

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of The Seattle Times)
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Filing Date: April 10, 2020)
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Case No.: FIA-20-0024

Issued: April 23, 2020

Decision and Order

On April 10, 2020, The Seattle Times (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) Richland Operations Office (ROO) regarding Request No. FOI 2020-00431. In that letter, ROO 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 interview records generated during a review of incidents regarding radiological contamination of personnel at the Hanford Site in 2019. *See* Appeal Exhibit (Ex.) 2 at 1 (summarizing Appellant’s FOIA request). On April 6, 2020, ROO responded to Appellant’s FOIA request and provided seventy-two pages of interview summaries responsive to Appellant’s request (Interview Summaries). Appeal Ex. 1. ROO redacted portions of the Interview Summaries pursuant to Exemptions 5 and 6 of the FOIA. Appeal Ex. 2 at 1–2.¹ Appellant asserts on appeal that ROO improperly applied Exemption 5. As explained below, we deny Appellant’s appeal.

I. Background

In 2019, CH2M HILL Plateau Remediation Company (CH2M), a contractor at the Hanford Site, established a “contractor resumption team” (Resumption Team) to interview DOE and contractor personnel concerning radiological exposure at the Hanford Site that occurred earlier that year. *See* Appeal Ex. 1 at 6 (summarizing the purpose of the interview to an interviewee). The interviews addressed interviewees’ professional backgrounds, knowledge of contamination events, perceptions of the sufficiency of trainings and internal controls at the Hanford Site, and recommendations for minimizing contamination events in the future. *See id.* at 6–9. The Interview Summaries were prepared by the Resumption Team to convey feedback and recommendations received from interviewees through this process.

In its response to Appellant’s FOIA request, ROO explained that it was withholding portions of the Interview Summaries under Exemption 5 of the FOIA based upon the deliberative process privilege and the common interest doctrine. Appeal Ex. 2 at 1–2.

¹ Appellant’s appeal does not challenge ROO’s redactions under Exemption 6.

On April 10, 2020, DOE's Office of Hearings and Appeals (OHA) received the appeal. The appeal asserts that ROO erroneously concluded that Exemption 5 of the FOIA was applicable to the Interview Summaries. Appeal at 1. According to Appellant, the contents of the Interview Summaries reflected "statements of fact made during interviews," were not advisory, and "inform[ed] no tangible, pointedly framed decision." *Id.* Therefore, Appellant argued that the deliberative process privilege was not applicable. *Id.* In addition, Appellant argued that ROO had not sufficiently justified its invocation of the common interest doctrine. *Id.* Finally, Appellant asserted that, even if Exemption 5 was technically applicable, ROO should nevertheless exercise its discretion to disclose the Interview Summaries because ROO had not adequately explained how disclosure "poses a sufficient prospect of actual harm to justify withholding them." *Id.*

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 Interview Summaries

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). ROO withheld portions of the Interview Summaries under the deliberative process privilege because "[t]he information within the documents that is being shielded covers the personal opinions of those interviewed rather than the final policy of the government." Appeal 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, 866 (D.C. Cir. 1980).

1. The Interview Summaries are Intra-Agency Records

Records produced by a contractor to a federal agency, like the Interview Summaries, are deemed intra-agency records under Exemption 5 when “outside consultants played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10 (2001) (*Klamath*). Documents prepared by a contractor acting in furtherance of its contracted role are protected unless the contractor “assume[s] a position that is ‘necessarily adverse’ to the government,” even if the contractor acts in its own self-interest in preparing the documents. *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 892 F.Supp.2d 28, 46 (D.D.C. 2012) (*EPIC*) (citing *Klamath*, 532 U.S. at 14).

In this case, the Resumption Team “played essentially the same part . . . [as] agency personnel might have done” in preparing the Interview Summaries; therefore, the Interview Summaries are intra-agency records under Exemption 5. *Klamath*, 532 U.S. at 10. DOE contracted with CH2M to perform remediation activities at the Hanford Site, and the Resumption Team acted in furtherance of this contractual duty to DOE in conducting the interviews to identify safety issues and potential process improvements. Regardless of CH2M’s self-interest in identifying problems in its operations at the Hanford Site, CH2M’s position was not “necessarily adverse” to DOE’s. *EPIC*, 892 F.Supp.2d at 46. Thus, we conclude that the Interview Summaries are intra-agency records under Exemption 5.²

2. The Interview Summaries are Pre-Decisional

The Interview Summaries are pre-decisional because they were prepared to assist in “analyzing causes [of radiological contamination] and develop corrective actions” at the Hanford Site. Appeal Ex. 2 at 6. Thus, the Interview Summaries clearly specify the decision-making process for which they were created; to inform CH2M’s corrective actions in response to radiological containment in the performance of its duties pursuant to a DOE contract. As CH2M had not decided what, if any, corrective actions to take prior to the Resumption Team’s interviews of DOE and contractor personnel described in the Interview Summaries, the Interview Summaries are pre-decisional. *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151.

