

United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Jerome Berryhill)
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Filing Date: November 4, 2019) Case No.: FIA-20-0005
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Issued: November 21, 2019

Decision and Order

On November 4, 2019, Jerome Berryhill (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Bonneville Power Administration (BPA) regarding Request No. BPA-2019-00620-F. In that determination, BPA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. BPA located several hundred pages of documents. It withheld 28 pages pursuant to FOIA Exemption (b)(5), citing attorney-client privilege, and 141 pages pursuant to Exemption (b)(6). Appellant challenges the redactions made pursuant to Exemption (b)(5). In this Decision, we deny the appeal.

I. BACKGROUND

Appellant filed a FOIA request on March 15, 2019, seeking “all BPA records pertaining to 4180 Wood Avenue, Eugene, Oregon, 97402.” Determination Letter at 1 (Aug. 7, 2019). BPA located 453 pages of records. *Id.* Redactions were applied to 28 pages pursuant to Exemption 5 of the FOIA, which protects from disclosure intra- and interagency documents that would be protected by privilege from disclosure during litigation. *Id.* BPA sent the Appellant a Determination Letter on August 7, 2019, outlining the located documents and the rationale for the applied exemptions. *Id.* Its explanation of Exemption 5 focused primarily on describing the deliberative process privilege, which exempts from disclosure intra- or interagency documents that show the predecisional decision-making process of an agency. *Id.* at 1–2. However, BPA concluded its explanation of the Exemption 5 redactions by invoking attorney-client privilege, stating, “[i]n this case, BPA asserts Exemption 5 to protect legal advice.” *Id.* The redacted documents are in the form of emails and draft letters.

Appellant timely filed his appeal, challenging BPA’s use of Exemption 5. Appeal at 1 (Nov. 4, 2019). In his appeal, he argued that, to properly invoke Exemption 5 for attorney-client privilege, BPA needed to identify a specific decision to which the exemptions applied. *Id.* at 1–2. He further argued that the redacted portions did not appear to involve an attorney and that no litigation was pending or threatened at the time. *Id.* at 2. Finally, he argued that the information was not confidential because the project discussed in the redacted documents had involved public input. *Id.*

II. ANALYSIS

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 the 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*). All withheld documents were internal to BPA, satisfying the origination requirement of Exemption 5.

“‘The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services,’ as well as ‘communications from attorneys to their clients if the communications rest on confidential information obtained from the client.’” *Animal Welfare Inst. v. Nat’l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 130 (D.D.C. 2019) (citing *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997)). For purposes of this privilege, an agency may be a client and its agency lawyers may function as its attorneys. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). The privilege is to be read narrowly, protecting only those communications intended to seek and convey legal advice based on confidential information provided by the client. *Id.*

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *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 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.” *Id.* 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.*

The draft letters are not confidential legal advice or request for such. They are drafts of a letter that was eventually sent to Appellant. The emails consist primarily of facts about BPA’s plan to perform maintenance and trimming on an easement used for powerlines. Agency attorneys are part of each email. There is a small amount of legal advice provided in the emails, but the majority of the information is non-confidential, factual information and non-legal opinion. Except for the small amount of legal advice communicated in emails by BPA’s attorneys, the information withheld under Exemption 5 does not fall under the attorney-client privilege. It does, however, fall under the deliberative process privilege.

The redacted emails were created as part of BPA’s process of deciding how to proceed with its maintenance and vegetation trimming plans in the face of resistance from the owner of the land

containing the easement. The emails consist of detailed discussion of various ways to proceed, indicating that they are predecisional and deliberative. They contain a back and forth discussion where new perspectives and ideas are introduced and evaluated. This is precisely the kind of information the deliberative process is designed to protect. Notably, the legal advice provided by BPA attorneys is also deliberative and predecisional, as it is part of the back and forth discussion that would eventually lead to a decision by BPA.

The draft letters are also predecisional and deliberative. The final versions of the letters were released to Appellant without Exemption 5 redaction. Comparison of the draft and final versions would allow the public to examine the changes made and, thus, the decision-making process of the drafters. *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982). If the drafts contain no changes from the final version, then Appellant already has that information and release of the drafts would not provide a remedy to Appellant. *Id.* (citing *Lead Industries Ass'n v. Occupational Safety and Health Admin.*, 610 F.2d 70, 85-6 (2d Cir. 1979)).

It is unclear from the Determination Letter whether BPA intended to invoke the deliberative process or attorney-client privilege. However, since the redacted information was properly withheld under the deliberative process privilege, we cannot see a reasonable purpose in remanding to BPA for correction. Accordingly, we find that the redacted information was properly withheld under Exemption 5.

III. ORDER

It is hereby ordered that the Appeal filed on November 4, 2019, by Jerome Berryhill, No. FIA-20-0005, 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 one's right to pursue litigation. OGIS may be contacted 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals