

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Greg Marlowe)
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Filing Date: August 2, 2019) Case No.: FIA-19-0029
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Issued: August 13, 2019

Decision and Order

On August 2, 2019, Mr. Greg Marlowe (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-01464-F. In that letter, OPI responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought correspondence that would “reveal . . . the actual reason [] two FOIA requests [submitted by Appellant] were improperly ‘transferred’ from the domain of DOE to . . . PTO.” Appeal Ex. 1 at 1. OPI provided thirty-six pages of records in response to Appellant’s request, including e-mails discussing the transfer of Appellant’s prior FOIA requests to the U.S. Patent and Trademark Office (PTO). OPI redacted portions of some of the responsive e-mails pursuant to Exemption 5 of the FOIA. Appellant asserts that OPI improperly applied Exemption 5. As explained below, we deny Appellant’s appeal.

I. Background

The FOIA request by Appellant to OPI which is at issue in this appeal sought communications explaining why OPI transferred two of his FOIA requests to PTO in 2013. Appellant’s transferred FOIA requests concerned record of invention forms related to research by Dr. Willard Libby in connection with the Manhattan Project. Appeal at 1. OPI issued a response to Appellant’s FOIA request in which it provided thirty-six pages of responsive records, including e-mail communications between DOE and PTO employees concerning Appellant’s FOIA requests. Determination Letter from Alexander C. Morris, Authorizing and Denying Official, OPI, to Greg Marlowe (Apr. 15, 2019) (Determination Letter).

The e-mail records OPI provided to Appellant indicated that, in the opinion of the corresponding DOE personnel, processing of Appellant’s FOIA requests would be moot because the requested records contained classified information and were barred from disclosure under provisions of the Invention Secrecy Act, codified at 35 U.S.C. § 181. Determination Letter Att. 1 at 2–4. The corresponding DOE personnel further determined that the appropriate course of action would be to transfer Appellant’s FOIA request to PTO for a determination. *Id.*

On August 2, 2019, DOE's Office of Hearings and Appeals (OHA) received the appeal. The appeal discusses at length Appellant's disagreement with DOE's processing of his FOIA requests and his opinion that the correspondence provided to him by OPI revealed a lack of understanding and judgement on the part of the corresponding DOE officials. Appellant's appeal made mention of Exemption 5 of the FOIA in a single sentence, quoting OPI's Determination Letter. Appeal at 1.

II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA].” *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). 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 a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

A. Applicability of Exemption 5 to the E-Mail Communications

Exemption 5 applies to “inter-agency or intra-agency memorandums or letters that 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). The U.S. Supreme Court has interpreted this provision to “exempt those documents, and only those documents that are normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

OPI withheld portions of the responsive records under the deliberative process privilege because they contained “pre-decisional, deliberative inter- and intra-agency communications between DOE staff and [P]TO officials.” Determination Letter at 2. The deliberative process privilege protects records which are both pre-decisional and deliberative. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014). A document is pre-decisional if it is “generated before the adoption of an agency policy.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is deliberative if “it reflects the give-and-take of the consultative process. The exemption thus covers 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 Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

The recipients of the e-mails identified by OPI as responsive to Appellant's FOIA request were all DOE or PTO personnel, and therefore each of the e-mails is an inter-agency or intra-agency record. The communications are pre-decisional, since each of the e-mails pre-dated OPI's determination to transfer Appellant's FOIA requests to PTO. Moreover, the redacted portions of the e-mails, including questions from OPI to other DOE personnel, comparison of options for addressing Appellant's FOIA requests, and discussion of hypothetical outcomes, are plainly deliberative communications reflecting the give-and-take of the consultative process. Communications of this nature, concerning how best to respond to external inquiries, fall squarely within the deliberative process privilege and are exempt from disclosure under Exemption 5 of the FOIA. See *Judicial*

Watch, Inc. v. Dep't of Treasury, 796 F.Supp.2d 13, 30–31 (D.D.C. 2011) (finding that e-mails between Department of Treasury personnel on how best to respond to a press inquiry were pre-decisional and deliberative intra-agency communications).

Appellant's appeal is almost entirely devoted to arguments concerning how DOE personnel processed FOIA requests he made over six years ago and the merits of the decision to transfer those requests to PTO, neither of which is relevant to the propriety of OPI's redactions under Exemption 5 in the present case. The appeal notes language in the Determination Letter indicating that DOE may, in some circumstances, disclose material in its discretion that is exempt from disclosure under the FOIA if DOE determines that doing so is in the public interest. Appeal at 1. However, discretionary decisions to release material exempt from disclosure under the FOIA rest with the office making the initial determination, not OHA. Moreover, OPI exercised considerable restraint in making its redactions under Exemption 5, which allowed Appellant to understand the primary basis for DOE's determination to transfer the FOIA requests to PTO. *See* Appeal at 3 (quoting unredacted analysis by a DOE official in the records provided to Appellant and criticizing the basis upon which the DOE official recommended transferring Appellant's FOIA requests to PTO). Accordingly, we deny Appellant's appeal.

III. Order

It is hereby ordered that the appeal filed by Mr. Greg Marlowe on August 2, 2019, No. FIA-19-0029, is denied.

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. OGIS may be contacted in any of the following ways:

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National Archives and Records Administration
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