



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Appeal No. 2014-157

October 28, 2014

Jeff Ruch
Public Employees for
Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, DC 20036

Dear Mr. Ruch:

This responds to the August 25, 2014, Freedom of Information Act (“FOIA”) appeal (“appeal”) (**No. 2014-157**) that you filed with the Department of the Interior (“Department”). Your appeal concerns your June 3, 2014, FOIA request to the National Park Service (“NPS”) that sought copies of “[t]hree investigations of [NPS] management at the USS Arizona Memorial...over poor morale...ticket sales...and...an ethics probe of the ticket sales.”

You filed this appeal to challenge the NPS’s decision to withhold in full, pursuant to the deliberative process privilege of FOIA exemption (5)¹ and FOIA exemption (6),² a “briefing statement” that the NPS determined is responsive to the FOIA request. You also challenge the NPS’s decision to invoke exemption (6) as a basis to withhold in full “an administrative inquiry to assess the work environment at the park.” You also state that the NPS did not follow the requirement in the FOIA for it to segregate and release the non-exempt portions of the documents that it withheld in full.

After fully reviewing the issues presented in the appeal, the withheld documents, and current case law, the Department concludes that the appeal will be **DENIED IN PART** and **GRANTED IN PART**.

The appeal is denied in part insofar as the NPS properly invoked the deliberative process privilege of exemption (5)³ as a basis to withhold some of the information in the briefing statement. The Department is also withholding some of the information from the administrative inquiry pursuant to the deliberative process privilege, as nothing precludes the Department from invoking additional exemptions or privileges on appeal to withhold protected information.

Both documents are predecisional in that the NPS employees prepared them prior to the decisionmakers determining how to address or resolve any of the issues under discussion and

¹ Exemption (5) protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency.” 5 U.S.C. § 552(b)(5).

² Exemption (6) allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

³ The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. See *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).

review. The documents are deliberative because they express the personal views and opinions of the authors and the employees with whom they spoke. Moreover, neither of the documents reflects final agency decisions on any of the issues and the NPS has not adopted either formally or informally as agency policy.⁴

The information that the Department will continue to withhold under the deliberative process privilege of exemption (5) consists of the opinions of employees regarding their working conditions and various other personnel-related matters. The Department is also withholding information in the documents that reflects each authors' impressions and interpretations of statements that employees made to them, as well as their opinions and assessments of various issues that they presented to NPS decisionmakers. Further, some of the information that the Department will withhold reflects incorrect or inaccurate information that, if disclosed, could mislead the public about agency actions that never occurred and cause a great deal of public confusion.

The appeal is also denied in part with respect to the NPS's withholding of some of the information in both reports under exemption (6). The NPS properly withheld information in the documents that consists of frank and candid statements that some employees made about their co-workers' job performance and other personnel and personal matters. The employees to whom this information pertains have significant privacy interests in withholding, as disclosure could cause them embarrassment, subject them to harassment or annoyance, or incite jealousy among their co-workers--precisely some of the harms that exemption (6) was designed to prevent. Both favorable and unfavorable assessments of an employee's job performance trigger a significant privacy interest in withholding.⁵

Additionally, the employees who offered statements and information in connection with the preparation of each of the documents have significant privacy interests in withholding some of the information too, as disclosure would lead to the type of harm, embarrassment, and possible retaliation that exemption (6) was also created to prevent.⁶ Furthermore, employees are more willing to come forward and speak about their knowledge of certain events and issues when they know that statements that can be attributed to them will not be disclosed, raising the interests they have in nondisclosure even more.

On the public interest side of the balancing test,⁷ the Department concludes that the very general concern that you note⁸ about knowing the "quality of park management" and the broad interest you

⁴ See *The Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 359 (E.D.N.Y. 2009) (noting that agencies "are not required to point to a specific agency decision in order to establish that the deliberative process is involved"); *Nielsen v. U.S. Bureau of Land Mgmt.*, 252 F.R.D. 499, 522 (D. Minn. 2008) (rejecting claim that agency was required to link withheld documents to specific agency decision).

⁵ See *Ripskis v. Dept. of Housing and Urban Development*, 746 F.2d 1, 2-3 (D.C. Cir. 1984).

⁶ See *Anderson v. United States Postal Service*, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998).

⁷ Under the FOIA, the public interest to consider when evaluating whether exemption (6) applies is limited to the FOIA's "core purpose" of "shedding light on an agency's performance of its statutory duties." See *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

cite that the “operation of a national park unit is a matter of public concern” is not sufficient to overcome the significant privacy interests the employees have in withholding the above-described information. With regard to the other public interest example that you offer in the appeal, i.e., “there are allegations of high-level misconduct, illegal profiteering and maladministration of one of the most solemn memorials in the U.S.,” the Department concludes that it too cannot overcome the significant privacy interests in withholding. None of the information the Department is withholding pertains to such allegations of misconduct.

For the above reasons, the Department concludes that the privacy interests in withholding outweigh the public interest, if any, in disclosure, and the Department will continue to withhold the information under exemption (6).

The appeal is granted in part insofar as the Department’s line-by-line, page-by-page review of the documents reveals that some of the information is not protected from disclosure by a FOIA exemption. **The Department will release this non-exempt information to you within 5 workdays from the date of this decision.**

This completes the Department’s response to your appeal. If you are dissatisfied with the Department’s determination that some of the information in the documents is protected from disclosure by exemptions (5) and (6), you have a right to seek judicial review 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: Charis Wilson, FOIA Officer, NPS
Kevin Killeen, Pacific West Region FOIA Officer, NPS
Deborah Bardwick, Assistant Field Solicitor, SOL-San Francisco Field Office
Cindy Cafaro, Departmental FOIA Officer

⁸ The burden is on the requester to establish that disclosure would serve the public interest. *See National Archives and Records Administration v. Favish*, 541 U.S. 157, 171-72 (2004).