

May 18, 2010

Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5875
14th and Constitution Avenue, NW
Washington, DC 20230
Fax: (202) 482-2552
FOIAAppeals@doc.gov

Re: Freedom of Information Act Appeal- Request # 2010-000153

Dear Assistant General Counsel for Administration:

This is an appeal pursuant to 5 U.S.C. § 552 and 15 C.F.R. § 4.1 O(a) concerning the withholding of certain requested documents by the National Marine Fisheries Service (“NMFS”). The Agency's refusal to release the requested documents violates the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended.

On December 25, 2009, the Association for Professional Observers (“APO”) requested documents under FOIA. Specifically, we requested:

- all documents from the National Marine Fisheries Service (“NMFS”) meetings and/or workshops on data confidentiality of fisheries observer data and information that took place in April 2003 and again in January 2008.

On February 23, 2010, APO received a letter responding to the request in a letter signed by Eric C. Schwaab, Assistant Administrator for Fisheries, granting a partial fee waiver for “agendas, list of attendees, PowerPoint presentations, and handouts given to attendees,” but denying a fee waiver for relevant emails. The letter stated: “NMFS has determined that a fee waiver is not warranted for e-mails from participants of the workshops. The APO has not demonstrated that these records would contribute to the understanding of a reasonably broad audience of persons interested in the subject. Furthermore, APO has failed to demonstrate how e-mails would contribute significantly to public understanding of NMFS policies concerning data confidentiality of fisheries observer data and information.” On March 20, 2010, APO filed an appeal of the partial denial of the fee waiver. On March 22, 2010, the agency acknowledged the appeal. To date, APO has not received a final response from the agency regarding the fee waiver appeal.

On April 20, 2010, Eric C. Schwaab sent a final response to the original FOIA request. In the response, Mr. Schwaab indicated that the agency had identified 537 responsive pages, that it was releasing 388 in their entirety, and that it was withholding 149 pages in part or

in whole pursuant to 5 U.S.C. § 522 (b)(5). However, the letter failed to give any explanation as to what material the withheld documents contained or how Exemption 5 applied to them. The agency did not give any indication as to how the documents were deliberative and pre-decisional in nature under Exemption 5, or how disclosure would disrupt a specific policy or final decision. Moreover, the agency also failed to segregate any reasonably segregable materials as required by FOIA.

Exemption 5

5 U.S.C. § 522(b)(5) of the Freedom of Information Act (“Exemption 5”) typically exempts from disclosure inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency, otherwise known as the deliberative process privilege.

In order to assert the deliberative process privilege under Exemption 5, a government agency must demonstrate with specificity and detail that the documents that they are seeking to withhold are both pre-decisional and deliberative. Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8-9 (2001); Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (in light of the “overwhelming thrust of FOIA... toward complete disclosure,” exemption 5 claims must be supported with specificity and in detail”); *See generally* Nat’l Wildlife Fed’n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988). A document is considered “pre-decisional” if an agency can point to the specific agency decision to which the document correlates, establish that the document was prepared for the purpose of assisting an agency official charged with making the decision, and verify that the document precedes the decision to which it relates. Providence Journal Co. v. U.S. Dept. of Army, 981 F.2d 552, 557 (C.A.1 (R.I.), 1992). A document is “deliberative” when it is “actually... related to the process by which policies are formulated.” Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 482 (C.A.2 (N.Y.), 1999) (quoting Hopkins v. U.S. Dept. of Housing and Urban Devel., 929 F.2d 81 (C.A.2 (N.Y.), 1991); *See generally* Nat’l Wildlife Fed’n, 861 F.2d at 1117. Factors that the courts consider include determining the nature of the documents at issue; whether the disclosure of such materials would disrupt the deliberative operations of agencies and be injurious to their consultative functions; and whether the documents could be reasonably separated into deliberative and non-deliberative material. *See* Montrose Chem. Corp. v. Train, 491 F.2d 63, 67-68 (D.C. Cir. 1974); Dudman Comm. Corp. v. Dept. of Air Force, 815 F.2d 1565, 1568, 259 U.S. App. D.C. 364, 367 (C.A.D.C., 1987).

Here, the agency has withheld, in part or in whole, several documents constituting memoranda, presentations, guidances, and other documents pertaining to observer data and the 2003 and 2008 workshops. The agency did not meet the criteria for withholding documents under Exemption 5.

For one, DOC failed to explain why Exemption 5 would apply to the various documents it withheld. The April 20, 2010 response letter to APO’s FOIA request did not articulate why the documents that DOC seeks to withhold are pre-decisional and deliberative in nature. Moreover, DOC failed to include any sort of index of documents which would explain how the withheld documents correlated to a final decision or policy made by the

agency and how disclosure would disrupt the deliberative and consultative functions of the agency.

Moreover, in several instances, DOC did not make any attempt to segregate the non-exempt portions of the material from the exempt portions in response to APO's request. For instance, DOC withheld an entire document entitled "Guidance Addressing Protection and use of Government Information under NMFS Federal Assistance Awards (memo to Shawn Carey, Alaska Region, Federal Program Officer from Chief and Senior Counsels, February 8, 2007)." In addition, the agency withheld 60 entire pages of a document entitled "Southwest Region Confidential Related Files relating to Western Pacific Fishery Management Council, State of California, HMS Fisheries." The agency did not attempt to segregate non-exempt portions of these documents. 5 U.S.C. § 522 states that "any reasonable 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." Moreover, "the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." Schiller v. NLRB, 964 F.2d 1205, 1029 (D.C. Cir. 1992)(quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977)). Thus, Exemption 5 may not protect compilations of factual data or other matters that may be reasonably segregated from deliberative material. See Id.; Train, 491 F.2d at 68. Given that APO's request was for documents related to meetings on observer data, segregation of this material from the exempt material is clearly reasonable.

In reviewing this appeal we would also like to draw your attention to the January 21, 2009 memo by President Barack Obama declaring the following policy for the Executive Branch:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The U.S. Department of Commerce's claim that the requested material is exempt from release falls short of meeting the requirements for exemption under 5 U.S.C. § 552(b)(5). Consequently, for all the reasons set forth above, APO maintains that its FOIA request has been improperly denied in part. As required, this appeal includes a copy of the original request, the response to the request.

Thank you for the consideration of this appeal.

Sincerely,

Ms. Elizabeth Mitchell

Association for Professional Observers

P.O. Box 933

Eugene, OR 97440

Tel: 541-344-5503

APO@apo-observers.org