United Sates Department of Energy
Office of Hearings and Appeals

In the Matter of Joe Smyth	)	
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Filing Date: April 22, 2022	)	Case No.: FIA-22-0014
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Issued: May 12, 2022

Decision and Order

On April 22, 2022, Joe Smyth (Appellant) of the Energy and Policy Institute appealed a final determination letter (Determination Letter) issued by the Department of Energy's (DOE) Office of Public Information (OPI). The Determination Letter responded to Request No. HQ-2021-01037-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. As explained in the Determination Letter, OPI withheld portions of the responsive records pursuant to FOIA Exemptions 5 and 6. The Appellant challenges the adequacy of the Determination Letter and the decision to withhold information pursuant to Exemption 5.

I. Background

On August 23, 2021, the Appellant submitted a FOIA request, asking for the following:

> All emails (including attachments) sent or received by Steven Winberg (former Assistant Secretary for Fossil Energy) or Dan Brouillette (former Secretary of Energy) that include any of the following three phrases: "San Juan" or "Enchant" or "FE0031843[.]" Please include records maintained by other Department of Energy staff on behalf of the individuals listed above, if applicable. The time limit for this request is September 1, 2020, to January 20, 2021.

FOIA Request from Joe Smyth at 1 (August 23, 2021).

On August 31, 2021, the Individual was notified that his request had been assigned to the DOE's Office of Fossil Energy and Carbon Management (FECM) to search for responsive records. Interim Response Letter from Alexander C. Morris to Joe Smyth at 1 (August 31, 2021). On September 9, 2021, the Appellant agreed to waive the portion of the initial request pertaining to responsive records from "other Department of Energy staff on behalf of the individuals listed above[.]" Email from Joe Smyth to Veronica Jones at 1 (September 9, 2021). In response to a request for greater clarification regarding the records the Appellant was seeking, the Appellant indicated that he was seeking records regarding whether former DOE Secretary Brouillette and Assistant Secretary Winberg had any involvement in the decision to alter a cost share agreement

between the DOE and Enchant Energy "for a project studying the possibility of a coal carbon capture project[.]" Email from Joe Smyth to Veronica Jones at 1 (September 22, 2021).

On March 31, 2022, the Appellant was provided a Determination Letter along with eight responsive records, which contained redactions made pursuant to Exemptions 5 and 6. In his Appeal, the Appellant argues that, in the Determination Letter, the agency "used boiler-plate language" when explaining redactions made pursuant to Exemption 5, specifically, that the agency "has failed to comply with FOIA by not explaining how Exemption 5 applies to the redacted emails." Appeal at 2 (April 22, 2022). The Appellant also argues that the agency "inappropriately appl[ied] Exemption 5 to the redacted emails," and further, that it "incorrectly appl[ied] the foreseeable-harm standard." *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

A. Adequacy of Determination Letter

In responding to requests for records under the FOIA, agencies are required to notify requesters of the decisions reached "and the reasons therefor." 5 U.S.C. § 522(a)(6)(A)(i)(I). Additionally, determination letters must meet certain requirements to allow requesters to determine whether a response is adequate. A determination letter must: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; and (3) specify the exceptions or exemptions under which information was withheld. *See, e.g., Center for Biological Diversity*, OHA Case No. FIA-17-0053 (2017); *Great Lakes Wind Truth,* OHA Case No. FIA-14-0066 (2014); *Tom Marks,* OHA Case No. TFA-0288 (2009).

The Appellant very specifically takes issue with the adequacy of the Determination Letter, arguing that the Determination Letter fails to explain how Exemption 5 "applies to the specific records that are being withheld or redacted." Appeal at 2. The Appellant argues that the Determination Letter provides conclusory statements regarding the exemption and that "the reasons for the stated exemptions are not particularized or sufficiently explained[.]" Appeal at 2. The DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing a 'brief explanation of how the exemption applies to the record withheld." 10 C.F.R. § 1004.7(b)(1).

In the matter at hand, the Determination Letter explains that Exemption 5 prevents the mandatory disclosure of "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). It cites the "deliberative process privilege" as justifying the deletions made pursuant to Exemption 5. The

Determination Letter explains that this privilege requires that the information being protected from disclosure be pre-decisional and deliberative and that the Exemption 5 documents at issue in this case contain pre-decisional and deliberative information. The Determination Letter asserts that the Exemption 5 redacted documents are pre-decisional because the withheld information "was developed before the agency adopted a final policy, and deliberative, in that it reflects the opinions of individual who were consulted as a part of the decision-making process." Determination Letter at 2. Accordingly, we find that the provided explanation meets the requirement to provide a "brief explanation" of how Exemption 5 applies to the withheld information.

