

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Center for Public Integrity)
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Filing Date: September 3, 2019) Case No.: FIA-19-0031
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Issued: September 10, 2019

Decision and Order

On September 3, 2019, the Center for Public Integrity (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) regarding Request No. 17-00121-H. In that letter, NNSA 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 a document titled “Independent Cost Estimate: Pit Manufacturing Equipment for the Plutonium Sustainment Program issued by the Office of Cost, Policy and Analysis” (Cost Estimate). Appeal Ex. 2. On August 14, 2019, the NNSA responded to Appellant’s FOIA request and provided a copy of the Cost Estimate. The NNSA redacted portions of the Cost Estimate pursuant to Exemptions 3 and 5 of the FOIA. *Id.* at 1–2.¹ Appellant asserts on appeal that the NNSA improperly applied Exemption 5. As explained below, we deny Appellant’s appeal.

I. Background

The NNSA’s Plutonium Program Manager requested that the Office of Cost Policy and Analysis prepare the Cost Estimate to assess the capability of the NNSA’s Plutonium Sustainment Program (Program) to meet production goals for plutonium pits for use in the nation’s nuclear weapon stockpile and to estimate costs for the Program for the 2018 fiscal year and beyond. Cost Estimate at 2. The Cost Estimate is organized into various sections that describe the Program, the methodology for the Cost Estimate, the results concerning the estimated cost and timeline for Program activities based on the assumptions applied, and recommendations to the Plutonium Program Manager based on the duration and cost findings.

On September 3, 2019, DOE’s Office of Hearings and Appeals (OHA) received the appeal. The appeal asserts that the NNSA misapplied Exemption 5 because the redacted portions of the Cost Estimate were factual in nature. Appeal at 1. According to Appellant, “[c]ost and manufacturing estimates, findings, and analysis of pit manufacturing equipment in no way present a formal decision to be made, but instead merely statements of finding or fact” *Id.*

¹ Appellant’s appeal does not challenge the NNSA’s redactions under Exemption 3, and so we do not consider them in this decision.

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 Cost Estimate

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).

The NNSA withheld portions of the Cost Estimate under the deliberative process privilege because it contained estimates and recommendations “to advise the agency on the funding level for Plutonium Sustainment in Fiscal Year (FY) 2018 and beyond.” Ex. 2 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 Cost Estimate is a pre-decisional record because it was delivered to the Plutonium Program Manager in July 2016 and concerns estimates and recommendations for funding for the Program for the 2018 fiscal year and beyond. Cost Estimate at 1–2. The Cost Estimate was not adopted into DOE’s fiscal year 2018 budget request, and therefore it did not lose its pre-decisional status through incorporation into a final agency decision. See *Am. Soc’y of Pension Actuaries v. IRS*, 746 F. Supp. 188, 191 (D.D.C. 1990) (holding that records that “contain the analytic backup for the government estimate [] ‘embody the agency’s effective law and policy’ and therefore are not protected by Exemption 5.”) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 152).

The Cost Estimate is also deliberative. The Cost Estimate contains recommendations and subjective analysis of Program costs and capabilities based upon subjective methodological choices, and is clearly not itself a final agency position. Appellant asserts that the estimates, findings, and analysis contained in the Cost Estimate are factual, and therefore are not deliberative in nature. This is not the case.

Cost estimates are inherently non-factual information, because, although “[n]umbers have a surface precision that may lead the unsophisticated to think of them as fixed . . . cost estimates [] are far from fixed.” *Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). Subjective choices as to which prior projects to use as references, the assumed sequence of project events, and other parameters introduce significant uncertainty into the Cost Estimate’s seemingly factual numerical representation of Program costs. Requiring the release of cost estimates and recommendations stemming from those estimates could chill decisionmaking on grounds other than cost and lead to second guessing of decisions that diverge from cost estimates; both of which could “skew the decisionmaking process . . . [and] increase the incentives to lower officials’ fudging [sic] such estimates, or to higher-ups’ not even calling for them.” *Id.* at 393. This outcome would significantly undermine the open, frank exchange of opinions that Exemption 5 is intended to protect. *EPA v. Mink*, 410 U.S. 73, 87 (1973). OHA has previously found that budget cost estimates fall within Exemption 5, and we reach the same conclusion in this case. *Citizen Action of New Mexico*, OHA Case No. TFA-0218 at 3 (2007).

B. Segregability

The FOIA requires agencies to take reasonable steps to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). The FOIA does not require perfection, and segregability may be unreasonable when there is a relatively small amount of non-exempt material and “the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

In this case, the NNSA tailored its redactions so as to withhold estimates and recommendations but provide Appellant with sufficient information to understand the purpose and broad methodology of the Cost Estimate. We find the NNSA’s redactions under Exemption 5 reasonable and appropriate.

III. Order

It is hereby ordered that the appeal filed by Center for Public Integrity on September 3, 2019, No. FIA-19-0031, 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:

Office of Government Information Services
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