

January 12, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: State of Nevada

Date of Filing: December 9, 2003

Case Number: TFA-0050

On December 9, 2003, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on November 14, 2003, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on August 14, 2003, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination released several responsive documents to the Appellant. However, ORD withheld eight documents under FOIA Exemption 5. This Appeal, if granted, would require ORD to release that information to the Appellant.

I. BACKGROUND

On August 14, 2003, the Appellant filed a request for information with ORD seeking a document entitled "Criticality Potential Curve Draft Report" (the Draft Report). In addition, the Request sought "all supporting documents, calculations, or analyses prepared in connection with this report." Determination Letter at 1. On October 6, 2003, ORD issued its initial response to the Request (the Response). Accompanying the Response was a copy of the Draft Report. The Response further explained that ORD had not completed its review of the supporting documents, calculations and analyses.

On November 14, 2003, ORD issued a determination letter (the Determination Letter) releasing five responsive documents to the Appellant. The Determination letter also withheld eight documents under FOIA Exemption 5's deliberative process privilege. On December 9, 2003, the Appellant submitted the present Appeal which challenges ORD's withholding determinations under Exemption 5.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold

information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 5 is at issue in the present case.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which 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); 10 C.F.R. § 1004.10(b)(5). In order to qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter-agency or intra-agency document, i.e., its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. *Department of the Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001).

A. Whether the Eight Documents Withheld by ORD are “Inter-agency or Intra-agency Memorandums”

The eight documents withheld by ORD were apparently prepared by outside consultants. Generally, documents received from outside the government are not inter-agency or intra-agency memorandums. In some circumstances, however, documents received from outside the agency are considered to be inter-agency or intra-agency memorandums. In *Klamath*, the Supreme Court noted that in some cases courts have found that communications between the government and outside consultants hired by them are, in effect, inter-agency or intra-agency documents and therefore protected by Exemption 5. Noting further that “in such cases, the records submitted by outside consultants played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done,” the Court noted:

[T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id., at 1066-67. In contrast, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective consultant are clearly not inter-agency or intra-agency documents. *Id.*, at 1067-69. Turning to the present case, it is clear that the eight documents withheld by ORD are “inter-agency or intra-agency” communications pursuant to Exemption 5. The information conveyed in these cases is scientific and logistical in nature and clearly was not meant to represent the consultant’s interest, but rather discusses the subject matter for which the DOE procured the consultant’s services. Therefore, the eight documents withheld by ORD are inter-agency or intra-agency memorandums.

B. Whether the Eight Documents Withheld by ORD Can be Withheld Under the Deliberative Process Privilege

Even if the information that ORD withheld under Exemption 5 is part of the agency's inter-agency or intra-agency communications, it still cannot be properly withheld under Exemption 5 unless it falls within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.

Among the privileges incorporated by the courts under Exemption 5 is the deliberative process privilege. It is this privilege upon which ORD bases its Exemption 5 claim in this case. The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974) (*Sears*). It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). The privilege protects not only documents, but the integrity of the deliberative process itself. See, e.g., *National Wildlife Federation v. United States Forest Service*, 861 F.2d 114, 1119 (9th Cir. 1988); *Schell v. HHS*, 843 F.2d 933, 940 (8th Cir. 1988); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980) (*Coastal States*). The predecisional nature of a document is not altered by the fact that the agency made a subsequent final decision or even if no decision was made at all. See, e.g., *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 (1979); *May v. Department of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 357 (3d Cir. 1985). The Supreme Court stated in *Sears*,

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 868.

Each of the documents withheld by ORD under the deliberative process privilege is both predecisional and deliberative. Since the request sought "all supporting documents, calculations, or analyses prepared in connection with the [Draft Report]," by definition, all responsive documents are clearly predecisional and part of the deliberative process which led to the issuance of the Draft Report. Moreover, our review of the withheld documents confirms their deliberative and predecisional nature.

The first document is a one page printed copy of a memo dated March 29, 1998. The first sentence of this document states “Here is a draft of a presentation on . . . that I’d like to see added to the next meeting’s agenda.” Since it is essentially a discussion of a draft document, it is clearly predecisional and deliberative in nature. The second document is an eight page printed copy of the draft Powerpoint presentation itself. For similar reasons, it too is clearly predecisional and deliberative.

The third document is a one page printed copy of another memo dated March 30, 1998. This document contains a theoretical discussion of engineering issues. It is also clearly predecisional and deliberative. The fourth document is a one page printed copy of a memo also dated March 30, 1998. This memo is a discussion of logistical issues concerning the above-mentioned presentation. It too, is clearly predecisional and deliberative. The fifth document is a one page printed copy of a memo dated March 9, 1998. It communicates the author’s opinion of several options for analyzing a particular engineering issue. It is clearly predecisional and deliberative.

The sixth document is a one page printed copy of a memo dated March 9, 1998. This document articulates an engineer’s opinion of potential results of a particular event. As an opinion speculating upon a hypothetical event, most of this document is clearly predecisional and deliberative. However, the second to last sentence of this email contains factual information. Such information cannot generally be withheld under the deliberative process privilege. *See, e.g., Coastal States*, 617 F.2d at 867. However, there are two circumstances under which the courts allow agencies to withhold factual material in an otherwise “deliberative” document. The first such circumstance occurs when the author of a document selects specific facts out of a larger set of facts and the selection of the facts is itself part of the deliberative process. *See, e.g., Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). The second of these circumstances occurs when factual information is inextricably intertwined with deliberative information that its release would reveal the agency’s deliberations. *See, e.g., Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774-77 (D.C. Cir. 1988). The release of this factual information would reveal both the substance of the agency’s deliberations as well as the opinions of the document’s author.

The seventh document is a one page table setting forth a series of estimates of the values of certain measurements in five hypothetical cases. It too, is clearly predecisional and deliberative. The eighth document is a one page memo dated February 26, 1998. This document expresses the opinion of the author concerning the process by which a specific engineering issue is to be analyzed. It is clearly predecisional and deliberative.

Several of the withheld documents contain names of individuals. The names of these individuals are factual in nature and therefore cannot properly be withheld under the deliberative process privilege. However, the identities of individuals can often be withheld under FOIA Exemption 6. Accordingly, we are remanding this portion of the present Appeal to the ORD. On remand, ORD shall either segregate and release the names of these individuals or issue a new determination letter withholding them under any other applicable exemptions to the FOIA.

Conclusion

Most of the information withheld by the ORD is predecisional and deliberative and was therefore properly withheld under Exemption 5. However, the information revealing the names of individuals is not predecisional or deliberative. Accordingly, we are remanding that portion to the ORD for further consideration.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada , Case No. TFA-0050, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Repository Development for further processing under the instructions set forth above.

(3) 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 12, 2004