

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

In the Matter of Government Accountability Project )	
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Filing Date: December 10, 2015 )	Case No.: FIA-15-0066
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Issued: December 22, 2015

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On December 10, 2015, Government Accountability Project (Appellant) appealed a determination received from the Department of Energy’s (DOE) Office of Inspector General (OIG) (Request No. HQ-2015-00343-F). In that determination, OIG 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. OIG identified 70 documents responsive to the request. At issue in this Appeal are four documents, which OIG released with some material redacted under exemptions of the FOIA. The Appellant challenges these withholdings. If granted, this Appeal would require OIG to release the withheld material.

**I. Background**

On December 10, 2014, the Appellant filed a request for “all documents concerning the DOE-IG’s investigation of the termination of Hanford contractor employee Donna Busche [and] all documents concerning the DOE-IG’s procedures for undertaking and reporting the outcomes of whistleblower retaliation investigations.” FOIA Request from Richard E. Condit, Government Accountability Project (GAP) (December 10, 2014).

On November 10, 2015, OIG issued a determination letter that included the partial release of Documents 31, 60, 65, and 66. Determination Letter from Daniel M. Weeber, Assistant Inspector General for Audits and Administration, OIG, to Richard E. Condit, GAP (November 10, 2015). OIG withheld material from these documents under Exemptions 5 and 6 of the FOIA. *Id.*

On December 10, 2015, the Appellant appealed the November 10 Determination Letter. Appeal Email from Richard Condit to OHA Filings (December 9, 2015). In the Appeal, the Appellant specifically contested “redactions placed in Documents 31, 60, 65, and 66.” *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) (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.

### **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. *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). If the agency cannot find a significant privacy interest, the information may not be withheld. *See NARFE*, 879 F.2d at 874; *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.

Under Exemption 6, OIG withheld from Documents 31, 60, 65, and 66 “names and information that would tend to disclose the identity of certain individuals,” stating “the public interest in the identity of individuals, whose names appear in these files, does not outweigh such individuals' privacy interests.” Determination Letter from Daniel M. Weeber, Assistant Inspector General for Audits and Administration, OIG, to Richard E. Condit, GAP (November 10, 2015). The Appellant challenges this as a “conclusory determination,” stating that OIG failed “to explain how identifying individuals named in its files tips the public interest balance in favor of redaction and secrecy.” Appeal Email from Richard Condit to OHA Filings (December 9, 2015).

A review of the relevant documents reveals that the material withheld under Exemption 6 consists of the names of individuals interviewed during OIG's inspection and the names and initials of the individuals who completed these interviews. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant

privacy interest in the identities of individuals providing information to government investigators. *Safecard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991). Similarly, the OIG employees who conducted these interviews have a significant privacy interest regarding the release of their identities in that such release could subject them to unwanted contact and harassment. *Cal-Trim Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment). We agree with OIG that the public interest in the identity of these individuals does not outweigh the privacy interests these individuals possess. Therefore, OIG properly withheld this material under Exemption 6.

## **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 an agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). 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 Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

### **1. 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).

OIG withheld material from all four documents at issue pursuant to Exemption 5. Document 31 is a document titled “(Draft) Assessment Plan.” OIG released the document title, the background section, and the section headings. A review of the unredacted document revealed that the withheld portions included edits someone made to the document using the track changes function. This withheld material clearly reflects the type of predecisional and deliberative information Exemption 5 seeks to protect.

Documents 60 and 65 were withheld in their entirety as they are “copies of Auditor’s handwritten interview notes.” Determination Letter from Daniel M. Weeber, Assistant Inspector General for Audits and Administration, OIG, to Richard E. Condit, GAP (November 10, 2015). Document 66 is a document titled “Questions/Discussion for [redacted].” From this document, OIG released the document title and sections headings (except for an individual’s name, which OIG withheld under Exemption 6). The withheld material consisted of lists of proposed questions for an interview. All of the material withheld from Documents 60, 65, and 66 consists of information that reflects the personal opinions of the drafter, not the agency. Our review of the relevant documents reveals that the withheld material is clearly predecisional and deliberative, and therefore exempt from mandatory disclosure.

## **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. 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, OIG 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.

## **3. Segregability**

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 find that OIG released all reasonably segregable information contained in the documents.

## **III. Conclusion**

After reviewing the Appeal, we find that OIG properly withheld information from Documents 31, 60, 65, and 66 under Exemptions 5 and 6 of the FOIA. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on December 10, 2015, by Government Accountability Project, Case No. FIA-15-0066, 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.

- (3) The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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