



May 8, 2009

USDA Forest Service, Chief's Office
Mail Stop 1143
1400 Independence Avenue, SW
Washington, DC 20250-1143
wo_foia@fs.fed.us

Re: Freedom of Information Act Appeal
FOIA Request 09-03-002 (LPNF)

Dear Ms. Kimball:

We are writing to timely appeal the denial of our request under the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.* On February 27, 2009, and pursuant to FOIA, ForestWatch submitted a request to the Los Padres National Forest (LPNF) for the final list of stimulus projects on the LPNF submitted to the Regional Office in accordance with the American Recovery and Reinvestment Act (ARRA). A copy of our FOIA request is attached as **Exhibit 1**.

Forest Supervisor Peggy Hernandez forwarded our request to the Regional Office. In this context, during a meeting on February 27, 2009, she informed me personally that the Forest Service did not want to disclose the requested list of projects because it “would lead the public to get involved in the decision-making process by ‘supporting or opposing’ the funding of certain projects.”¹ On March 24, 2009, the Regional Office denied our request, withholding seven pages of records in full pursuant to FOIA exemption 5. A copy of the Regional Office’s denial is attached as **Exhibit 2**.

Discussion

The purpose of FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). FOIA requires that federal agencies disclose records to any person upon request, unless the information falls within one of the narrow exemptions from FOIA listed in 5 U.S.C. § 552(b). *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Dobronski v. FCC*, 17 F.3d 275, 277 (9th Cir.1994). In furtherance of FOIA’s policy of governmental transparency, its disclosure exemptions are to be very narrowly construed by the agencies and reviewing courts. *Multnomah County Medical Soc’y v. Scott*, 825 F.2d 1410, 1413 (9th Cir. 1987); *Church of Scientology of Cal. v. U.S. Dep’t. of the Army*, 611 F.2d 738, 741-42 (9th Cir.1979) (“The Freedom of Information Act . . . mandates a policy of broad disclosure of

¹ This is not a verbatim quote. However, this paraphrase accurately captures the substance of Ms. Hernandez’s statement, which was itself a reiteration of a comment she had made to me during an earlier telephone conversation regarding our effort to obtain this information.

government documents when production is properly requested.”). The government bears the burden of showing that the withheld information is exempt from disclosure. 5 U.S.C. §552(a)(4)(B) (“the burden is on the agency to sustain its action”); *see also Multnomah County Medical Soc’y v. Scott*, 825 F.2d at 1413. The Supreme Court has stated that:

Exemption 5 protects from disclosure “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 the agency.” 5 U. S. C. §552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.

Department of Interior v. Klamath Water Users Protective Association, 121 S. Ct. 1060, 1065 (2001). The privileges protected by exemption 5 include the “deliberative process” privilege, which covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 150 (1975).

In invoking FOIA’s exemption 5, the Regional Office’s written determination cited the “deliberative process privilege” as the reason for withholding the requested project list. The Regional Office concluded that the list of proposed stimulus projects was submitted for deliberation and consideration as part of the Forest Service’s implementation of the ARRA, and on that basis, declined to provide us with that list. *See Ex. 2 at 1*

The information requested does not qualify for the deliberative process exemption under any of the reasons asserted by the Agency. As an initial matter, the reason suggested by Supervisor Hernandez — that disclosure of the final list of stimulus projects on the LPNF “would lead the public to get involved in the decision-making process by ‘supporting or opposing’ the funding of certain projects“ — is manifestly contrary to the congressional purpose underlying FOIA. “The words of a statute [FOIA] are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light ‘on an agency’s performance of its statutory duties.’” *United States Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 772-73 (1989). Likewise, the Court of Appeals for the Ninth Circuit has held that “[t]he statute is a commitment to ‘the principle that a democracy cannot function unless the people are permitted to know what their government is up to.’” *Favish v. OIC*, 217 F.3d 1168, 1171 (9th 2000) (internal quotations omitted). Similarly, President Johnson stated that “[a] democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury.” President Lyndon Johnson’s statements upon signing the Freedom of Information Act (July 4, 1966).

We have requested the final list of stimulus projects on the LPNF precisely to learn what the Agency is “up to” and Supervisor Hernandez’s concern that the public may become involved in “‘supporting or opposing’ the funding of certain projects“ on the Forest is simply irrelevant. Indeed, access to information of this type is FOIA’s central premise.

