

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
ANDERSON BENNETT) FOIA Control No. 2011-208
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2011

Released: September 30, 2011

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny an Application for Review (AFR) filed by Anderson Bennett (Bennett)¹ seeking review of a decision of the Office of Managing Director (OMD)² that granted in part and denied in part his Freedom of Information Act (FOIA) request³ for records used to evaluate and dispose of his request for Reclassification of Position.⁴ We find that OMD correctly determined that the agency records not disclosed are deliberative materials that fall within FOIA Exemption 5 and that there are no additional segregable portions of those records that could be released.

II. BACKGROUND

2. Bennett’s Request seeks all records not provided by him “which were used to evaluate and disposition (sic) [his] request for Reclassification of Position, dated June 4, 2010.”⁵ A search of the files of the FCC officials involved in the evaluation of and response to the Reclassification Petition located the evaluation statement the FCC Chief Human Capital Officer (CHCO) used to evaluate the Reclassification Request; emails between Commission staff concerning the request; work materials; questionnaires; and staff notes.⁶

3. OMD found that the evaluation statement used by the CHCO was releasable under the FOIA as were other portions of the records found in the FOIA search.⁷ OMD also referred Bennett to publically

¹ See Review of Freedom of Information Action, filed May 2, 2011, by Bennett (AFR).

² See Letter from Mindy Ginsburg, Deputy Managing Director to Bennett (April 8, 2011) (Decision).

³ See Letter from Bennett to Federal Communications Commission (February 24, 2011) (Request).

⁴ See Memorandum from Bennett to Steven VanRoekel, Managing Director (June 4, 2010) (Reclassification Request).

⁵ Request at 1.

⁶ Decision at 1.

⁷ *Id.*

available materials used to prepare the evaluation statement.⁸ OMD determined that the remaining documents are exempt from disclosure pursuant to the deliberative process privilege of FOIA Exemption 5⁹ because they contain staff advice and recommendations on how to address the Reclassification Request. As required by the FOIA, OMD reviewed the records subject to Exemption 5 to determine if segregable portions of those records could be released and determined that there were factual portions of those records which could be released.¹⁰ OMD also reviewed the records subject to Exemption 5 to determine if discretionary release is appropriate and determined that some portions of the records could be released as a matter of its discretion without impinging on the policies underlying FOIA Exemption 5.¹¹

III. APPLICATION FOR REVIEW

4. Bennett filed an AFR noting that the consultative process that OMD was protecting by invoking FOIA Exemption 5 was “a simple position classification audit” and “pertained to only to (sic) the position classification of a single employee, i.e. me,”¹² and arguing that Exemption 5 cannot be used to withhold information from the subject of a report.¹³ Bennett argues that his position classification audit does not present any legal or policy matters and therefore the use of Exemption 5 is inappropriate.¹⁴ Bennett also contends that all interviews and questionnaires associated with the evaluation of his Reclassification Petition should be considered the pre-deliberative establishment of the facts by the HR Specialist and should not be subject to Exemption 5.¹⁵ Bennett argues that position classification audits are routine actions undertaken in accordance with OPM guidance designed to promote uniformity and equality and therefore there “shouldn’t be much ‘deliberative process’ or ‘give and take’ associated with this process”¹⁶ and therefore Exemption 5 has been grossly misapplied. Bennett argues that the “overzealous use of FOIA Exemption 5 in minor matters such as this one is in direct conflict with”¹⁷ the President’s and Chairman’s policies.

IV. DISCUSSION

5. None of Bennett’s arguments warrant a result different than that reached by OMD. Bennett contends, relying on the *Julian* case, that Exemption 5 cannot as a matter of law be used to withhold records from a FOIA requester who is the subject of the report being sought. *Julian*, which involved a prisoner seeking a copy of his pre-sentencing report under the FOIA, does not stand for so broad a proposition. In granting the prisoner’s request, the *Julian* court reiterated its prior interpretation of Exemption 5 as “incorporat[ing] the privileges which the Government enjoys under the relevant statutory

⁸ *Id.*

⁹ 5 U.S.C. §552(b)(5).

¹⁰ Decision at 2.

¹¹ *Id.* See *President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed.Reg. 4683 (Jan. 21, 2009); *Attorney General’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (Mar. 19, 2009) (available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>).

¹² AFR at 1.

¹³ *Id.*, (citing *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1 (1988)).

¹⁴ *Id.*

¹⁵ AFR at 4.

¹⁶ AFR at 3.

¹⁷ AFR at 2

and case law in the pretrial discovery context.”¹⁸ However, because the Court determined that Congress “has strongly intimated, if it has not actually provided, that no [pre-sentencing] privilege should exist”¹⁹ as against a subject prisoner, it held that Exemption 5 was unavailable because there was no underlying privilege to which it could attach. The Court has since reiterated that the FOIA requester’s identity matters only where “the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege.”²⁰ Since the deliberative process privilege here protects the Commission’s deliberations rather than Bennett, *Julian* is no bar to OMD’s use of FOIA Exemption 5 in this instance.

