United States Department of Energy
Office of Hearings and Appeals

In the Matter of the Center for Biological Diversity	)	
	)	Case No.: FIA-17-0048
Filing Date: November 21, 2017	)	
	)	

Issued: December 21, 2017

Decision and Order

On November 21, 2017, the Center for Biological Diversity (Appellant) appealed a determination issued by the Department of Energy's (DOE) Office of Public Information (OPI) on September 15, 2017 (Request No. HQ-2017-00965-F). In that determination, OPI responded, on behalf of the Office of Energy Efficiency and Renewable Energy (EERE), to a request filed 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. The Appellant challenges the adequacy of the search for responsive records and OPI's decision to withhold information under Exemption 5 of the FOIA. As explained below, we have determined that the Appeal should be granted in part.

I. Background

The Appellant filed a FOIA request at DOE headquarters for "all records mentioning, referencing or including the Energy Star Program . . . since November 1, 2016." Request from Appellant to DOE (April 26, 2017). The Appellant subsequently agreed to amend its request to the following:

> All records that describe, discuss, or analyze the viability, budget, or changes to the administration of the Energy Star program including communications with the (a) Beach head team and/or the Trump Administration, (b) EPA and/or OMB, and (c) Non-governmental entities. The time period for this request is November 1, 2016, to present and does not include records which discuss products, home, and/or publically available information.

Email from Appellant to Auborn Finney, OPI (June 15, 2017). In response to the request, OPI asked EERE to conduct a search for responsive records. On September 15, 2017, OPI issued a determination on EERE's behalf. Determination Letter from Alexander C. Morris, FOIA Officer, OPI, to Appellant (September 15, 2017). In that determination, OPI indicated that EERE had located four responsive records. OPI labeled those documents numerically, as Documents 1, 2, 3, and 4. OPI withheld information in Documents 1, 2, and 4 pursuant to the deliberative process of

Exemption 5 of the FOIA. *Id*. at 1, 4. OPI described its Exemption 5 withholdings as "draft versions of documents and pre-decisional discussions between DOE staff."[1] *Id*. at 1-2.

In its appeal to the Office of Hearings and Appeals (OHA), the Appellant challenges the adequacy of the DOE's search for responsive records. Appeal from Appellant to Director, OHA (November 21, 2017) ("Appeal") at 4-5. The Appellant contends that OPI's determination did not contain a detailed description of the search that was performed, and that this suggests that the search was inadequate. *Id*. at 5. The Appellant also challenges OPI's decision to withhold information under the deliberative process privilege of Exemption 5. *Id*. at 5-6. The Appellant argues that the OPI should have produced a detailed affidavit, or a similar document, describing the reasons for the Exemption 5 withholdings. *Id*. at 5-6. The Appellant requests an additional search and the release of all material withheld under Exemption 5. *Id*. at 9-10.

II. Analysis

The Appellant has challenged the search that was performed as well as OPI's Exemption 5 withholdings. The common thread in both these challenges is that OPI's determination letter was not sufficiently detailed. Accordingly, we will begin by addressing whether OPI's determination letter was adequate. Our analysis will then review the adequacy of the search and whether OPI properly withheld information under Exemption 5.

A. Adequacy of the Determination Letter

It is well established that a federal court may require an agency to support a FOIA determination by means of detailed declarations or affidavits, or through a "Vaughn index" describing the reasons for each redaction. *Chesapeake Bay Found., Inc. vs. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 105 (D.D.C. 2009). The Appellant contends that OPI should have responded to its request in a similarly thorough manner. Appeal at 5-6. However, agencies are not required to produce declarations or affidavits, or Vaughn indices, when initially responding to FOIA requests. *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.") Consequently, it was not necessary for OPI to produce a detailed description of its search or the reasons for its Exemption 5 withholdings.

On the other hand, the FOIA does require agencies to notify requesters of the determination reached "and the reasons therefor." 5 U.S.C. § 552(a)(6)(A)(i)(I). In addition, we have found that DOE determination letters must fulfill certain requirements to enable the FOIA requester to decide whether the agency's response to the request was adequate and proper, and to provide this office with a record upon which to base its consideration of an administrative appeal. *See, e.g., The Oregonian*, OHA Case No. VFA-0467 (1999). Determination letters must: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; and (3) specify the exemption or exemptions under which information was withheld. *See, e.g., Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Tom Marks*, OHA Case No. TFA-0288 (2009). Additionally, DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing "a brief explanation of how the exemption applies to the record withheld." 10 C.F.R. § 1004.7(b)(1). Further, with respect to the deliberative process privilege of

[1] OPI also redacted information in Document 3 pursuant to Exemption 6 of the FOIA. Appeal at 1, 4.

Exemption 5, we have in some cases required determination letters to specify "which decision making process or matters would be compromised by release of the documents." *National Security Archive*, OHA Case No. FIA-13-0069 (2013); *see also Citizens for Responsibility and Ethics in Washington*, OHA Case No. FIA-13-0010 (2013).

OPI's determination letter states that EERE conducted a search of its files and located four responsive records; no further description of the search process is required under the FOIA or DOE regulations. The redacted documents attached to OPI's determination letter also clearly show where information was withheld under Exemption 5. Although OPI has not identified the decision-making processes at issue for the purposes of its deliberative process analysis, we find that the released material combined with the nature of the request provided the Appellant with a sufficient amount of information upon which to base an appeal.[2] To the extent that the Appellant seeks more information about each of the documents, we provide that below. In addition, we are remanding this matter to OPI for the reasons provided herein. On remand, OPI may choose to provide additional detail in a revised determination letter.

B. Adequacy of the Search

We next review the adequacy of the search that was conducted in response to this request. The FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1981) (emphasis in original). For a search to be adequate, an agency must search "*all* locations likely to contain responsive documents." *Bartko v. Dep't of Justice*, 167 F. Supp. 3d 55, 64 (D.D.C. 2016) (emphasis in original). We have not hesitated to remand a case where it is evident that the search conducted was, in fact, inadequate. *See, e.g.*, *Ralph E. Sletager*, OHA Case No. FIA-14-0030 (2014).

We contacted both the OPI and officials in EERE to obtain a description of the search. Our review found that EERE sent the request to eight managers in the EERE's Building Technologies Office (BTO), the office with responsibility for DOE's role in the ENERGY STAR program.[3] Memorandum of Telephone Conversation between Lucy Debutts, EERE, and Gregory Krauss, OHA (November 29, 2017) ("Debutts Memo") at 1; FOIA Search Certification Form, HQ-2017-00965-F (July 6, 2017) ("Certification Form") at 1. Each of those individuals performed searches of their email accounts. Debutts Memo at 1; Certification Form at 1. The individuals searched using the term "Energy Star" and reviewed records for responsiveness. Certification Form at 1. Lower-level employees were not asked to search their records. OPI and EERE officials explained that this was because it was understood that the Appellant sought records regarding significant changes to the ENERGY STAR program and lower-level officials were unlikely to have proposed such changes. Memorandum of Telephone Conversation between Auborn Finney, OPI, and

[2] For example, it is evident from the released material that Documents 1 and 4 regard the FY 2018 budget and that Document 3 consists of a communication between DOE and Environmental Protection Agency officials on a press release related to the ENERGY STAR program.

[3] The DOE administers the ENERGY STAR program jointly with the Environmental Protection Agency.

Gregory Krauss, OHA (December 11, 2017). Memorandum of Telephone Conversation between Ashley Armstrong, BTO, and Gregory Krauss, OHA (December 6, 2017) ("Armstrong Memo") at 1. The search produced 13 documents, which EERE provided to OPI. Certification Form at 1. OPI determined that nine of the records were unresponsive or duplicates and therefore released four documents only. Memorandum of Telephone Conversation between Auborn Finney, OPI, and Gregory Krauss, OHA (November 29, 2017).

We find that this search process, for the most part, was reasonably calculated to uncover the requested records. Records regarding significant changes to the ENERGY STAR program likely would have been shared through email. The search term "Energy Star" should have retrieved most or all responsive records. We agree that it was reasonable not to send the request to all individuals within the BTO. It is unlikely that discussion of substantial changes to the ENERGY STAR program would have been communicated to lower-level officials, or by them, without also being received by the BTO leadership.

Furthermore, we do not disagree with OPI's finding that 9 of the 13 documents it obtained from EERE were not responsive or duplicates. Our review of those documents found that one is an email contained within the email chain in Document 2. It was unnecessary to release this record. Five of the documents regard internal DOE discussions about Executive Order 13771. Some of this correspondence regards DOE's energy conservation standards, but it does not include discussion about the ENERGY STAR program.[4] Three other emails regard a draft Memorandum of Understanding (MOU) developed between DOE, the Environmental Protection Agency (EPA), the Department of Housing and Urban Development, and the Department of Agriculture. These documents contain some brief discussion about using ENERGY STAR program expertise for cooperative purposes, but they do not include any discussion about significant changes to the ENERGY STAR program. Therefore, we agree that these documents are unresponsive.

We nevertheless find that the search that was conducted was inadequate in two respects. First, one of the eight BTO leaders informed us that he may not have conducted a search and that he may have additional responsive records. Memorandum of Telephone Conversation between David Lee, BTO, and Gregory Krauss, OHA (December 11, 2017). We will remand this matter so that EERE can verify that all eight individuals conducted a search. Second, we are not persuaded that a search has been conducted in all locations likely to have responsive records. One BTO official stated that individuals in EERE's senior leadership may have additional responsive records. Armstrong Memo at 1. Those individuals have not conducted a search. Email from Auborn Finney, OPI, to Gregory Krauss, OHA (December 12, 2017). We therefore find that OPI should identify any individuals in EERE's leadership likely to have responsive records and ask them to conduct a search. OPI should also verify that there are no other locations, either in EERE or in an office outside EERE,[5] likely to have responsive documents.

