

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

In the Matter of Kathy L. Black)		
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Filing Date: June 20, 2016)	Case No.:	FIA-16-0040
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Issued: June 27, 2016

Decision and Order

On June 20, 2016, Kathy L. Black (Appellant) filed an Appeal from a determination issued to her on June 14, 2016, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2016-00525-F). In its determination, the OIR responded to the Appellant’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 the Appellant’s request, the OIR released one document, but withheld portions of that document on the grounds that they were either nonresponsive or exempt from disclosure under Exemptions 5 of the FOIA. The Appellant asserts that OIR improperly withheld information under Exemption 5. This Appeal, if granted, would require OIR to release the withheld material.

I. Background

On February 19, 2016, the Appellant filed a FOIA request with the DOE. In the request, the Appellant sought “[a]ny email sent or received by Kenneth Venuto, of the DOE office of Human Capital Management, from June 1, 2015 to December 1, 2015, pertaining to my transfer from the Bonneville Power Administration to the Southwestern Power Administration effective August 9, 2015.” Request email dated February 19, 2016, from Appellant to OIR. In response to the request, OIR located one responsive document. Determination Letter from Alexander C. Morris, OIR, to Appellant. OIR withheld information from the document on the grounds that the information was either nonresponsive or that it was exempt from disclosure under Exemptions 5 of the FOIA. *Id.* With respect to its Exemption 5 withholdings, OIR withheld the information under the deliberative process privilege. *Id.* Explaining its reasoning, OIR stated that the withheld information consisted of material that was pre-decisional and not representative of a final agency decision. *Id.* OIR concluded that release of the material “would compromise the deliberative process by which government makes its decision.” *Id.*

In the Appeal, the Appellant contends that the withheld information is not pre-decisional because she had already accepted a position with Southwestern Power Administration (SWPA). Appeal Letter received June 20, 2016, from Appellant to OHA (Appeal) at 1-2.

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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA's goal of broad disclosure. *See 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 a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

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*).

As noted, OIR withheld information pursuant to the deliberative process privilege of Exemption 5. Under the deliberative process privilege, 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) (*Petroleum Info. Corp.*). 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 reviewed redacted and unredacted versions of the document. The Appellant has challenged the withholding claiming:

The redacted portion . . . cannot be pre-decisional on the question of whether to offer me employment at Southwestern Power Administration. If the decision in question is something else, such as a decision on whether or not to rescind my accepted offer, then DOE has not provided proof that this particular email was indeed pre-decisional. If anything, the email itself places doubt on whether it is pre-decisional because it appears to be asking for status on whether or not something has happened. The burden is on the agency to establish the pre-decisional nature of the communication.

Appeal at 2. We have reviewed the unredacted version of the document. The only issue we must review is whether OIR properly withheld the information under Exemption 5's deliberative process. We conclude that it did. The material in the document is pre-decisional in that it was asking for an opinion prior to a decision being made. We further find that the information is the type of information that the deliberative process privilege routinely protects. None of the Appellant's several arguments on Appeal are persuasive.

Finally, DOE's FOIA regulations provide that the DOE should release material exempt from mandatory disclosure if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. OIR, however, concluded that discretionary disclosure would not be in the public interest because the knowledge that deliberative discussions might be shared publicly could inhibit "frank, written discussion of policy matters" and thus harm the quality of agency decisions. Determination Letter at 2. We agree with OIR's reasoning.

It Is Therefore Ordered That:

- (1) The Appeal filed on June 20, 2016, by Kathy L. Black, Case No. FIA-16-0040, 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.

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 the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
Email: ogis@nara.gov

Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

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Date: June 27, 2016