

Department of Energy

Washington, DC 20585

APR - 4 2003

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Newhouse News Service

Date of Filing: March 7, 2003

Case Number: TFA-0019

On March 7, 2003, Newhouse News Service (the Appellant) filed an Appeal from two final determinations that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on February 19, 2003, and March 2, 2003. In its determinations, BPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information it withheld.

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). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated January 2, 2003, the Appellant submitted a FOIA request to BPA for documents including "copies of any BPA audits, internal or external, that examine energy trading practices, including the agency's use of options or other derivatives." Request Letter dated January 2, 2003, from Tom Detzel, The Oregonian, Newhouse News Service, to Joseph Bennett, Office of General Counsel, BPA (Request Letter). On February 19, 2003, BPA responded that it had identified as responsive to the Appellant's request two internal audit reports, two external consultant reports, and sections of recent annual reports. Determination Letter dated February 19, 2003, from Arnie A. Eissler, Freedom of Information Officer, BPA, to Tom Detzel (February 19, 2003 Determination Letter). The February 19, 2003 Determination Letter released the relevant portions of the annual reports and stated that a review of the external reports was not completed. *Id.* The Determination Letter withheld the internal audit reports under the deliberative process privilege pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). In the March 3, 2003 Determination Letter,



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BPA released redacted portions of the external reports and withheld portions under Exemption 5. March 3, 2002 [sic] Determination Letter from Annie Eissler to Tom Detzel (March 3, 2003 Determination Letter).

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues that the internal audit reports could not be predecisional because no final decision could be pending given the dates of these audits, 1998 and 2002. Appeal Letter dated February 28, 2003, from Tom Detzel to Director, Office of Hearings and Appeals (OHA), DOE. In addition, the Appellant asserts that, even if the reports can be withheld under Exemption 5, the factual portions of the internal reports should have been segregated and released. *Id.* Further, the Appellant claims that the external consulting reports are factual in nature and should be released. *Id.*

II. ANALYSIS

Deliberative Process and Predecisional Documents

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. 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) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

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*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both

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predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications. Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Internal Reports

BPA has listed two documents--the internal reports--that it has withheld in their entirety because they contain information that is predecisional and part of the deliberative process. We have been provided with copies of these documents. We have reviewed these documents and believe that they were properly withheld under Exemption 5. They are almost entirely deliberative in nature. The factual information which is contained in these documents is so intertwined as to make segregation virtually impossible. Further, the factual information contained in these two documents was selected from a larger quantity of factual information so that the selection is part of the deliberative process. These reports were prepared by auditors who reviewed many facts but relied on only selected facts for their report. Also, in the two internal reports, there is only a limited amount of factual information because the authors of the reports assumed the recipient had a working knowledge of the programs audited. Further, release of the factual information would point to the policies that management was reviewing and would reveal the auditors' thought processes.

The External Reports

BPA further listed two documents where the deliberative portions were redacted and the factual information released to the Appellant. We have reviewed these two external reports as well and believe that the redaction was proper and all segregable factual information was released.

III. THE PUBLIC INTEREST

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records

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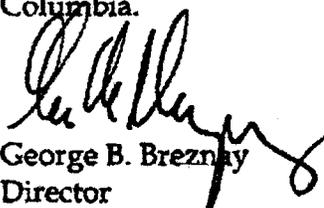
available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. The Appellant argues that discretionary release would be in the public interest. Appeal Letter at 2. We disagree. In this case, no public interest would be served by release of the comments and opinions contained in the reports, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987); *Newhouse News Service*, 28 DOE ¶ 80,241 (2002).

IV. CONCLUSION

The information that BPA withheld was properly found to be exempt under the Exemption 5 deliberative process privilege. Therefore, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Newhouse News Service on March 7, 2003, Case No. TFA-0019, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where 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: APR - 4 2003