

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

In the Matter of Citizens for Responsibility)
and Ethics in Washington)
Filing Date: June 18, 2024)
_____)

Case No.: FIA-24-0030

Issued: June 27, 2024

Decision and Order

On June 18, 2024, Citizens for Responsibility and Ethics in Washington (Appellant) appealed a first partial response letter dated April 17, 2024, issued by the Department of Energy’s (DOE) Environmental Management Consolidated Business Center (EMCBC). The letter responded to Request No. EMCBC-00378-24, a request filed by Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The first partial response letter was accompanied by five pages of responsive records, which were partially redacted pursuant to FOIA Exemptions 5 and 6. Appellant challenges the decision to withhold information from the responsive records pursuant to Exemption 5. In this Decision, we deny the appeal.

I. Background

On February 1, 2024, Appellant submitted the FOIA request to DOE. FOIA Request from Citizens for Responsibility and Ethics in Washington at 1 (Feb. 1, 2024). The request asked for:

1. All communications from September 1, 2020 to the date this request is processed between Environmental Management Consolidated Business Center Chief Counsel Brandon Middleton and the Heritage Foundation, including but not limited to any individual with an email address ending in “@heritage.org.”
2. All communications from September 1, 2020 to the date this request is processed sent by or to Brandon Middleton mentioning any of the following terms:
 - a. “Heritage Foundation”
 - b. “Project 2025”
 - c. “Schedule F”
 - d. “2025 Presidential Transition Project”
 - e. “Mandate for Leadership”

Id. at 1.

On April 17, 2024, EMCBC issued a partial response letter with documents containing redactions pursuant to FOIA Exemption 5 and Exemption 6. Partial Response Letter from EMCBC to Citizens for Responsibility and Ethics in Washington at 1 (Apr. 17, 2024). The letter explained that certain information was redacted pursuant to Exemption 5 because it is protected by the deliberative process privilege and/or the attorney-client privilege. *Id.* at 1–2. EMCBC further explained that it redacted mobile phone numbers in the responsive documents pursuant to FOIA Exemption 6 to protect the privacy interests of agency personnel. *Id.* at 2.

Appellant timely appealed the partial response letter on June 18, 2024. Appeal Letter Email from Citizens for Responsibility and Ethics in Washington to OHA Filings at 1 (June 18, 2024). In its appeal, Appellant challenges the redactions made pursuant to Exemption 5. *Id.* at 2. Appellant argues (1) that the redacted sections of the responsive documents reflect a request for data that by its very nature cannot be deliberative; and (2) that nothing contained in the responsive documents reflects a protected attorney-client communication. *Id.* at 2–3. EMCBC acknowledges that attorney-client privilege was incorrectly applied to the responsive documents but contends that all of the information redacted under Exemption 5 is nonetheless exempt from disclosure under the deliberative process privilege. Email from EMCBC to OHA (June 20, 2024).

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 consultative 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.

Appellant contends that the information redacted pursuant to Exemption 5 is not pre-decisional and deliberative because the responsive documents “reflect[] a directive from DOE leadership to their subordinates” and “a request for information from subordinates . . . does not reflect an exchange of ideas.” Appeal at 2–3. We disagree. First, it is not at all clear to us that the email chain in question is from DOE leadership to a subordinate. Second, even if that assertion was correct, a request from DOE leadership to subordinate federal employees may be pre-decisional and deliberative if the leader is asking the subordinate employee to give their opinion or use their judgment.

Here, EMCBC withheld text in an email describing the types of positions that a supervisor believed could be aligned with Schedule F characteristics, as well as portions of an attachment showing a list of positions in the supervisor's office that she believed fit that description. The redacted text in the email reflects the supervisor's understanding of how Schedule F would work prior to implementation of Executive Order 13957 at DOE. The information provides guidance to help various DOE components create their own preliminary list of potential Schedule F positions in their offices. The context surrounding the email made it clear that the description provided in the email was not DOE's final judgment as to which positions Schedule F may apply. By terming the lists that the email recipients are supposed to create as "potential," the email clearly shows that the description provided does not reflect a final decision made by DOE. This is particularly clear because there are no legal consequences that stem from this decision, and, thus, it has no real operative effect. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 529 U.S. 261, 271 (2021).

As to the attachment with the list of positions, it is explicitly described as "preliminary." The words potential and preliminary also show that the lists, including the one provided in the attachment, are subject to the "give-and-take" of the agency's process. As such, both the portion of the email that is redacted and the attachment are pre-decisional and deliberative and were properly withheld.

III. Order

It is hereby ordered that the appeal filed on June 18, 2024, by Citizens for Responsibility and Ethics in Washington, FIA-24-0030, 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.

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Poli A. Marmolejos
Director - Office of Hearings and Appeals