. 3 at 2. OIR also determined that, with regard to the Exemption 5 withheld material, release of this material would compromise the deliberative process by which the government makes it decisions. Appeal, Ex. 3 at 2.

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 the 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" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In the present case, only the deliberative process privilege is at issue in evaluating the propriety of OIR's application of Exemption 5.

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. *Sears*, 421 U.S. at 149. 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 deliberative process prong of Exemption 5 is to protect the quality of agency decisions. *Sears*, 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*, 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.

1. September 11 E-mail

The September 11 E-mail chain contains discussions of issues concerning planning for a media event illustrating the benefits of projects that had received funds under the American Recovery and Reinvestment Act of 2009 (Recovery Act). October 27, 2015 Memorandum of Telephone Conversation between, Elizabeth Sullivan, Esq., DOE/OIR, and Richard Cronin, Attorney-Advisor, OHA. As such, the withheld material consists of the deliberations of DOE and EOP officials as to the best way to stage the event and the personnel needed to operate the event. Given the deliberative nature of this information, we find that OIR properly withheld this information under the deliberative process privilege of Exemption 5. Another portion of the withheld material consists of inquiries made by an EOP official so that the official could draft a briefing memorandum for his supervisors. This inquiry reveals the official's thoughts as to what would be important to include in the brief. As such, we find that it is predecisional and deliberative material protected under Exemption 5.

2. October 7 E-mail

The October 7 E-mail is a chain E-mail where the withheld Exemption 5 material consists of EOP and DOE officials discussing the status of Recovery Act loan guarantee applications and assessments of the viability of the projects if the requested loans guarantees were not issued. We find that this material is predecisional in nature and reflects the opinions of the authors of the E-mails in the October 7 E-mail chain. Thus, we find this material to be covered by the deliberative process privilege and properly withheld under Exemption 5.

3. October 20 E-mail

The Exemption 5 withheld material contained in the October 20 E-mail chain concerns a request for information from an EOP official regarding the substance and planning for a media event at which the President of the United States was scheduled to appear. As such, the withheld material reflects the author's assessments and recommendations regarding the event. We find that the withheld material would be protected by the deliberative process privilege. Given this finding, we have determined that OIR properly withheld this information pursuant to Exemption 5.

4. October 25 E-mail

The October 25 E-mail chain contains several inquiries between DOE officials and EOP officials regarding the current status of a proposed loan guarantee to one firm. The withheld material also contains information regarding recommendations from the officials regarding the substance of a proposed visit by the Vice President of the United States. We find that this material contains assessments and deliberative information which would be protected by the deliberative process privilege. Consequently, we find that this Exemption 5 material was properly withheld from the October 25 E-mail chain.

B. Material Withheld Under Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co*., 456 U.S. 595, 599 (1982) (*Washington Post*). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep't of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Pursuant to Exemption 6, OIR redacted two types of information in the five responsive documents: EOP employee business contact information (phone numbers and E-mail addresses) and two short one-paragraph biographies of two employees who received employment as a result of the Recovery Act. The Determination Letter asserts that the E-mail chains are "similar files" under Exemption 6 since they contain information in which an individual has a privacy interest. Appeal Ex. 3 at 2. The OIR also asserts that releasing the withheld Exemption 6 information could subject the EOP employees named in the E-mail chains to unwarranted or unsolicited communications. *Id.* Balancing the privacy interest of the named individuals with its assessment that no public interest would be furthered by release of the withheld information, OIR determined that the information in question should be protected by Exemption 6. *Id.*

1. EOP Employee Contact Information

As for the E-mail addresses and the business phone numbers of the EOP officials, who are federal employees, withheld in the five E-mail chains, we find that OIR properly withheld this information pursuant to Exemption 6. We agree with OIR that the E-mail chains themselves, because they reveal personal information regarding EOP employees named in the E-mail chains, are "similar

files" as required as a threshold test for the application of Exemption 6. *Washington Post*, 456 U.S. at 602 (all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection).

We also agree with OIR's determination that the named EOP employees have a privacy interest in their business contact information. As a general rule, civilian federal employees who are not involved in law enforcement generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations. *See e.g. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from [OPM]"), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006). However, the courts have also recognized that some federal employees possess, by virtue of the nature of their work, protectable privacy interests in their identities and work addresses. *See e.g., Judicial Watch, Inc. v. Dep't of the Army*, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (granting defendant's motion for summary judgment as to Department of Defense employee names and duty stations withheld pursuant to Exemption 6; finding that it is "likely" that the requested documents would be published on the Internet and that media reporters would seek out employees, and stating "[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent"). In the present case, we find that the EOP employees, because of their duties in directly supporting the President of the United States, could be subject to harassment or annoyance and thus have a protectable privacy interest in their business contact information.

Because we have found a protectable privacy interest in the withheld business contact information we must now weigh this against whether release of this information would further the public interest by shedding light on the operations and activities of the government. We agree with OIR that no information regarding the operations and activities of the government would be provided by release of the business contact information. Because the privacy interest of the EOP officials as contained in their business contact information outweighs the null public interest in releasing the information, we concur with OIG's conclusion that release of this information would constitute a clearly unwarranted invasion of personal privacy. Consequently, we find that Exemption 6 was properly applied to the EOP employees' contact information contained in the E-mail chains.

2. Employee Biographies

As discussed above, we find that the E-mail chains are "similar files" in which Exemption 6 may be utilized. We also find that the two private sector employees have a significant privacy interest in the biographical information contained in the September 11 E-mail chain. The biographies contain a brief summation of their work histories before the Recovery Act. Given this, we find that the two employees, who did not have positions in A123 management, have a significant privacy interest in the biographies.[2] We also find that release of this information would not further the public interest by shedding light on the operations and activities of the federal government. Consequently, we find, after weighing the significant privacy interests of the two employees who

[2] We inquired whether the employees or their biographical information were used in the media event referenced in the September 11 E-mail chain. We were informed that, to the best knowledge available to OIR, neither the employees nor their biographical information were used in the media event. *See* October 28, 2015, Memorandum of Telephone conversation between Elizabeth Sullivan, Esq. and Richard Cronin.

are the subject of the withheld biographies with the non-existent furthering of the public interest produced by a release of the biographies, that release of the biographies would constitute a clearly unwarranted invasion of personal privacy. Consequently, we find that OIR properly applied Exemption 6 to the two biographies.

We also find that the Appellant's argument regarding inconsistency of releasing the A123 CEO's biography is misplaced. Unlike the withheld employee biographies, the CEO biography only contains information indicating that, at the time of the proposed media event featuring A123, he was the President and CEO of A123. The rest of this biography recounts the financial progress of A123 under his leadership and does not reference his past employment history. Thus, unlike the employee biographies, there is little, if any, privacy interest contained in the A123 CEO's disclosed biography.

C. 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 harm to the agency's ongoing decision-making process. We believe that such a release would discourage frank and candid recommendations by agency officials. Therefore, discretionary release of the properly redacted material at issue would not be in the public interest.

Because the analysis of the applicability of Exemption 6 already considers the public interest in release of the Exemption 6 withheld material, we need not make a separate public interest determination regarding discretionary release of the Exemption 6 material. *Another Way BPA*, Case No. TFA-0437 (2010)

D. 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). Upon review, we find that OIR, with the possible exception of the specified sections in the September 11 and October 20 E-mail chains described above, performed a reasonable segregation of the all the responsive E-mail chains.

III. Summary

We find that OIR properly applied Exemptions 5 and 6 to the information withheld from the E-mail chains at issue in this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by R. James Valvo, III, Case No. FIA-15-0060, 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 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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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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