March 7, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Federation of American Scientists
Date of Filing:	February 7, 2005
Case Number:	TFA-0088

On February 7, 2005, Federation of American Scientists (the Appellant) filed an Appeal from a final determination issued on January 24, 2005 by the Office of Security and Safety Performance Assurance (SSPA), within the Department of Energy's (DOE) Office of Security (OOS). In that determination, SSPA responded to a Request for Information filed 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. SSPA's determination identified one document as responsive to this request and withheld it in its entirety under Exemptions 2 and 5of the FOIA. This Appeal, if granted, would require SSPA to release that information withheld under Exemptions 2 and 5 to the Appellant.

I. BACKGROUND

The Appellant filed a Request for Information with SSPA seeking a copy of a report entitled "Highly Enriched Uranium: Striking a Balance" (The Report). The Report is a draft report that describes the history of the highly enriched uranium inventory in the United States from 1945 to 1996.[1] On January 24, 2005, SSPA issued a determination letter (the Determination Letter) withholding the Report in its entirety under FOIA Exemptions 2 and 5. Specifically, SSPA contends that the Report

> reflects the tentative views of the author(s) and reflects draft sections and chapters for consideration by agency officials. The [Report] does not represent a final agency position on the matter discussed in the [R]eport. It was subject to further review by DOE officials. Thus the preliminary opinions reflected in the [Report] are by their very nature pre-decisional.

Determination Letter at 2. The Determination Letter further states:

> The [Report] was reviewed to determine if any portion could be provided after redaction of any exempt material. Any parts that might be considered for [release

[1] The Report has never been issued to the public. Each page of the Report is marked "Official Use Only-Draft."

> following] redaction, however, are 'high 2' information. Its disclosure could reveal possible locations and quantities of fissile material that could be targeted for destruction by terrorists and others who wish to harm us.

Id. On February 7, 2005, the Appellant submitted the present Appeal which challenges SSPA's withholding determinations under Exemptions 2 and 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 Exemptions 2 and 5 are at issue in the present case.

A. Exemption 5

Exemption 5 protects from disclosure "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). "To qualify, a document must thus satisfy two conditions: 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." *United States Department of the Interior v. Klamath Water Users Protective Association*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S. Ct. 1488 (1984) (*Weber Aircraft*)*; NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath*, 121 S. Ct. at 1065.

The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are

formulated." *Sears*, 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). 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 its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. *See EPA v. Mink*, 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft Corp.*, 465 U.S. at 802, 104 S. Ct. 1488.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, 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 exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the document at issue in the present case, we note that much of the Report is clearly deliberative and pre-decisional. The Report itself is a draft document which never evolved into a final, finished form. While the Report was originally intended to be released to the public, the document was never completed and was never released to the public and thus reflects only the tentative, preliminary opinions of its authors rather than the policies or findings of the DOE.

While the document itself is clearly pre-decisional and deliberative in nature, it contains a great deal of purely factual information, such as facts, figures, photographs and historical narrative. As discussed above, factual information is generally not considered to be pre-decisional and deliberative in nature. This fact was implicitly recognized in the Determination Letter, which contends that "Any parts [of the Report] that might be considered for [release following] redaction, however, are 'high 2' information." Determination Letter at 2. Accordingly, we now turn to SSPA's withholding under Exemption 2.[2]

B. Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir.

[2] Our discussions with SSPA officials indicate that a small portion of the data contained in the Report was preliminary in nature. Preliminary or tentative data is considered pre-decisional and deliberative in nature and can therefore be properly withheld under Exemption 5.

1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

SSPA's Determination Letter indicates that it withheld those portions of the Report that were factual in nature because its release could reveal the locations and quantities of fissile material, which could be used by terrorists or other enemies to harm national security interests.

SSPA may continue to withhold that information in the Report which would reveal the location or quantity of fissile material under Exemption 2. That information is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information contained in the Report that would reveal the location or quantity of fissile material if released neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is clearly predominantly internal.

The information contained in the Report that would reveal the location or quantity of fissile material if released meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency,* 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Disclosure of information revealing the location and quantity of fissile material risks allowing terrorists to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of fissile materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public that requested it. Accordingly, we find that the information revealing the location and quantity of fissile material can be properly withheld under the "high two" prong of Exemption 2.

We contacted SSPA officials as part of our review of its withholdings of information under Exemption 2. Our discussion with those officials revealed that a significant amount of the withheld factual information contained in the Report could be released without revealing the location or

quantities of fissile materials. Since such information could be released without risking the harm cited in the Determination Letter, SSPA cannot continue to withhold this information under the cited reasoning. Accordingly, we are remanding this matter to SSPA. On remand, SSPA must promptly conduct a new review of the Report and issue a new determination letter in which it either segregates and releases all factual information contained in the Report that does not reveal the location or quantity of fissile material or explains why it is continuing to withhold such information under different reasoning.

III. CONCLUSION

Because some information contained in the Report cannot continue to be withheld under the justification provided in the Determination Letter, we are remanding this matter to SSPA. Those portions of the Report which are not factual in nature or which involve preliminary or tentative data are properly withheld under Exemption 5. Those portions of the Report which would reveal the locations or quantities of fissile material are properly withheld under Exemption 2. Factual information contained in the Report that is neither preliminary or tentative in nature nor would reveal the location or quantity of fissile material cannot continue to be withheld under the justification provided in the Determination Letter. On remand, SSPA must either release this information, or withhold it under a different justification. If SSPA withholds this information under different reasoning, the new reasoning must be fully explained in a new Determination Letter.

It Is Therefore Ordered That:

(1) The Appeal filed by the Federation of American Scientists, Case No. TFA-0088, is hereby granted in part as set forth in Paragraph (2) and is denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Security and Safety Performance Assurance for further processing in accordance with 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: March 7, 2005