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August 10, 2015

Sent Via First-Class Mail and Email
Director Poll A. Marmolejos
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Office of Hearings and Appeals
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Re: HQ-2015-00734-F
Freedom of Information Act Appeal

Dear Director Marmolejos:

This is a Freedom of Information Act ("FOIA") appeal submitted on behalf of my client, former Idaho Governor Cecil D. Andrus, to appeal the Department of Energy's ("DOE") wholly inadequate and unlawful response to Governor Andrus' January 22, 2015 FOIA request number HQ-2015-00734-F.

INTRODUCTION

On January 22, 2015, Governor Andrus submitted a FOIA request to DOE seeking copies of all categories of documents regarding a waiver or an interpretation of the 1995 Settlement Agreement ("Batt Agreement") between DOE and the state of Idaho for storage and cleanup of nuclear materials at the Idaho National Laboratory ("INL"). The request sought all communications and documents regarding the planned or anticipated transportation of commercial spent nuclear fuel from any private commercial utility to the INL. The request covered communications between DOE and its contractors, and the state of Idaho. As noted above, the request was assigned DOE FOIA number HQ-2015-00734-F.

On March 18, 2015, per my correspondence to DOE, we clarified that Governor Andrus is seeking communications related to the December 2014 request from DOE to the Idaho Governor and Attorney General for a "waiver" of paragraph D.2.e of the 1995 Settlement Agreement regarding commercial spent nuclear fuel shipments. On April 28, 2015, we agreed that the search for responsive documents would be from January 1, 2012, to January 22, 2015.

On July 10, 2015, DOE provided us a response from DOE FOIA Officer Alexander C. Morris. A copy of the response letter and its accompanying *Vaughn* index is attached to this appeal pursuant to DOE administrative appeal requirements in 10 C.F.R. § 1004.8(b). *See* Attachment A hereto.

In the response, DOE provided a total of forty-one (41) documents, of which thirty (30) are essentially completely redacted under FOIA Exemption 5 based on unsupported claims of deliberative process, attorney-client, and attorney work product exemptions. Virtually the only unredacted documents provided by DOE were public news articles and limited correspondence that were already widely available, such as DOE's December 2014 request for a waiver.

Governor Andrus now appeals DOE's partial denial of his FOIA request through the unlawful and excessive redaction of information under FOIA Exemption 5. 5 U.S.C. § 552(b)(5). Release of this information is in the public interest, and the response letter and index are so vague that DOE's reliance on Exemption 5 cannot be sustained. *Id.* § 552(a)(4)(B). Additionally, the redactions are so complete that DOE cannot rely on coded redaction to prove it has taken reasonable steps to segregate releasable information. *Id.* § 552(b).

Indeed, DOE has applied Exemption 5 so excessively that the response is essentially a complete denial. Because withholding information under Exemption 5 is discretionary, DOE's actions certainly do not "reaffirm[] the commitment to accountability and transparency" established by President Obama and Attorney General Holder in 2009. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); 74 Fed. Reg. 4683 (Jan. 21, 2009); 74 Fed. Reg. 51878 (Oct. 8, 2009).

Therefore, Governor Andrus requests that DOE waive its discretionary withholding of information under FOIA Exemption 5 and release the responsive documents without redaction. Release of this information is in the public interest because Governor Andrus and the citizens of Idaho deserve to know how DOE and their elected officials are handling the storage and cleanup of nuclear waste within their own state. Alternatively, if DOE does not release all of the information withheld under Exemption 5, then it must provide an adequate justification for each document withheld.

RELEVANT AUTHORITIES

FOIA requires that agency documents be released to the public upon request. 5 U.S.C. § 552(a)(3)(A). However, FOIA lists nine categories of information that may be withheld at the discretion of the agency. *Id.* § 552(b)(1)-(9). DOE has codified those exemptions at 10 C.F.R. § 1004.10(b)(1)-(9). DOE must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). DOE bears the burden of proving that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B). DOE regulations also require that exempt documents shall nonetheless be released whenever disclosure is in the

public interest. 10 C.F.R. § 1004.1.

FOIA Exemption 5 includes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Courts have identified three traditional privileges that fall under Exemption 5: the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In its determination, DOE withheld information pursuant to all three privileges.

To be withheld under the deliberative process privilege, a record must be both pre-decisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992).

The attorney work-product privilege protects documents prepared by an attorney in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). However, "the policies of the FOIA would be largely defeated" if agencies withheld documents "simply because litigation might someday occur." *Senate of P.R. v. DOJ*, 823 F.2d 574, 586 (D.C. Cir. 1987) (citing *Coastal States*, 617 F.2d at 865).