Appellant asserts that the Interview Summaries are not pre-decisional because ROO “has not demonstrated and cannot truthfully demonstrate a formal decision of any kind . . . informed by the contents of the [Interview Summaries].” Appeal at 1. Contrary to Appellant’s argument, ROO is under no such obligation in asserting that the Interview Summaries are pre-decisional. To the contrary, so long as an agency can establish the role that a record played in deliberating potential courses of action, it need not “identify a specific decision in connection with which a memorandum

² We will not opine on the common interest doctrine cited by ROO in reaching our conclusion that the Interview Summaries are intra-agency records. “The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims.” *Hunton & Williams v. DOJ*, 590 F.3d 272, 277 (4th Cir. 2010) (finding that Exemption 5 covered communications between a governmental entity and a private party sharing privileged material, even if the governmental entity did not have a contractual relationship with the private party, where the governmental entity and private party shared a common interest). Having concluded that the Interview Summaries are intra-agency records under Exemption 5 pursuant to *Klamath*, we need not evaluate Appellant’s arguments as to the applicability of the common interest doctrine.

is prepared.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). Thus, as the Interview Summaries clearly specify the deliberative process for which they were created, the absence of a specific action taken in response to the information provided in the Interview Summaries is not a barrier to the application of Exemption 5 in this case.

3. The Interview Summaries are Deliberative

The Interview Summaries are also deliberative. The interviewees’ opinions as to the causes of radiological contamination at the Hanford Site and recommendations for reducing the risk of future contamination are non-factual opinions provided at the request of the Resumption Team to inform potential corrective actions. Moreover, the Interview Summaries, reflecting the differing opinions of interviewees, are summaries prepared by the Resumption Team and are not verbatim transcripts. These concise summaries reflect the information that the Resumption Team interviewers found most informative, and worthy of transmitting to the management officials who organized the Resumption Team. The distillation of the information gathered in the interviews by the Resumption Team into the Interview Summaries is itself a deliberative act which strongly supports ROO’s invocation of the deliberative process privilege. *See Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (finding that a record produced by “cull[ing] the relevant [sources], extract[ing] pertinent facts, organiz[ing] them to suit a specific purpose, and [] identify[ing] the significant issues” is deliberative, and exempt from disclosure under Exemption 5 even if the record is factual in nature).

The context in which the Interview Summaries were prepared further supports ROO’s invocation of the deliberative process privilege. The purpose of the deliberative process privilege is to facilitate candid exchanges of information in the development of governmental policy. *See Klamath*, 532 U.S. at 8–9 (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions,’ . . . by protecting open and frank discussion among those who make them within the Government.”). Here, DOE and contractor interviewees, as well as the Resumption Team, were asked to identify deficiencies that led to radiological contamination. Publicly exposing the opinions reflected in the Interview Summaries, particularly those critical of existing practices and most likely to help develop corrective action, would seriously risk chilling DOE’s ability to obtain candid assessments of operational practices in the future.

As the underlying opinions of the interviewees are non-factual, the Interview Summaries prepared by the Resumption Team to inform managerial decision-making reflected further deliberative action, and the disclosure of the redacted material risks damaging future DOE decision-making by chilling the candid exchange of information concerning operating practices, we conclude that ROO properly withheld the portions of the Interview Summaries redacted pursuant to the deliberative process privilege.

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). In this case, contrary to Appellant's assertions in his appeal, ROO adequately tailored its redactions to the Interview Summaries pursuant to Exemption 5 so as to disclose non-exempt information. We do not perceive any defect in ROO's efforts to segregate and disclose non-exempt information.

III. Order

It is hereby ordered that the appeal filed by The Seattle Times on April 10, 2020, No. FIA-20-0024, 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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