6. We likewise reject Bennett’s arguments that Exemption 5 is inapplicable to records created in the process of consideration of his Reclassification Request because, in his view, consideration of that request does not present any legal or policy matters. Whether to grant a reclassification request is a personnel decision to which Exemption 5 applies.²¹ Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”²² To fall within the scope of this privilege the agency records must meet two criteria – they must be both predecisional and deliberative.²³ To be predecisional the records in question must have been “prepared in order to assist an agency decision maker in arriving at his decision.”²⁴ To be deliberative the records must be such that their disclosure “would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”²⁵ We have reviewed the records withheld by OMD under Exemption 5 and find that they were properly withheld. The records are predecisional because they were created in connection with disposition of Bennett’s Reclassification Request prior to any decision on that request. The records are deliberative because they reflect staff discussions and evaluations of the Reclassification Request within the agency, which are at the core of the consultative process.

7. Bennett also submits that OMD erred in not producing all “factual data documents, i.e. questionnaires, the responses thereto, any telephone or meeting notes of discussions regarding the questionnaires or [his] duties and responsibilities, and any emails regarding [his] duties and

¹⁸ *Julian*, 486 U.S. at 11 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)).

¹⁹ *Julian*, 486 U.S. at 13.

²⁰ *U.S. Dep’t of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 771 (1989); see also *Loving v. Dep’t of Defense*, 550 F.3d 32, 36 (D.C. Cir. 2009) (*Julian* does not alter standard analysis of FOIA Exemption 5 with respect to Army private seeking DoD and Army memoranda prepared for the President in connection with President’s statutory review of private’s death sentence because the party protected by privilege was the President, not the private).

²¹ See *American Fed’n of Govt Employees, Local 2782 v. Dep’t of Commerce*, 632 F. Supp. 1272, 1277 n.6 (D.D.C. 1986) (FOIA Exemption 5 protects the deliberative process involved in making personnel decisions, an area in which candor is “particularly important”); *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 83 (D.D.C. 2005)(documents related to retiree’s highest grade for retirement properly withheld under FOIA Exemption 5 deliberative process privilege); *Allen v. Dep’t of Defense*, 1984 WL 2858, 3 (D.D.C. 1984) (personnel documents concerning the proposed employment of additional DoD attorney properly withheld under FOIA Exemption 5 deliberative process privilege).

²² *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

²³ *Id.* at 151-52.

²⁴ *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). See also *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

²⁵ *Formaldehyde Inst.*, 889 F.2d at 1122, (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

responsibilities.”²⁶ He argues that these documents are part of the “pre-deliberative establishment of the facts” and not subject to FOIA Exemption 5.²⁷ We disagree. FOIA Exemption 5 protects an agency’s entire deliberative process.²⁸ Hence, even if the content of a document is factual, it is exempt from disclosure if disclosure would “expose the decision-making process itself to public scrutiny.”²⁹ We find that because the factual material withheld by OMD cannot reasonably be segregated from OMD’s evaluation of the Reclassification Petition, the documents in question were properly withheld pursuant to FOIA Exemption 5. Disclosure of such material would serve only to reveal the evaluative process by which members of the decision-making chain arrived at their conclusions and what those predecisional conclusions were.³⁰

8. We reject Bennett’s arguments that OMD’s application of Exemption 5 was “overzealous” given that position classification audits are, in Bennett’s view “routine actions” and “minor matters.”³¹ Even if we were to accept Bennett’s characterization of the position classification audit process (which we do not in as much as the process requires the application of law to facts), the FOIA exemptions (including Exemption 5) remain fully applicable to protect the deliberative process used to evaluate Bennett’s Reclassification Petition. FOIA Exemption 5 exists to protect the Commission’s deliberative processes, regardless of whether those deliberations are of a matter of general or particular applicability, small or large.

9. As did OMD, we have examined the agency records at issue here to determine whether any additional portions could be segregated and released, or whether any of the records should be released in the exercise of our discretion under the FOIA.³² We can discern no additional non-exempt material that can be reasonably segregated from the withheld records, beyond the material released by OMD in response to the Request.³³

²⁶ AFR at 4.

²⁷ *Id.*

²⁸ *Montrose Chemical Corp. of Cal. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

²⁹ *National Wildlife Fed. v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988)(internal quotation marks and citation omitted). *See also Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38-39 (5th Cir. 1982) (protecting from release evaluation of facts that would reveal evaluative process and predecisional conclusions); *Horowitz v. Peace Corps*, 428 F.3d 271, 277 (D.C. Cir. 2005) (document need not be released where decisionmaker’s thought processes are woven into document to extent that attempt at segregation would reveal deliberations).

³⁰ *See Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 575 F.2d 932, 935 (D.C. Cir. 1978).

³¹ AFR at 3.

³² *See President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed.Reg. 4683; *Attorney General’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (Mar. 19, 2009) (available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>).

³³ *See Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

V. ORDERING CLAUSES

10. IT IS ORDERED that Bennett's Application for Review is DENIED. Bennett may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).³⁴

11. The following officials are responsible for this action: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created 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 Bennett's right to pursue litigation. Bennett may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.