[4] The energy conservation standards that DOE issues are distinct from the ENERGY STAR program. DOE issues mandatory, minimum energy conservation standards for appliances and equipment. The ENERGY STAR program is a voluntary program that enables energy efficiency gains through labeling and other tools.

[5] In this respect, we note that the request seeks communications involving the transition team and Trump administration officials.

C. Exemption 5 Withholdings

The FOIA requires that documents held by federal agencies generally be released to the public upon request. It also, 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 exemptions 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).

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, OPI withheld information pursuant to the deliberative process privilege. 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). 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*.

1. *Documents 1 and 4*

We reviewed the information that OPI withheld under the deliberative process privilege in Documents 1 and 4. Those records, which are nearly the same, consist of an intra-agency communication, an email, between EERE officials. Attached to the email in both instances is a 20-page document ("Q&A Document") containing questions posed to the BTO by the EERE's Office of Legislative Affairs. Memorandum of Telephone Conversation between Joanne Lowry, BTO,

and Gregory Krauss, OHA (December 14, 2017) ("Lowry Memo") at 1. The questions ask for information about the effect of the President's FY 2018 budget proposal on the BTO. *Id*. BTO officials worked together to draft a response to these questions. *Id*. OPI released the text of the questions but redacted the answers. The Q&A Document in Document 1 is nearly identical to the one in Document 4, except that the latter appears to be a revised version.

We agree that information in the Q&A Document may be withheld under the deliberative process privilege. The redacted material is predecisional in that it reflects ongoing discussions about the effect on the BTO of potential budget changes. The material is deliberative because it consists of policy analysis by BTO officials on which activities would be terminated, which would remain, and what the BTO's priorities would be under the proposed budget. The document clearly reflects a consultative process, both within the BTO and between the BTO and others in EERE. We also note that much of the redacted material has been marked with edits and comments. Because releasing this material would reveal the drafting process, we believe that this record should be treated like a draft document, a type of record that the deliberative process privilege routinely protects.[6]

Nevertheless, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). At least some redacted portions of Documents 1 and 4 appear to be factual in nature and therefore not protected by the deliberative process privilege. For example, in a section labeled "Background," the Q&A Document provides a factual description of the Better Buildings program. Because not all of this material is deliberative, OPI should review whether portions of it can be segregated and released.

2. *Document 2*

In Document 2, OPI redacted material in a March 1, 2017, email from a BTO official to an EPA official. In the email, an inter-agency communication, the BTO official explains how DOE and the EPA have in the past coordinated a joint press release announcing winners of awards given through the ENERGY STAR program. The redacted portion of the email contains analysis about continuing this coordination in the new presidential administration. We find that the withheld material is predecisional and deliberative because it consists of the thoughts and opinions of one BTO official on future coordination between the agencies. In addition, although one of the redacted sentences contains a statement that is more factual than deliberative, we find that a release of this information could compromise the nature of the deliberations. Agencies are not required to release factual material that is so "'inextricably intertwined'" with material protected by deliberative process privilege that it "would 'compromise the confidentiality of the deliberative information that is entitled to protection under Exemption 5.'" *Hopkins v. United States Dep't of Housing & Urban Dev*., 929 F.2d 81, 85 (2nd Cir. 1991) (quoting *EPA v. Mink*, 410 U.S. 73, 92 (1973)).

[6] The Q&A Document in both Documents 1 and 4 is labeled as a "draft." Although it appears that the Q&A Document in Document 1 is a draft, we have been unable to verify the same for Document 4. One BTO official indicated that the final version of the document sent to the Office of Legislative Affairs was labeled as a "draft." Lowry Memo at 1. In any event, given that both documents show the drafting process, the deliberative process privilege applies.

3. *Public Interest*

DOE regulations provide that the DOE should 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. However, we agree with OPI that release of Exemption 5 material in Documents 1, 2, and 4 is not in the public interest. Such a release could restrict the ability of DOE officials to share opinions without fear of disclosure, and thereby harm the quality of agency decisions.

III. Conclusion

Based on the foregoing, we find that OPI must take additional steps to conduct an adequate search, including verifying that all eight individuals conducted a search and referring the request to additional individuals who may have responsive records. OPI should also review whether any factual information can be segregated and released from Documents 1 and 4.

IV. Order

It is hereby ordered that the Appeal filed on November 21, 2017, by the Center for Biological Diversity, Case No. FIA-17-0048, is granted in part.

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

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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Director
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