United States Department of Energy
Office of Hearings and Appeals

In the Matter of Greg Marlowe	)	
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Filing Date: November 9, 2015	)	Case No.: FIA-15-0065
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Issued: December 4, 2015

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Decision and Order

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On November 9, 2015, Greg Marlowe (Appellant) appealed a determination that he received from the Department of Energy's (DOE) Office of Information Resources (OIR) (Request No. HQ-2015-00106-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 116 documents, with some material redacted under exemptions of the FOIA. The Appellant challenged the breadth of the withholdings.

I. Background

On October 19, 2014[1], the Appellant filed a request for "copies of any and all DOE records—be they letters, emails, memos, phone logs or the like—pertaining to the above referenced FOIAs [HQ-2012-01696-F and HQ-2013-00772-F] and spanning the period from December 2012 through the present." FOIA Request from Greg Marlowe to Fletcher Whitworth, Office of Classification, DOE (October 19, 2014) (emphasis omitted). The FOIA Request goes on to state the Appellant seeks:

1. Evidence of any and all contact between the DOE and the USPTO that resulted in the December 12, 2012, email from the DOE's General Counsel for Intellectual Property and Technology Transfer, Ms. Linda Field, in which she provided descriptive content regarding eight still classified patent applications attributed to Dr. W.F. Libby filed between 1943-1948.
2. Documents bearing on the documented contact (phone or email?) initiated at my request by the DOE's Candace Ambrose on March 22, 2013. At that time

[1] The Appellant erroneously emailed his FOIA request to the wrong office, but that office forwarded his FOIA Request to OIR on October 23, 2014.

she solicited from the USPTO [archival source for the presently classified eight Libby-related record of invention forms directly linked to his eight patent applications] information about two of the patent applications filed on June 20, 1944, specifically which scientists' names appear as contributing "inventors" on the relevant section of the two associated record of invention forms. . . .

3. Evidence of any and all internal DOE communications as well as inter-agency (re: DOE-USPTO) sharing of information respecting discussions about the status and content of both HQ FOIAs. . . .

Id. On September 20, 2015, OIR sent a determination letter, which identified 116 documents responsive to the Appellant's request. Determination Letter from Alexander C. Morris, OIR, DOE to Greg Marlowe (September 30, 2015). The Determination Letter stated that 26 of the documents partially fall under the jurisdiction of the National Archives and Records Administration (NARA) and eight documents partially fall under the jurisdiction of the United States Patent and Trademark Office (USPTO). *Id*. OIR released the documents, redacting the information originating from NARA and USPTO, and transferred these documents to NARA and USPTO respectively for their review and release determination of the redacted information.[2] *Id*. OIR withheld material from the responsive documents under Exemptions 2, 5, and 6. *Id*.

On November 9, 2015, the Appellant appealed the Determination Letter. Appeal Email from Greg Marlowe to OHA Filings (November 8, 2015). In his Appeal, the Appellant states that the documents "have been so 'sanitized in part or in whole' that . . . they reveal NOTHING about how and why the DOE has concocted some of its . . . decisions." *Id*. Based on our understanding of the Appeal, we reviewed the responsive documents to identify information related to DOE decisions and to determine whether any of that material, which was withheld under Exemptions 5 and 6, should be released.

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.

[2] OHA reviewed the material transferred to NARA and USPTO and it consisted of emails, which originated from those respective offices. In accordance with 10 C.F.R. § 1004.4(f)(1), those documents were appropriately transferred for determination of release.

A. Exemption 6

Exemption 6 shields from disclosure "personnel 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); *see also* 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).

In determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. If the agency cannot find a significant privacy interest, the information may not be withheld. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (NARFE); *Associated Press v. Dept. of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *See NARFE*, 879 F.2d at 874; *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 773 (1989). Lastly, the agency must balance the personal privacy interest in the information proposed for withholding against the public interest in the same information. *See NARFE*, 879 F.2d at 874; *Reporters Comm*., 489 U.S. at 762.

