

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

In the Matter of Simon Edelman)		
)		
Filing Date: January 28, 2022)	Case Nos.:	FIA-22-0004
)		PAA-22-0002
_____)		

Issued: February 4, 2022

Decision and Order

On January 28, 2022, Mr. Simon Edelman (Appellant), through his counsel, appealed a determination letter issued by the United States Department of Energy’s (DOE) Office of Inspector General (OIG) regarding Request No. HQ-2021-00130-PA. In that letter, OIG responded to Appellant’s request under the Privacy Act, 5 U.S.C. § 552a, as implemented by DOE regulations codified at Part 1008 of Title 10 of the Code of Federal Regulations (C.F.R.), in which Appellant sought all records related to a complaint that he submitted to OIG alleging reprisal for revealing ethical violations and corruption by a former Secretary of Energy. *See* Appeal at 6–7 (reflecting Appellant’s FOIA request). OIG responded to Appellant’s request by letters dated December 30, 2021, and January 12, 2022, and provided responsive documents. *Id.* at 15–19, 22–26. OIG redacted portions of the documents pursuant to Exemptions 5, 6, and 7 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004.¹ *Id.* Appellant asserts on appeal that OIG failed to conduct an adequate search for responsive records and that OIG improperly applied Exemption 5 of the FOIA. Appeal at 1–2. As explained below, we grant Appellant’s appeal as to the adequacy of OIG’s search and deny the appeal in all other respects.

I. Background

Appellant’s counsel contacted the OIG hotline on January 11, 2018, alleging that Appellant had experienced retaliation for disclosing corruption. *See* Document (Doc.) 51 at 1 (summarizing OIG’s processing of Appellant’s complaint). OIG conducted an investigation of Appellant’s complaint which concluded on March 28, 2018, when OIG closed its file concerning Appellant’s complaint. *Id.* at 1–6. In October 2020, Appellant submitted a Privacy Act request seeking “all

¹ Pursuant to 5 U.S.C. § 552a(k)(2), “investigatory material compiled for law enforcement purposes” is exempt from disclosure under the Privacy Act, and therefore OIG could withhold all records concerning Appellant’s complaint under the Privacy Act. However, pursuant to 5 U.S.C. § 552a(t)(2), an agency may not withhold a record pursuant to the Privacy Act which is otherwise accessible under the FOIA. Therefore, OIG considered whether responsive records were subject to disclosure under the FOIA in processing Appellant’s request for records.

records related to [Appellant] and his reprisal complaint and any investigation or review undertaken by OIG”² Appeal at 6.

OIG identified 51 documents responsive to Appellant’s request. *Id.* at 22–23. In its responses to Appellant, OIG explained that it had redacted portions of responsive records pursuant to Exemptions 5, 6, and 7 of the FOIA. *Id.* at 15–19, 22–26. Among other things, the records included: an e-mail dated January 18, 2018, authored by OIG’s Assistant IG for Investigations concerning Appellant’s complaint (Doc. 1); a response to that e-mail from an individual whose name was redacted by OIG (Doc. 10); and a chronology of OIG’s investigation of Appellant’s complaint from OIG’s internal case-tracking database (Doc. 51). OIG withheld from Doc. 1 and Doc. 10 a paragraph containing an opinion from a DOE attorney concerning an issue of law at issue in OIG’s investigation of Appellant’s complaint pursuant to Exemption 5 of the FOIA, and withheld an identical paragraph from Doc. 51 in which the information from Doc. 1 and Doc. 10 had been copied into OIG’s case-tracking database. Doc. 1 at 1; Doc. 10 at 1; Doc. 51 at 4.

On January 28, 2022, DOE’s Office of Hearings and Appeals (OHA) received Appellant’s appeal. The appeal asserted that OIG failed to conduct an adequate search for responsive records because records provided by OIG refer to other relevant documents not located by OIG’s search and none of the documents provided by OIG furnished a basis for OIG’s decision to close Appellant’s complaint file without further action. Appeal at 2–3. Appellant also argued that OIG failed to adequately justify the applicability of Exemption 5 to its redactions to Doc. 1, Doc. 10, and Doc. 51 or to establish that disclosing the redacted information could reasonably be foreseen to harm an interest protected under Exemption 5.³ *Id.* at 4.

OHA contacted OIG concerning its search for records responsive to Appellant’s request and redactions pursuant to Exemption 5. In its February 2, 2022 response, OIG acknowledged the existence of additional records responsive to Appellant’s request and indicated that it would transmit a supplementary response to Appellant with additional records. Response at 1. Regarding its redactions pursuant to Exemption 5, OIG asserted that the attorney-client, attorney work-product, and deliberative process privileges all applied to the redacted portions of the records. *Id.* at 3. OIG opined that disclosure of the redacted information could confuse the public as the redacted opinion was merely advisory and not a formal determination by OIG, disclosure of advisory opinions could have a chilling effect on the ability of OIG to obtain such opinions in the future, and disclosure would prevent DOE attorneys from being able to freely discuss their ideas, strategies, and recommendations. *Id.* at 4–5.

