



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

DEC 26 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9345.1-12

MEMORANDUM

SUBJECT: Releasability of HRS Documents under FOIA

FROM: Henry L. Longest II, Director *Dr. Henry L. Longest II*
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, VIII

Director, Emergency and Remedial Response Division
Region II

Director, Hazardous Waste Management Division
Regions III, VI, IX

Director, Hazardous Waste Division, Region X

PURPOSE:

This memorandum is to provide guidance to the Regions on what Hazard Ranking System (HRS) material is considered releasable under the Freedom of Information Act (FOIA).

BACKGROUND:

The issue of what HRS materials are considered releasable under FOIA has not been addressed consistently by all Regions. A July 9, 1991, memorandum from Allyn Davis of Region VI requested guidance on this issue. In addition, several other Regions have requested guidance from my staff on issues of FOIA releasability for NFRAP (no further remedial action planned) sites and sites being deferred to other authorities. This memorandum responds to those questions.

OBJECTIVE:

The objective is to ensure Regional consistency by providing direction on releasability under FOIA of HRS documents.

DISCUSSION/IMPLEMENTATION:

The Office of General Counsel (OGC) has prepared guidance outlining the Agency's policy regarding the releasability of HRS information (see attachment 1). This OGC memorandum addresses the extent to which materials prepared in the site assessment process may be withheld as "deliberative" in response to FOIA requests. Additional background information on the grounds for refusing disclosure of the contents of the HRS package are discussed in a January 16, 1986, memorandum finalizing the decision on a FOIA appeal (attachment 2). The OGC guidance is summarized in general terms as follows:

- Materials underlying a "no further remedial action planned" (NRAP) decision are releasable.
- Draft HRS scoring sheets may be withheld.
- For sites that are under consideration for the NPL, but not yet proposed, the HRS scoring sheets, documentation record, and factual material need not be disclosed.
- HRS scores for RCRA deferral sites may be withheld.

The OGC guidance addresses our legal obligations, while pointing out (in attachment 1) that the Agency has the flexibility to release documents which we may legally withhold. However, it is Agency policy not to release these documents unless we are required to do so.

This guidance should answer many of the FOIA-related questions that the Regions have. It should be noted that the advice given here is general in nature, and in specific cases it is advisable to consult a regional or OGC FOIA attorney.

cc: Janet Grubbs
George Wyeth
Alan Margolis

Attachments



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

Attachment 1

OCT 17 1991

MEMORANDUM

OFFICE OF
GENERAL COUNSEL

SUBJECT: Treatment under FOIA of Documents Generated in Site Assessment Process

FROM: George B. Wyeth *George B. Wyeth*
Attorney
Solid Waste and Emergency Response Division (LE-132S)

Alan Margolis *Alan Margolis*
Attorney
Grants, Contracts and General Law Division (LE-132G)

TO: Janet Grubbs
Site Assessment Branch
Office of Solid Waste and Emergency Response (OS-230)

At the May 1991 Site Assessment Section Chiefs' meeting, and on a number of occasions more recently, questions have come up regarding the extent to which materials prepared in the site assessment process (particularly preliminary HRS scoring sheets) may be withheld as "deliberative" in response to FOIA requests.¹ This memorandum responds to those questions; it should be noted that the advice given here is general in nature, and in specific cases it is advisable to consult a regional or OGC FOIA attorney. Moreover, this advice is not intended to bind the Agency in connection with final agency determinations on FOIA appeals.

First to be protected under FOIA as deliberative, documents must be (1) predecisional (i.e., prior to the adoption of an agency policy or decision), and (2) deliberative (i.e., making recommendations or expressing opinions on legal or policy matters.) Draft HRS scores would generally fall within this category. A draft that is adapted as final agency policy is no longer protected (however, such scores are made public in the docket at the time a site is proposed for the NPL anyway).