Throughout the documents, OIR redacted under Exemption 6 material that included "a personal email address, phone number, and P.O. Box address. . . ." Determination Letter from Alexander C. Morris, OIR, DOE to Greg Marlowe (September 30, 2015). A review of the unredacted documents revealed that this information belonged to the Appellant. OIR cannot use Exemption 6 to withhold from a requester information pertaining only to himself because there is no privacy interest at stake. *See Dean v. FDIC*, 389 F. Supp. 2d 780, 794 (E. D. Ky. 2005) (stating that "to the extent that the defendants have reacted the 'name, address, and other identifying information' of the plaintiff himself in these documents . . . reliance on Exemption 6 or 7(C) would be improper.") We remand the responsive documents to OIR for the release of this information.

The FOIA also 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 material, we found that in some cases, OIR withheld more than what was properly exempt. For example, OIR properly withheld some material in Document 42 (and subsequent documents relating to the same email chain), using Exemption 6, which consisted of "individuals' personal schedules." Determination Letter from Alexander C. Morris, OIR, DOE to Greg Marlowe (September 30, 2015). OIR, however, redacted more than just the identifying personal information. Because the documents revealed several instances of this type of over-withholding using Exemption 6, on remand, OIR should reconsider the breadth of its redactions, making sure to only withhold material appropriately exempt.

B. Exemption 5

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 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 (1974). 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 the Determination Letter, OIR withheld information pursuant to Exemption 5's deliberative process and attorney-client privileges.

Exemption 5 permits the withholding of 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*, 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. 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 the Determination Letter, OIR stated that it withheld under the deliberative process privilege, material that included "exchanges between government employees and government representatives regarding decisions not yet made." Determination Letter from Alexander C. Morris, OIR, DOE to Greg Marlowe (September 30, 2015). This material was in the form of email chains between different DOE employees, discussing the processing of the Appellant's FOIA requests. Although these documents are undoubtedly pre-decisional, it is unclear whether all the material is deliberative.

Under Exemption 5, an agency may also withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). While the privilege primarily applies to facts divulged by a client to his attorney, courts have held that it also encompasses opinions given by an attorney

to a client based upon, and therefore reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005); *see also McKinley v. Bd. of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 65 (S.D.N.Y 2012); *Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). In the governmental context, "an agency can be a 'client' and agency lawyers can function as attorneys within the relationship of the privilege." *Rein v. U.S. Patent and Trademark Office*, 553 F. 3d. 353, 376 (quoting *Coastal States Gas Corp*., 617 F.2d at 863). Not all communications between attorney and client are privileged, however. *See Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp.2d 121 (D.D.C. 2013). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

In the Determination Letter, OIR stated that it withheld information under Exemption 5's attorney-client privilege, information that included "documents that contain attorney-client communications and legal advice provided by DOE attorneys." Determination Letter from Alexander C. Morris, OIR, DOE to Greg Marlowe (September 30, 2015). This material was in the form of email chains between DOE employees in OIR and the Office of the General Counsel. Although some of these emails clearly contained material necessary to obtain or provide legal advice, many of these communications were informational or procedural in nature.

After our review of the responsive documents, we contacted OIR to discuss the redactions made pursuant to Exemption 5. Memorandum of Telephone Conversation with Angelia Bowman, OIR (November 30, 2015). After discussing certain redactions, which were either not properly withheld or over-withheld, OIR agreed to review the Exemption 5 redactions and issue a new determination regarding these withholdings. *Id*.

III. Conclusion

Based on the foregoing, we find that OIR's use of Exemptions 5 and 6 was overbroad, and in some cases improper, and remand those documents for the release of nonexempt material.

It Is Therefore Ordered That:

(1) The Appeal filed on November 9, 2015, by Greg Marlowe, Case No. FIA-15-0065, is hereby granted to the extent set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) 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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