

United States Department of Energy
Office of Hearings and Appeals

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In the Matter of the Center for Biological Diversity)
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Filing Date: December 18, 2017) Case No.: FIA-17-0053
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Issued: January 5, 2018

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Decision and Order

On December 18, 2017, the Center for Biological Diversity (Appellant) appealed a determination letter issued to it from the Department of Energy’s (DOE) Western Area Power Administration (WAPA) (Request No. WAPA-2017-01129-F). In that determination, WAPA 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. WAPA released over 1,000 documents, but redacted certain portions, in relevant part, pursuant to FOIA Exemptions (b)(3), (4), and (5). The Appellant challenged the adequacy of WAPA’s search and the accompanying determination letter. It further challenged WAPA’s decision to withhold information pursuant to the above listed FOIA exemptions. This Appeal, if granted, would require an additional search for responsive information and would require WAPA to release some or all of the redacted information.

I. Background

On May 18, 2017, WAPA received a FOIA Request from the Appellant, seeking “all records mentioning, including and/or referencing Big Bend to Witten Transmission Line Project. *See* <https://energy.gov/nepa/ea-1880-big-bend-witten-transmissionline-project-south-dakota>, website last visited May 17, 2017.” FOIA Request (May 17, 2017); WAPA Acknowledgement Letter (June 8, 2017). In response, WAPA provided the Appellant with a DVD containing the responsive documents. Determination Letter (September 19, 2017). WAPA determined that certain information should be withheld pursuant to Exemptions 3, 4, and 5 of the FOIA.¹ Determination Letter (September 19, 2017).

On December 18, 2017, the Office of Hearings and Appeals (OHA) received the Appellant’s challenge to WAPA’s determination. FOIA Appeal (December 18, 2017). In the Appeal, the Appellant contends that WAPA’s search for responsive records and the determination letter were inadequate, *id.* at 4-5, and that WAPA failed to carry “its burden to prove that it may lawfully withhold responsive records under Exemption[s]” 3, 4, and 5. *Id.* at 5-16. The Appellant further

¹ WAPA additionally redacted information pursuant to Exemption 6; however, those redactions are not before us on appeal. *See* FOIA Appeal at 6. (December 18, 2017).

alleges that WAPA “failed to show that it provided all reasonable segregable portions of fully withheld records.” *Id.* at 16.

II. Analysis

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 WAPA should have responded to its request in a similarly thorough manner. FOIA Appeal at 5, 12. However, agencies are not required to produce declarations, 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 WAPA to produce a detailed description of its search or the reasons for its withholdings.

However, 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, 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).² 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 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).

WAPA provided the Appellant with an interim determination letter and a final determination letter. Interim Determination Letter (August 10, 2017); Final Determination Letter (September 19, 2017). In the interim determination letter, WAPA stated that it located the responsive records, and the final determination letter indicated that it provided a DVD of the responsive records. *Id.* No further description of the search process is required under the FOIA or DOE regulations. The redacted documents provided with the determination letter also clearly show where information was withheld and which exemption was applied. With regard to the Exemption 5 redactions, WAPA

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

did indicate in the redaction that the attorney-client privilege was used, and explained in the determination letter that all other Exemption 5 redactions were made pursuant to the deliberative process privilege. Determination Letter at 2-3; Binder 1 Redaction. To the extent the Appellant seeks more information about the redacted documents, we are remanding this matter to WAPA for the reasons provided herein. On remand, WAPA may choose to provide additional detail in a revised determination letter.

B. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply “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*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ralph Sletager*, Case No. FIA-14-0030 (2014).

WAPA provided our office with information regarding the search it conducted to process the Appellant’s FOIA request. Memorandum of Conversations between WAPA and OHA (December 21, 27 and 28, 2017). WAPA began its search on May 18, 2017, and determined that the requested records, pertaining to the Big Bend to Witten Transmission Line Project, would be housed solely at WAPA’s Montana regional office. *Id.* WAPA sent the exact language of the FOIA request to the Montana office. *Id.* The Montana office responded with two completed search certificates, showing that searches were conducted by six different individuals over the course of 22 hours. Search Certificates (May 26, 2017; July 17, 2017). The search certificates show that both manual and automated searches were conducted of staff records, email accounts, archived email accounts, and archived onsite records using the following search terms: “Big,” “Bend,” “Bigbend,” “Witten,” “Whitten,” “Lowerbrule,” “RUS,” “Rural Utilities,” “Rural Utility,” “Big Bend-Witten,” and “Big Bend Lower Brule.” *Id.*

Contrary to the Appellant’s claim that WAPA “found four responsive records to the Center’s FOIA request,” FOIA Appeal at 5, WAPA’s search produced over 1,000 documents, which WAPA provided to Appellant in seven electronic binders compiled onto one DVD. Emails from WAPA to OHA (December 21, 2017); Memorandum of Conversations. With regard to the Appellant’s additional contention that “WAPA’s Final Determination Letter merely states that DOE’s Office of Energy and Efficiency and Renewable Energy started its search on July 3, 2017 which is the cutoff date for responsive documents,” FOIA Appeal at 5, this information is not contained in WAPA’s Final Determination Letter. Determination Letter (September 19, 2017).³ As such, we decline to examine this issue any further.

Based on the search information provided by WAPA, we find that it conducted a search reasonably calculated to uncover the records sought by the Appellant, and that the search was therefore adequate.

³ We note that it appears that the Appellant may have copied from its previous FOIA appeal, *Center for Biological Diversity*, Case No. FIA-17-0048 (2017), and pasted incorrect information into the present appeal.

C. Exemptions

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). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of the requested records is not possible." 5 U.S.C. § 552(a)(8)(A). DOE must "take reasonable steps necessary to segregate and release nonexempt information." *Id.*

The Appellant challenges WAPA's use of Exemptions 3, 4, and 5 to withhold information from the released documents contained in Binders 1-7.

1. Binder 1: Exemption 5

The Appellant challenges WAPA's use of Exemption (b)(5) to redact the responsive documents. FOIA Appeal at 11-16. 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). 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).

a) Attorney-Client Privilege

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Subpoena of Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); 8 J. Wigmore, *Evidence*, § 2291, p. 590 (McNaughton Rev. Ed. 1961); McCormack, *Law of Evidence*, Sec. 87, p.175 (2d ed. E. Cleary 1972). Not all communications between attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

WAPA used the attorney-client privilege of Exemption 5 to redact a portion of one document contained in Binder 1. As the redacted document shows, the withheld portion is a "record note." WAPA explained that this document is a file copy, and this record note is internal to the agency. Memorandum of Conversations. Our review of the redaction reveals that the first sentence contains

information that was necessary to obtain legal advice from WAPA's attorney, and the second sentence details the advice that was provided. Accordingly, this redaction was properly made pursuant to the attorney-client privilege of Exemption 5.

With regard to the remaining redactions, WAPA has requested that we remand the matter to it for further review, analysis, and processing. Email from OHA to WAPA (January 3, 2018). As such, we remand the redactions contained in Binders 2-7.

III. Order

It is hereby ordered that the Appeal filed on December 18, 2017, by the Center for Biological Diversity, No. FIA-17-0053 is granted in part and remanded to WAPA for further processing.

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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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