



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 28 2008

OFFICE OF
INSPECTOR GENERAL

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036

Re: Freedom of Information Act (FOIA) Appeal, HQ-APP-00090-08

Dear Mr. Ruch:

I am writing in response to your letter of May 27, 2008 to the U.S. Environmental Protection Agency, Office of Inspector General (OIG), in which you appeal an initial denial by the OIG, on May 20, 2008, concerning a FOIA request for a "report completed by EPA OIG investigator Cory Rumble which discusses the status of the EPA cleanup in Libby [Montana]." On May 20, 2008, the OIG denied the request on the basis that the requested record was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(7)(A). Your appeal challenges both of these grounds.

As a preliminary matter, I note that this FOIA request is a repeat request by you for the same information that you made approximately a year ago, and which was denied, both at the initial denial and administrative appeal stages, under 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(7)(A). See *Appeal Decision Letter from Mark Bialek to Jeff Ruch, August 8, 2007*.

Exemption 7(A)

5 U.S.C. § 552(b)(7)(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." To fit within Exemption 7(A), the government must show that 1) a law enforcement proceeding is pending or prospective and 2) release of the information could reasonably be expected to interfere with enforcement proceedings." Manna v. U.S. Department of Justice, 51 F.3d 1158, 1164 (3d Cir. 1995). With respect to your prior FOIA request, Exemption 7(A) applied because the investigation was active. At this time, however, the investigation has concluded, and no pending or prospective civil or criminal proceedings are contemplated. Accordingly, Exemption 7(A) is no longer a viable basis to withhold the report you seek.

Exemption 5

In my prior decision letter to you, I upheld withholding the document, in part, under 5 U.S.C. § 552(b) (5) (Exemption 5), which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." That analysis still applies to this appeal.

Exemption 5 encompasses both statutory privileges and those commonly recognized by case law. The deliberative process privilege is among the most frequently invoked privileges that have been held to be incorporated into Exemption 5. See, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The deliberative process privilege is designed to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. at 151. "The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1982) citing, Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-774 (D.C. Cir. 1978) (en banc).

There are two fundamental requirements for the deliberative process privilege to be invoked. First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan, 591 F.2d at 774. Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2D 1136, 1143-44 (D.C. Cir. 1975).

A document from a subordinate to a supervisor is generally predecisional in nature, see Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992), as are documents generated as part of a continuing process of agency decision making. See, Casad v. HHS, 301 F.3d 1247, 1252 (10th Cir. 202). The Rumble document was written by an OIG subordinate to his immediate supervisor and, moreover, was generated as part of an investigation. It is without question predecisional.

As to the second prong – whether the document is deliberative in nature, the deliberative process privilege is ordinarily not applicable to purely factual matters, or to factual portions of otherwise deliberative material. In this regard, you maintain that you only seek those portions that "contain[] statements of fact or assessments of the status of the cleanup." Appeal, p. 2. In this regard, agencies are entitled to withhold factual material when the author of a document selects specific facts out of a larger set of facts. The very act of "distilling and selecting" which facts to portray has been held to be deliberative in nature. See Montrose Chemical Corp. v. Train

491 F.2d 63, 71 (D.C. Cir. 1974). In this case, the document is a selective summary of information of the issues and concerns of various EPA employees and private individuals on technical/scientific issues regarding EPA's residential cleanup program in Libby. The document reflects Rumble's judgments as to which facts to include, and what facts and issues he thought was important. That is quintessentially deliberative.

As both prongs of the deliberative process privilege have been established, Exemption 5 was properly invoked and remains applicable to justify withholding the document in its entirety. There is no reasonably segregable portion that could be released, as "the facts" in the report reflect the author's deliberative process in their selection.

Accordingly, as Exemption 5 protects this document from disclosure, your appeal is denied. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Bialek", written in a cursive style.

Mark Bialek

Associate Deputy Inspector General and
Counsel to the Inspector General

Enclosures

cc: OIG FOIA Officer
 Freedom of Information Operations Staff
 Barbara Bruce, OGC