B. Appropriateness of Redactions under Exemption 5

Exemption 5 protects "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 agency[.]" 5 U.S.C. § 552(b)(5). One of the purposes of this exemption is to protect the deliberative process within an agency. *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132, 150 (1975). To be considered deliberative, the document must be one which was created before the agency's final decision was made, and it must contain information that "reflects the give-and-take of the consultative process." *Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 35, 43 (D.D.C. 2012) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). As the Supreme Court has stated "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 151 (D.C. Cir 2006). The concern is that the disclosure of the deliberative process will hinder the open discussion of agency policies and related matters within the agency. *Id.* at 150.

The Appellant argues that the agency failed to establish that the information withheld under Exemption 5 in these documents was both pre-decisional and deliberative in nature, stating that "it is evident that some of these documents must have been improperly redacted." Appeal at 3. Specifically, the Appellant argues that the information withheld in Documents 1, 2, 5, 6, 7, and 8 does not appear to be pre-decisional, as the agency did not identify a specific "decision at issue[,]" and that the information withheld in Documents 2, 5, and 8 is not deliberative. Appeal at 3.

An examination of the emails containing Exemption 5 redactions indicates that these emails consist of exchanges between DOE employees. These emails were drafted and exchanged not only in relation to the decision to alter the cost share agreement, but in relation to other decisions pertaining to the San Juan Generating Station modification project. The emails contain questions, elicit guidance, suggest courses of action, and in short, reveal the give-and-take evidencing a deliberative nature. Accordingly, we find—with one exception—that Exemption 5 was appropriately applied in all of these documents. However, regarding the Exemption 5 redactions made in Document 6, after seeking clarification from General Counsel and OPI, we have determined that the redactions are inconsistent with Exemption 5 because the redacted information is publicly available. Email from John Litynski to Faith Cline at 1 (May 3, 2022) (wherein the subject matter expert indicated the data may be released, as it is available online). Accordingly, we are remanding to OPI to release the portion of Document 6 that consists of public information.

Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt…" 5 U.S.C. § 552(b). However, when the non-exempt information is "inextricably intertwined" with information that is otherwise properly protected pursuant to an exemption, releasable segregation is not possible. *Mead Data Cent., Inc. v. United Stated Dep't of the Air Force,* 566 F.2d 242, 250 (D.C. Cir. 1977). In making the argument that the agency withheld information in a manner inconsistent with Exemption 5, the Appellant also argues that even assuming portions of the documents are in fact subject to the deliberative process privilege, "there is potentially more information included in these emails that is not [pre-decisional] or deliberative in nature that should be provided under FOIA." Appeal at 3. Having examined the contents of the emails, we find that any potentially releasable portions of the emails at issue are inextricably intertwined with the Exemption 5 protected information such that segregation is not possible. Accordingly, we find that the redactions were appropriately made.

C. Foreseeable-Harm Standard

The Appellant argues that even if the redacted responsive documents "[fell] within the scope of Exemption 5" the DOE failed to identify, with particularity, the foreseeable harm "that would occur by releasing the redacted records." Appeal at 6. If "the agency reasonably foresees that disclosure would harm an interest protected by an exemption[,]" then the agency "may withhold information" pursuant to FOIA. 5 U.S.C. § (a)(8)(A)(i). Specifically, the Appellant states that the language contained in the Determination Letter, namely, the agency's assertion that "the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public[]," constitutes "the boiler-plate language that courts have held is insufficient" to meet the foreseeable harm standard. Appeal at 6. The cases to which the Appellant cites pertain to decisions courts have made in the context of summary judgement, where courts are tasked with determining whether the agency appropriately applied the FOIA exemptions based on items like affidavits and Vaughn indices. Appeal at 6 (citing *Ctr. for Investigative Reporting v. U.S. Customs Border Prot.,* 436 F.Supp.3d 90, 106-07 (D.D.C. 2019); *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation,* 3 F.4th 350, 370 (D.C. Cir. 2021)). While affidavits and Vaughn indices[1] are produced by agencies in connection with motions for summary judgment in federal court, "agencies are not required to produce declarations, affidavits or Vaughn indices when initially responding to FOIA requests." *Center for Biological Diversity* at 3 (citing *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000)). Accordingly, it was not necessary for the agency to provide the detailed explanations counsel is seeking. And given the nature of the potential harm to the decision-making process that could occur when those providing advice may be inhibited if their frank opinions could be made public, we find that DOE has met the foreseeable harm standard. *See e.g. In the Matter of the Hill*, OHA Case No. FIA-20-0042 at 5-6 (2020).

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[1] "A Vaughn index" serves to "identif[y] each responsive document, the exemption under which it is being withheld, and an explanation of why that exemption is applicable, or in the alternative a similar document describing each withholding." *In the Matter of Cecil D. Andrus,* OHA Case No. FIA-15-0046 at 4 (2015) (*citing Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

Order

It is hereby ordered that the Appeal filed on April 22, 2022, by Joe Smyth is granted in part and remanded to OPI for further processing as described herein and denied with respect to all other issues.

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. § 522(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.

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