



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Appeal No. 2018-152

July 12, 2019

Jeff Ruch
Public Employees for
Environmental Responsibility
962 Wayne Ave., Suite 610
Silver Spring, MD 20910

Dear Mr. Ruch:

This responds to the July 19, 2018, Freedom of Information Act (“FOIA”) appeal (“appeal”) (**Appeal No. 2018-152**) that you filed with the Department of the Interior (“Department”). The appeal concerns your April 26, 2018, FOIA request to the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) that sought documents generally pertaining to the decision to halt work on a study entitled “Potential Health Risks of Living in Proximity to Surface Coal Mining Sites in Central Appalachia.” You filed the appeal to challenge OSMRE’s decision to invoke FOIA exemption (5)¹ as a basis to redact information on pages 34 – 38 of a document it released to you entitled, “5_NAS IG Questions-SOL_Redacted.” These five pages reflect questions that the Office of Inspector General (“OIG”) posed to OSMRE on issues pertaining to the subject of the FOIA request and include OSMRE’s draft responses. OSMRE invoked exemption (5) to withhold all of its draft responses from the document.

Your appeal is **GRANTED** insofar as most of OSMRE’s draft responses to the OIG are not protected from disclosure, as OSMRE already released to you in connection with the FOIA request almost all of its nearly duplicative *final* responses in a document entitled, “2_OSMRE_s Response to OIG - NAS Audit - SOL_Redacted” (pages 251 – 255). The only deviation between OSMRE’s draft responses and its final ones is OSMRE’s response to the last question (response #6 on page 38 in the draft and page 255 in the final). However, OSMRE released both the draft and final versions of response #6 to you in their entirety. Additionally, the only information that OSMRE redacted from its *final* responses to the OIG is ½ a sentence of its response to question #3 on page 254, where it invoked the deliberative process² and attorney-client³ privileges of exemption (5) to support the withholding. OSMRE invoked these exemption (5) privileges as bases to withhold the entire sentence from its draft response to this aspect of question #3 on page 37, which is a draft response that duplicates OSMRE’s final response.

In light of the above, the Department concludes that the withheld draft responses on pages 34 – 38 that duplicate OSMRE’s already released final responses are not protected from disclosure by exemption (5) and should have been released to you.

Your appeal is **DENIED** in that the Department will continue to withhold, pursuant to the deliberative process and attorney-client privileges of exemption (5), a portion of OSMRE’s draft response to question

¹ 5 U.S.C. § 552(b)(5).

² The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004).

³ The attorney-client privilege of exemption (5) protects confidential communications made by a client to his/her attorney and also protects from disclosure certain communications provided by an attorney to his/her client. *See Maine v. United States Dep’t of the Interior*, 298 F.3d 60 (1st Cir. 2002).

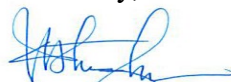
#3 on page 37, which, as noted above, OSMRE also redacted from its final responses that it released to you. This protected information reflects information that forms a part of the give-and-take of the consultative process and details a confidential communication between an attorney and a client. Further, the Department reasonably foresees that disclosure would harm interests protected by each of the exemption (5) privileges invoked.

The Department has attached to this decision the five pages that comprise pages 34 – 38 of the document entitled, “5_NAS IG Questions-SOL_Redacted” with the protected information discussed above redacted. The Department has marked the area of the deletion and, on page 37 (now page 4), used the code “EX5 (DPP)(ACP)” to identify the information that it is continuing to withhold under the deliberative process and attorney-client privileges of exemption (5). The Department is releasing the remainder of the information on these pages to you in full.

This completes the Department’s response to your appeal. You have a right to seek judicial review of this decision under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: OSMRE FOIA Officer
SOL-Division of Mineral Resources
Departmental FOIA Officer