¹ Documents that are not protected under FOIA are commonly referred to as "releasable." It should not be inferred that the Agency must always exercise its right to withhold documents; exercise of a FOIA exemption is a matter of Agency discretion. The Agency may choose to release deliberative or other privileged documents; it simply need not do so. In general, however, the Agency's practice has been not to release draft HRS scoring sheets, for policy reasons.

Factual material in the agency's possession is not deliberative and must generally be released.

One question raised at the Section Chiefs' meeting had to do with releasing information after a site is assigned "no further action" status ("NFRAPed"), based on its HRS score. A NFRAP determination is neither predecisional nor deliberative and may not therefore be withheld pursuant to the deliberative process prong of FOIA exemption 5. Therefore, materials underlying the NFRAP decision are not withholdable under the deliberative process privilege or other FOIA exemptions (e.g., the final score and supporting scoring sheets), and are considered releasable.² Draft scoring sheets would, however, not be releasable.

A related question had to do with the status of preliminary HRS scoring sheets -- that is, sheets other than the ones that formed the basis for a final decision (either to list or to NFRAP). Often, preliminary HRS scores are calculated which are superseded as the analysis is refined or new data is obtained. To the extent these are retained, they remain deliberative and need not be disclosed. This is true even after a final score has been determined. This is to ensure that staff feel free preparing tentative scores based on a partial analysis, without having to fear that the preliminary scores will be used against the Agency later.

A third FOIA-related question recently came from one of the regions. Since the answer may be of more general interest, we thought we would include it here. The region had received a request for all documents contained in the HRS scoring package for a site that is being considered for proposal to the NPL, but has not yet been proposed. The HRS scoring sheets, including the documentation record, are clearly deliberative at this stage, and need not be disclosed. In addition, factual material in the package (i.e., factual references) need not be released. While factual material in the Agency's files is normally releasable, releasing materials in response to a request for "the HRS package" necessarily identifies particular factual material as being contained in a draft HRS package and thus sheds light on the nature of the Agency's analysis. Therefore, the contents of

² Other grounds for denying release include FOIA exemptions (b)(7)(A), which covers enforcement-sensitive documents and (b)(5), which, in addition to the deliberative process privilege, also incorporates the attorney-client privilege and the attorney work product privilege (i.e., materials prepared in, or in anticipation of, litigation). These exemptions (aside from the deliberative process application of (b)(5)) would not appear to be generally applicable to site assessment materials, although they might be applicable in particular cases.

the package need not be disclosed.³ (Of course, if the site is later proposed, the scoring package and supporting materials would become releasable, but they would then be made public in the docket anyway.)

The relationship between EPA and states raises significant FOIA questions as well. Communications from states that are deliberative in nature (i.e., communicating advice or opinions regarding the potential listing of a site) appear to be protected. Although there is only limited case law on this point, at least one court has held that material from state agencies sent to a federal agency for the purpose of giving the federal agency advice on a matter under consideration is generally privileged.

Agency staff should bear in mind that during a rulemaking (i.e., after a site has been proposed in the Federal Register and before it goes final), communications from states, especially communications outside the normal course of implementing a cooperative agreement, may present a more complex issue. Communications in rulemaking will be discussed in a separate memorandum.

Agency staff should also keep in mind that documents originating at EPA and sent to states are subject to state FOIA-equivalent laws. Such laws may vary in the degree of confidentiality allowed. Regions may have to discuss with the state agencies they deal with what the rules are in those states before sending material that they may not want to have disclosed.

Finally, a question came up recently about whether HRS scores for sites that have been deferred to RCRA may be withheld. If the score is in fact a preliminary draft (which is generally the status of any HRS score for a site that has not been either proposed for listing or NFRAPed based on the score), it need not be released. This is not affected by the fact that the site is no longer being considered for listing, if the reason it is no longer being considered is deferral to RCRA rather than its HRS score. In short, HRS scoresheets for sites that have been deferred to RCRA remain deliberative and need not be released.

I hope that this helps to answer the questions you raised. If you have any further questions, please do not hesitate to contact us.

³This is discussed further in a final determination of a FOIA appeal that was issued on January 16, 1986. A copy of that determination is enclosed herewith.