Additionally, each of the three rationales suggested in the determination letter lack foundation. The Los Padres National Forest deliberated over which projects to include on its list for recommendation to Regional, and forwarded this *completed list* to Regional on or before February 20, 2009. The deliberations of the Los Padres National Forest with respect to the project list ended at that time and FOIA's exemption 5 therefore does not apply.

Notably, the Agency's determination letter asserted three grounds upon which it alleged that exemption 5 applied: "(1) to encourage open, frank, *discussions on matters of policy* between subordinates and supervisors; (2) to protect against premature disclosure of *proposed policies* before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of *reason and rationales* that were not ultimately the ground for an agency action." See Ex. 2 at 1 (emphasis added). However, the final list of stimulus projects on the LPNF submitted to the Regional Office contains neither: (1) "discussions on matters of policy"; (2) "proposed policies," nor; (3) discussion of "reason and rationales" related to the funding request. It is a list. Not only is it merely a list, it is a *final* list. While it is certainly possible that not all of the funding proposals contained in that list will be granted by the Agency, even so, disclosure of the list will not implicate any of the interests protected by FOIA's exemption 5. In sum, withholding the requested records would not further the purposes of exemption 5 to protect the agency's decision-making process, because that decision by the Los Padres National Forest has already been made.

The Regional Office's decision is also not in accordance with recent policies promoting transparency and open government in processing FOIA requests. On January 21, 2009, President Obama issued a MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES regarding the Freedom of Information Act. The memorandum states, in part:

In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The President's memorandum is attached to this appeal as **Exhibit 3**. Following this memorandum, the U.S. Attorney General issued a MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES regarding FOIA on March 19, 2009. This memorandum states, in part:

an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

The Attorney General's memorandum is attached to this appeal as **Exhibit 4**.

Even if the Forest Service decides to continue to withhold this requested project list, it must still release all reasonably segregable non-exempt portions of the list as required by 5 U.S.C. § 552(b). We believe that the Regional Office's decision to withhold the requested records in full was in error because, at a minimum, the records contain some portions that are not exempt from disclosure. The Attorney General's memorandum addresses this issue, stating that

Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Chief's powers of discretionary release under 36 C.F.R. § 200.7(b)(2), and 7 C.F.R. § 1.19(b), as such disclosure would serve the public interest of educating citizens regarding the operations and activities of the Agency regarding this matter. This issue was recently and directly addressed in the Guidance provided by the Office of Information Policy ("OIP"): President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines *Creating a "New Era of Open Government"* (available for download at <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm> (last visited May 8, 2009), the Guidance is attached to this appeal as **Exhibit 5**). The OIP noted the initiatives embodied both by the Presidential and Attorney General's recent mandates and instructed that:

To achieve a "new era of open Government" agency personnel must think about the FOIA differently. They must focus on the principles set out in the President's Memorandum and the Attorney General's Guidelines. Most importantly, agency personnel should view all FOIA decisions through the prism of openness.

Exhibit 5 at 4. Indeed:

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." *Id.* at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." *Id.* at 172. The President's FOIA Memoranda directly links transparency with accountability which, in turn, is a requirement of a democracy. The President recognized the FOIA as "the most prominent expression of a profound national commitment to ensuring open Government." Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of

determining what can be protected under what exemption. Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking “Can this be released?” rather than asking “How can this be withheld?”

Third, in keeping with the Attorney General’s directive, agencies “should not withhold information simply because [they] may do so legally.” Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President’s directive that “[i]n the face of doubt, openness prevails.”

Id. Accordingly:

Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, *but they will be most applicable under Exemption 5.*

* * *

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General’s Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential.

Id. at 5, 7 (emphasis added).

Conclusion

For these reasons, we respectfully request that the Forest Service reverse the Regional Office's denial of our request, and promptly provide us with a copy of the requested list of stimulus projects for the Los Padres National Forest. In closing, I feel it important to also note OIP's new policy regarding the litigation of challenges to agency decisions to withhold information. Should we be required to seek judicial review of this matter, the Agency's decision will be defended by the DOJ only to the extent that disclosure of the final list of stimulus projects on the LPNF submitted to the Regional Office would: (1) harm an interest protected by FOIA exemptions, or (2) be prohibited by law. *See, e.g., Exhibit 5* at 2. As we have explained above, neither of these elements obtain in this case. Accordingly, we anticipate your prompt decision to reverse the Regional Office's denial of our FOIA request.

Sincerely,

/s/

Jeff Kuyper
Executive Director

Cc: Congresswoman Lois Capps, 23rd Congressional District
David Bahr, Transparency Initiative, Western Environmental Law Center