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). However, this privilege does not protect facts conveyed to the client by the attorney when obtained from other persons or sources. *Brinton v. Dep't of State*, 636, F.2d 600, 603 (D.C. Cir. 1980). Additionally, interpretations of agency law are not protected because the "attorney-client privilege may not be used to protect . . . agency law from disclosure to the public." *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997).

GROUNDS FOR APPEAL

DOE bears the burden of establishing why Exemption 5 applies to each redacted document. *See* 5 U.S.C. § 552(a)(4)(B). DOE must construe FOIA exemptions narrowly, provide "detailed justification" of its reasons for withholding information, and take reasonable steps to segregate non-exempt information within documents. *Vaughn v. Rosen*, 484 F.2d 820, 823-27 (1973). Conclusory or generalized justifications cannot satisfy this burden. *Id.* at 826.

Here, DOE has redacted all non-public information from its response, and it has provided only conclusory and generalized statements in support of its discretionary

withholding under Exemption 5. DOE has failed to sustain its burden of providing a detailed justification for withholding information under each claimed exemption; and it has further failed to take reasonable steps to segregate non-exempt information within documents.

DOE's response letter, attached *Vaughn* index, and coded redactions, even when considered together, do not satisfy DOE's burden of proof. The response letter contains general, conclusory statements that merely state DOE's general authority to withhold information under FOIA Exemptions. In fact, other than restating Governor Andrus' request, only two sentences in DOE's response letter address the content of the withheld information as follows:

> The material being withheld under Exemption 5 includes deliberations that reflect DOE's internal, deliberative policies concerning proposed shipments of commercial spent nuclear fuel to the Idaho National Laboratory. The information consists of possible action plans, policy concerns, and other deliberative communications pertaining to this ongoing and evolving process.

See DOE Response Letter at *3 (July 10, 2015) (Attachment A). Similarly, the *Vaughn* index contains no description whatsoever of the information withheld under Exemption 5.

This generic and circular reasoning is hardly a "detailed justification" for withholding specific information. *Vaughn*, 484 F.2d at 823. Nowhere in the letter is there any reference to a pending decision under deliberation; any attorney work-product prepared for pending or foreseeable litigation; or confidential communication between an attorney and a client. Furthermore, the response letter does not indicate that DOE even considered the public interest when withholding information under deliberative process privilege.

DOE's *Vaughn* index provides no further justification for withholding information. To comply with FOIA requirements, the index's "explanation of the exemption claim and the descriptions of withheld material . . . must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt" under FOIA. *Founding Church of Scientology of Wash. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Here, the index serves only to identify the number of documents and redactions for each office within DOE. The Index only specifically addresses the content of six documents to explain that omitted attachments are publicly available information. Thus, DOE's *Vaughn* Index is not "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Id.*

Similarly, the coded redactions provided in the responsive documents do not satisfy DOE's obligations under FOIA. Releasing responsive documents with coded redactions does not satisfy *Vaughn* index criteria "where there exists wholesale deletions

of numerous pages." *Coleman v. F.B.I.*, Civ. A. No. 89-2772, 1991 WL 333709, at *4 (D.D.C. 1991). Here, DOE's combined redactions are so complete that the entire response consists of black voids with absolutely no context. The information that actually was released consists only of e-mail addresses, subject lines and dates; plus a few publicly available letters and news articles. Thus, there is no way to determine whether the redactions contain releasable information, or whether DOE has taken reasonable steps to segregate releasable information as required under 10 C.F.R. § 1004.7.

Given that the DOE is seeking a waiver of the 1995 Batt Settlement Agreement that prohibits commercial spent nuclear fuel shipments to Idaho, it is outrageous that DOE would go so far to hide its intentions and the planning that went into the December 2014 waiver request. DOE's blatant violations of FOIA here, and its utter failure to consider the high public interest in full disclosure of its plans for commercial spent nuclear fuel shipments to INL, evidence the reasons why the agency so lacks credibility with most Idahoans.

DOE can and should seek to rectify its violations of law and breach of the public trust by fully disclosing all the requested documents.

RELIEF SOUGHT

For the foregoing reasons, Mr. Andrus respectfully requests that DOE release all of the information withheld under Exemption 5. As stated above, release this information is entirely discretionary, and DOE must release this information because the storage and cleanup of nuclear waste in Idaho is in the public interest of Idaho's citizens.

If DOE does not release all of the information withheld under Exemption 5, then it must provide specific descriptions of the material withheld from each redacted document, the consequences of releasing those materials, and why disclosing the information is not in the public interest. Descriptions and explanations of withheld material must be detailed enough for my client and a reviewing court to reasonably determine whether the withheld information is actually exempt from disclosure, and that DOE has taken reasonable steps to segregate releasable information.

Very truly yours,
/s/ Laird J. Lucas
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Encl.
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