

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

In the Matter of Cato Institute)	
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Filing Date: January 19, 2023)	Case No.: FIA-23-0009
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Issued: January 31, 2023

Decision and Order

On January 19, 2023, Cato Institute (Appellant) appealed a determination letter dated December 9, 2022, issued by the Department of Energy’s (DOE) Office of the Inspector General (OIG). The letter responded to Request No. HQ-2020-00704-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. The determination letter was accompanied by 154 pages of responsive records, which were partially redacted pursuant to FOIA Exemptions 4, 5, 6, 7(A), 7(C), and 7(E). The Appellant challenges the decision to withhold information from the responsive records pursuant to Exemptions 5. In this Decision, we deny the appeal.

I. Background

On April 12, 2020, Appellant submitted the FOIA request to DOE. FOIA Request from Patrick Eddington at 1 (April 12, 2020). The request asked for:

- DoE contacts with American university and college officials, associations or groups representing academics, unions representing university or college staff and employees, businesses with operations in China, and business trade associations regarding the activities of Chinese government, business or academic activities on American university and college campuses or with American businesses of interest to the Chinese government as intellectual property (IP) or technology theft targets.
- Records dealing with Chinese American individuals and organizations with whom DoE officials have been in contact with regarding the activities of Chinese government, business or academic activities on American university and college campuses of interest to the Chinese government as intellectual property (IP) or technology theft targets.
- Records dealing with Chinese government use of non-traditional intelligence collectors, including but not limited to Chinese national students in the United States, to target American citizens or organizations of interest to the Chinese government.

- Records dealing with Chinese government efforts to establish organizations on American university and college campuses dedicated to advancing Chinese government interests, acting as cover for intelligence collection operations, or for the purpose of otherwise monitoring the activities of Chinese nationals as well as Americans.
- Records citing examples of Chinese government coercive methods, including legislation, regulation, or Chinese intelligence service activities, utilized against American businesses operating in China that have compromised the privacy and security of the communications of said American businesses or the data of Americans in the possession of said businesses.
- Records regarding contacts by DoE officials with American scholars, researchers or academics who have written on issues involving China or Chinese American relations.
- Correspondence between DoE officials and Congress regarding any of the above matters.

Id. at 1-2.

DOE acknowledged receipt of the request on April 14, 2020. Acknowledgement Letter from Alexander C. Morris to Patrick Eddington at 1 (April 14, 2020).

In April of 2020, the Appellant discussed narrowing its request with a DOE FOIA Analyst. Email from Traci McCoy to Patrick Eddington at 1 (April 23, 2020). DOE sent the Appellant a supplemental interim response in July of 2020 to confirm the search terms and relevant program offices. Supplemental Interim Response from Alexander C. Morris to Patrick Eddington at 1-3 (July 22, 2020).

OIG informed the Appellant that it was processing the request in December of 2021 and provided the Appellant with updates on the request then and in August of 2022. Email from Karen Sulier to Patrick Eddington at 1-6 (Aug. 25, 2022). OIG issued a determination letter on December 2, 2022, and provided 25 responsive documents, totaling 154 pages, with information withheld pursuant to Exemptions 4, 5, 6, 7(A), 7(C), and 7(E) of FOIA. Determination Letter at 1-2 (Dec. 9, 2022).

Appellant timely appealed the determination letter on January 19, 2023. Appeal Letter Email from Patrick Eddington to OHA Filings at 1 (Jan. 19, 2023). In its appeal, the Appellant challenges all redactions made pursuant to Exemptions 5 and 7(E), which were contained in Documents 16, 17, 20, and 23.¹ The Appellant argues that the information redacted pursuant to Exemption 5 is factual

¹While this appeal was pending, OIG reviewed its previous redactions and determined that it would be appropriate to release some previously redacted information, including all information redacted pursuant to Exemption 7(E), and provide it to the Appellant. Email from Alexander Borman to Erin Weinstock at 1 (Jan. 24, 2023). As there are no longer any responsive records redacted pursuant to Exemption 7(E), this portion of the appeal is moot.

OIG also determined that it would be appropriate to release information previously redacted pursuant to Exemption 5 in Document 20. *Compare* Determination Letter at 2 *with* Supplemental Release from OIG to Patrick Eddington at 9 (Jan. 24, 2023). OIG eliminated four invocations of Exemption 5 in Document 23, but the information in Document 23 remained redacted pursuant to other FOIA exemptions. *See* Supplemental Release at 11-12. Therefore, this appeal only considers the propriety of the redactions in Documents 16 and 17.

and, therefore, not subject to the deliberative process privilege, which is incorporated within Exemption 5. *Id.*

II. Analysis

Exemption 5 of FOIA allows an agency to withhold “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 exemption includes the deliberative-process privilege, which involves records “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

For a document to be withheld under the deliberative process privilege, the information in the document must be both pre-decisional and deliberative. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 150-51 (D.C. Cir. 2006). A document is “pre-decisional” if it is “generated before the adoption of an agency policy.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In order to be deliberative, a communication must “reflect[] the give-and-take of the consultive process.” *Id.* at 866. Deliberative documents include subjective information like personal opinions or recommendations that do not necessarily reflect a current agency position or policy. *Id.* at 866-67.

An agency may only withhold information pursuant to FOIA if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.” 5 U.S.C. § 522(a)(8)(A)(i)(I). In the context of Exemption 5, this provision requires that agencies be able to explain how disclosing the information would “adversely impair internal deliberations.” *Reporter’s Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369-70 (D.C. Cir. 2021).

The Appellant contends that OIG redacted information that was “purely factual” and that OIG failed to show any foreseeable harm that would occur as a result of releasing the redacted information. Appeal at 1-2.

OIG argues that the material that it redacted pursuant to Exemption 5 in Documents 16 and 17 is deliberative and pre-decisional. OIG contends that the Document 16 redactions were made to protect information regarding “OIG’s internal discussions regarding a potential course of action to be taken regarding a pending revision of DOE Order 486.1, *Department of Energy Foreign Government Talent Recruitment Programs*.” OIG Response from Alexander Borman to Erin Weinstock (Jan. 24, 2023). OIG claims that the information redacted in Document 17 discusses recommendations on “how to better facilitate interagency cooperation between law enforcement entities” and “potential criminal charges that were considered.” *Id.* OIG also explains that releasing the information sought by Appellant would “interfere with the ability of OIG employees to make candid recommendations and cause public confusion,” particularly given the office’s role as an independent evaluator of the DOE. *Id.*

After reviewing the redacted records, we find OIG’s explanation of the Exemption 5 redactions in these documents to be reasonable. All of the information redacted contains recommendations or discussion of ideas that OIG was considering in connection with a decision. We also find that

OIG's concern about the need to keep this information private as part of its role as DOE's independent evaluator to be well-founded.² Accordingly, we find that OIG properly withheld the redacted information in question under FOIA Exemption 5.

III. Order

It is hereby ordered that the appeal filed on January 19, 2023, by Cato Institute, FIA-23-0009, 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. § 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.

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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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² We note, as we have previously, that there is no indication that an agency must make a showing of harm at the time it releases records to a requestor. See *In the Matter of Joe Smyth*, OHA Case No. FIA-22-0014 (May 14, 2022); *In the Matter of Advocates for the West*, OHA Case No. FIA-23-0001 (Nov. 21, 2022).