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

² Appellant’s request for records was assigned to OIG and DOE’s Office of the Chief Human Capital Officer (HC) to conduct a search. HC provided Appellant with 34 pages of responsive records. Appeal at 12. Appellant’s appeal does not allege any deficiency in HC’s search for responsive records and accordingly is not addressed in this Decision.

³ OIG notated Doc. 1, Doc. 10, and Doc. 51 to indicate that the redactions to the paragraph in question were made pursuant to Exemptions 5, 6, and 7(c) of the FOIA. OIG subsequently clarified that the references to Exemptions 6 and 7(c) were in error, and that the redactions were exclusively made pursuant to Exemption 5. Response at 3, n. 3.

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. 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. Adequacy of OIG’s Search

In responding to a request for information filed under the FOIA, 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). 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*, OHA Case No. FIA-14-0030 (2014).⁴

In this case, OIG has conceded the existence of additional records responsive to Appellant’s request. Response at 1. At least some of the additional records were referenced in Doc. 51 as alleged by Appellant in his appeal. *Id.* at 2. As OIG did not conduct a search for these records as of its January 12, 2022, response to Appellant’s request, and it is apparent that additional responsive records exist, we find that OIG’s search was not reasonably calculated to uncover all relevant documents.

B. Applicability of Exemption 5 to Doc. 1, Doc. 10, and Doc. 51

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). OIG withheld a paragraph from three records on the basis that the redacted information, which was identical in each record, was exempt from disclosure pursuant to the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege. 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).

⁴Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

1. Doc. 1, Doc. 10, and Doc. 51 are Intra-Agency Records

Doc. 1 and Doc. 10 are e-mails exchanged between DOE personnel, and Doc. 51 is an image of information contained in an OIG database. These records were prepared by DOE personnel and, in the case of Doc. 1 and Doc. 10, were transmitted to other DOE personnel. Appellant's appeal does not include any arguments to the effect that these documents are not intra-agency records. Accordingly, we find that all three documents are intra-agency records.

2. The Redacted Information is Pre-Decisional and Deliberative

The redacted portion of the documents is pre-decisional because the redacted opinion was provided months before OIG made a decision as to whether to close its investigation or take other action. *See Worldnetdaily.com, Inc. v. DOJ*, 215 F.Supp.3d 81, 84–85 (D.D.C. 2016) (holding that a memo recommending against prosecuting a defendant was pre-decisional because it was prepared nearly two months before the issuance of a letter formally declining to prosecute the defendant). The redacted opinion was provided to OIG no earlier than January 18, 2018, over two months prior to OIG's decision to close Appellant's case file. Doc. 1; Doc. 51 at 5. During the intervening period, OIG's ongoing investigatory activities and communications with other law enforcement bodies showed that it did not reach a final decision on Appellant's complaint until long after January 18, 2018. Doc. 51 at 1–5. Moreover, the DOE attorney who provided the opinion to OIG was not a member of OIG and had no authority to make a final decision as to OIG's investigation of the complaint. *See Worldnetdaily.com, Inc.*, 215 F.Supp.3d at 84 (finding that a memo recommending against prosecuting a defendant was pre-decisional because it was prepared by attorneys whose supervisors were free to accept or reject the recommendation at their discretion).

The redacted portion of the documents is also deliberative because it reflects the subjective legal opinion of the individual providing the advice at the request of OIG. *See Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (holding that “[t]here can be no doubt that [] legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5.”). The provision of a non-binding, subjective opinion by an agency expert on a topic at the request of OIG to assist it in carrying out an investigation is clearly indicative of the “give-and-take of the consultative process,” and is thus exempt from disclosure under the deliberative process privilege of Exemption 5. *Coastal States Gas Corp.*, 617 F.2d at 866.

Appellant asserts that, even if the redacted material is exempt from disclosure, releasing the information will not harm an interest protected under Exemption 5 and, therefore, that the information should be disclosed pursuant to 5 U.S.C. § 552(A)(8)(a)(i)(I). Appeal at 2. Contrary to Appellant's argument, we find that the anticipated harm of disclosure cuts to the very purpose of Exemption 5. As argued by OIG in its response to Appellant's appeal, the public disclosure of opinions provided to OIG by sources with whom it consults concerning issues raised in its investigations could compromise the candor and fullness of those opinions. Response at 4–5. OIG indicated this basis for its redactions in its response to Appellant's request, and this position is amply supported by judicial precedent. Appeal at 24; *see also Worldnetdaily.com, Inc.*, 215 F.Supp.3d at 85 (finding that disclosure of an advisory legal opinion exempt from disclosure under the deliberative process privilege could inhibit candor in the decision-making process).

For the reasons set forth above, we find that the information redacted by OIG from Doc. 1, Doc. 10, and Doc. 51 was exempt from disclosure under the deliberative process privilege and that its disclosure could reasonably be expected to harm an interest protected under Exemption 5. Having reached this conclusion, we need not assess the other bases asserted by OIG for its redactions under Exemption 5.

III. Order

It is hereby ordered that the Appeal filed by Simon Edelman on January 28, 2022, No. FIA-22-0004/PAA-22-0002, is granted as to the adequacy of OIG's search for responsive records and denied in all other respects. This matter is remanded to OIG to issue a new response in accordance with the explanation provided above.

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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