



**Department of Energy**  
Washington, DC 20585

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

In the Matter of America First  
Legal Foundation

Filing Date: November 2, 2022

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Case No.: FIA-23-0002

Issued: November 21, 2022

**Decision and Order**

On November 2, 2022, America First Legal Foundation (Appellant) appealed a determination letter issued by the Department of Energy's (DOE) Office of Public Information (OPI) responding to request No. HQ-2022-00654-F, a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. As stated in the determination letter, OPI withheld portions of a responsive document pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5) (Exemption 5). The Appellant challenges the DOE's decision to redact portions of a responsive document under Exemption 5, the DOE's finding that reasonably foreseeable harm would result from disclosure of the redacted records, and the DOE's finding that non-exempt information could not be segregated from the records. In this decision, I grant the appeal in part and deny the appeal in part.

**I. Background**

On March 30, 2022, the Appellant submitted a FOIA request to the DOE, seeking the following two (2) records:

- A. The Department's "Equity Action Plan," that was required by Section 7 of Executive order 13985 (January 20, 2021) on "Advancing Racial Equity and Support of Underserved Communities Through the Federal Government." To be submitted to the Assistant to the President for Domestic Policy and the Director of the Office of Management and Budget by January 20, 2022.
- B. The Department's "Equity Assessment," that was required by Section 5 of Executive Order 13985 (January 20, 2021) on "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," to be submitted to the Assistant to the President for Domestic Policy by August 8, 2021.

FOIA Request from America First Legal at 2 (March 30, 2022).

The Appellant also requested a waiver of fees related to processing its FOIA request, pursuant to 5 U.S.C. § 552(a)(4)(A). FOIA Request at 4.

On September 30, 2022, the DOE issued a determination letter to the Appellant. Determination Letter from Alexander C. Morris to America First Legal Foundation (September 30, 2022). In its determination letter, the DOE indicated it assigned the Appellant's FOIA request to its Office of Economic Impact and Diversity (ED) to conduct a search for responsive records. Determination Letter at 1. The Determination letter also indicated ED identified two (2) documents responsive to the Appellant's request. *Id.* The DOE released one document in full and redacted 43 pages of the 44-page second document, pursuant to Exemption 5. *Id.* The DOE indicated the redacted documents included agency progress reports, which were protected from disclosure under the deliberative process privilege. *Id.* The DOE also indicated that "discretionary disclosure of the deliberative material is not in the public interest because foreseeable harm could result from such disclosure." Determination Letter at 2.<sup>1</sup>

On November 2, 2022, the Appellant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). Appeal Email from America First Legal Foundation to OHA Filings (November 2, 2022). In its appeal, the Appellant argues the redacted material is not protected under the deliberative process privilege because the document is a "Final Report" and is neither pre-decisional nor deliberative. Appeal Email at 3–4. The Appellant also argues that even if the document is pre-decisional and deliberative, other federal agencies "have determined that there was no foreseeable harm in releasing their findings and reports in response to FOIA requests," so no identifiable harm would result from the DOE disclosing the redacted document in full. Appeal Email at 5. Lastly, the Appellant argues the DOE did not "take any steps necessary to segregate and release nonexempt information." *Id.*

## II. Analysis

The FOIA requires federal agencies to disclose records to the public, upon request, unless the records are exempt from disclosure. 5 U.S.C. § 552(b). Under Exemption 5, "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" are protected from disclosure. *Id.* § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The U.S. Supreme Court has interpreted this exemption to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Courts have held that Exemption 5 applies to records that would be protected under three civil discovery privileges: the attorney-client privilege, the attorney work-product privilege, and "the executive deliberative process privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

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<sup>1</sup> The determination letter also indicated no fees would be charged for processing the Appellant's request. Determination Letter at 3.

### A. The Deliberative Process Privilege

The deliberative process privilege protects from disclosure “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). An agency may only invoke the deliberative process privilege for records that are pre-decisional and deliberative. *Sierra Club*, 141 S. Ct. at 785–86.

After reviewing the redacted material in the records, I find the information withheld by the DOE is pre-decisional. A record is “predecisional” if it was “generated before the agency’s final decision on the matter” and “does not ‘communicate a policy on which the agency has settled.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of State*, 585 F. Supp. 3d at 41–42 (quoting *Sierra Club*, 141 S. Ct. at 786). In this case, the redacted records were created by a committee within the DOE and contain its findings regarding whether underserved communities may face barriers in accessing DOE programs. The redacted records were created before the DOE published its list of final priorities, as shown in its Equity Action Plan. The committee had no decision-making authority. The records do not draw any conclusions based upon the committee’s findings, do not direct whether or how the committee’s findings should be acted upon, and do not contain a statement of policy. The Appellant claims it requested the “Final Report” that was “intended to express DOE’s official position” and did not request “any predecisional drafts.” Appeal Email at 4. However, the Appellant specifically requested the “Equity Assessment” in its FOIA request, not the records of the agency’s final priorities. FOIA Request from America First Legal at 2. Also, the DOE’s top priority actions were published in its Equity Action Plan, which is publicly available on the DOE’s website at <https://www.energy.gov/diversity/roadmap-equity-and-justice-department-energy>. Therefore, I find the redacted records are pre-decisional.

I also find the redacted records are deliberative in nature. Documents are deliberative if “they were prepared to help the agency formulate its position.” *Sierra Club*, 141 S. Ct. at 785. In analyzing this requirement, the role the document plays in the deliberative process should be considered. *Judicial Watch v. Reno*, 154 F. Supp. 2d 17, 18 (D.C. Cir. 2001). The Appellant claims they requested the DOE’s “Final Report,” which they characterize as “simply an objective compilation of findings on DOE programs” and asserts that does not reflect any consultative processes. Appeal Email at 4. However, the redacted records reflect the analyses of different teams within the committee, the processes used, and the limitations faced by the committee, in finding certain information. Appeal Email at 4. The recommendations found in the records were used by the DOE Secretary’s Advisor on Equity to determine which priorities should be included in the DOE’s Equity Action Plan. As such I find that the material redacted from these records is both pre-decisional and deliberative, and therefore the deliberative process privilege was properly asserted.

## **B. Foreseeable Harm**

After an agency determines whether records are exempt from disclosure under a FOIA exemption, it must determine whether it is reasonably foreseeable that “disclosure would harm an interest protected by [the] exemption.” 5 U.S.C. § 552(a)(8)(A)(i); 10 C.F.R. § 1004.10(c)(1). “The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news,” and the privilege is meant to protect the quality of agency decisions by ensuring “open and frank discussion” among agency officials. *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001).

In support of its appeal, the Appellant states “other federal agencies . . . have determined that there was no foreseeable harm in releasing their findings” and therefore, it is “unreasonable” that the DOE’s disclosure of the redacted records would “uniquely result in harm.” Appeal Email at 5. However, notwithstanding any allegations about what other agencies may or may not have released, our review is limited to the DOE records at issue and redactions therein. That review has persuaded us that releasing the redacted records would likely have a chilling effect on the ability of DOE officials to have open and candid discussions about possible deficiencies in DOE’s programs, as the committee was tasked with considering. As such, we find it is reasonably foreseeable that disclosure of the redacted records would harm an interest protected by Exemption 5.

## **C. Segregability**

If the agency determines that full disclosure of a requested record is not possible, the agency must determine whether “partial disclosure” of a record is possible and “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii); 10 C.F.R. § 1004.10(c)(2). However, an agency may withhold otherwise non-exempt portions of a record if those portions are “inextricably intertwined with exempt portions” of the record. *Mead Data Ctr., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

After reviewing the redacted records, I find that partial disclosure of the redacted records is possible. There are two portions of the redacted records that contain non-exempt material that can be segregated from the rest of the responsive document and disclosed. Those portions are found on page 2, including the bolded and underlined heading at the top of the page and the three paragraphs that follow, and page 5, including the first bolded and underlined heading near the top of the page and the three paragraphs that follow. With regard to rest of the redacted material, however, we find that any non-exempt material that may be found is inextricably intertwined with information protected by Exemption 5 and was therefore properly redacted.

## **III. Order**

It is hereby ordered that the appeal filed by America First Legal Foundation on November 2, 2022, Case No. FIA-23-0002, is granted in part and denied in all other respects as described in the decision above.

This matter is hereby remanded in part to the DOE OPI, which shall issue a new determination letter in accordance with the instructions set forth in this decision.

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.

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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A handwritten signature in blue ink, appearing to read "Poli A. Marmolejos".

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals