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09-3991-A

Date: **JUL 27 2009**

Mr. Jeff Kuyper  
Executive Director  
Los Padres Forest Watch  
Post Office Box 831  
Santa Barbara, California 93102

Dear Mr. Kuyper:

This letter is in response to your Freedom of Information Act (FOIA) appeal dated May 8, 2009. We received your appeal in our Washington Office FOIA Service Center on May 11, 2009. You are appealing Pacific Southwestern Regional Forester Randy Moore's March 24, 2009, denial of records pursuant to FOIA Exemption 5, 5 U.S.C. 552 (b)(5). The records (seven pages of spreadsheets) denied originated at the Los Padres National Forest (LPNF) and pertain to "the final list of stimulus projects on the LPNF submitted to the Regional Office in accordance with the American Recovery and Reinvestment Act (ARRA)."

You assert that "the information requested does not qualify for the deliberative process exemption under and of the reasons asserted by the Agency. As an initial matter, the reason suggested ... that disclosure of the final list of stimulus projects on the Los Padres National Forest (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."

Exemption 5 of the FOIA provides for protection of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." The courts have determined that Exemption 5 generally covers three primary categories of documents: (1) those subject to the deliberative process privilege, (2) those subject to the attorney-work product privilege, and (3) those subject to the attorney-client privilege.<sup>1</sup> In addition, Exemption 5 documents must be a type covered by the phrase "inter-agency or inter-agency memorandums or letters." The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the main purpose of the deliberative process privilege "which is well established in the law, is...to 'prevent injury to the quality of agency decisions.'" Cofield v. City of LaGrange, Georgia, 913 F. Supp. 608, 615 (D.D.C. 1996)(quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).<sup>2</sup> This privilege prevents harm to the

<sup>1</sup> Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1082, 1084 n.1 (9<sup>th</sup> Cir.1997).

<sup>2</sup> In addition, the deliberative process privilege also serves: "to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of 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 actions." Eugene Burger Management Corp., v. HUD, 192 F.R.D. at 1, 4 (D.D.C. 1999) (quoting Coastal States Gas Corp. v. Dept of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).



quality of agency decisions by shielding the opinions, conclusions and reasoning used in the administrative and decision-making process of the Government. See U.S. v. Morgan, 313 U.S. 409, 422 (1941); Petroleum Info. Corp., v. Dept. of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Access Reports v. Dept. of Justice, 926 F.2d 1192, 1194, 195 (D.C. Cir. 1991); U.S. v. Farley, 11 F.3d 1385, 1389 (7<sup>th</sup> Cir. 1993). This privilege protects the decision-making processes of Government agencies, and protects "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Id. at 150.

Specifically, three policy purposes consistently have been held to constitute the basis for this privilege: (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 reasons and rationales that were not in fact ultimately the ground for an agency action. See e.g., Russell v. Dept. of the Air Force, 682 F.2d. 1045, 1048 (D.C. Cir. 1982).

It is designed to encourage frank and uninhibited communications among government officials in the course of creating public policy. Sears, 421 U.S. at 149-51; Petroleum Info. Corp., 976 F.2d at 1434; Access Reports, 926 F.2d at 1194-95; and Farley, 11 F.3d at 1389. This privilege remains even after a final agency decision has been made, because "disclosure at any time could inhibit the free flow of advice." Federal Open Market Comm. v. Merrill, 443 U.S. 340, 360 (1979). The privilege protects the consultative functions of the Government by preserving the confidentiality of opinions, recommendations, and deliberations, which constitute part of the process by which government decisions are made and Government policies are formulated. Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc). In order for documents to qualify for withholding under the deliberative process privilege, two prerequisites must be met: 1) the documents must be pre-decisional, and 2) the documents must be deliberative.

In order to be pre-decisional, the document must be "antecedent to the adoption of agency policy." Jordan v. Dept. of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).<sup>3</sup> In determining whether a document or a portion is pre-decisional, the Supreme Court has held that an agency need not identify a specific decision in connection with which a document is prepared. Sears, 421 U.S. at 151 n. 18. Rather, it is sufficient for the agency to establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 868 (D.C. Cir. 1989). In order to be

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<sup>3</sup> "A 'pre-decisional document' is one 'prepared in order to assist an agency decision maker in arriving at his decision' and may include 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.' A pre-decisional document is part of the 'deliberative process' if 'disclosure of [the] materials would expose an agency's decision making process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions.'" Formaldehyde Inst. v. Dept. of Health & Human Servs., 889 F.2d 1118, 1122 (D.C. Cir. 1989). "In other words, the document is considered to be part of the 'deliberative process' as long as it is 'actually ...related to the process by which policies are formulated.'" Jordan v. U.S. Dept. of Justice, 591 F.2d 753 at 774 (D.C. Cir. 1978). National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1118 (9<sup>th</sup> Cir. 1988) (emphasis added).

deliberative, the document must be “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 1135, 1143-44 (D.C. Cir. 1975). Deliberative documents frequently consist of “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Sears, 421 U.S. at 150. Thus, the exemption covers recommendations, draft documents, proposals, analyses, suggestions, discussions, and other subjective documents that reflect the give-and-take of the consultative process. Coastal States, 617 F.2d at 866.

Applying this analysis to the spreadsheets at issue, we have determined that the list is pre-decisional and deliberative. This list of proposed final projects for funding under ARRA constitutes opinions and advice to management prior to the Regional Office or Washington Headquarters making a final decision as to which projects to approve or disapprove. These documents are pre-decisional because they were prepared prior to a still pending FS decision on which projects to approve/disapprove.

You state “...that each of the three rationales suggested in the determination letter lack foundation. The LPNF deliberated over which projects to include on its list for recommendation to the Region, and forwarded this completed list to the Region on or before February 20, 2009. The deliberations of the LPNF with respect to the project list ended at that time and FOIA Exemption 5 therefore does not apply.” In fact, no decision has been made as to the final approved projects after February 20, 2009, as the agency had not reached a final decision. The final list submitted by LPNF to the Region may have been the Forest’s final list of proposed projects, but it certainly is not the final list of approved projects at either the Region or Washington Headquarters level. Therefore, these documents are “antecedent to the adoption of an agency policy.” Jordan, 591 F.2d at 774.

In addition, you state that “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 LPNF has already been made.” As stated above, it is our assertion that exemption 5 protection of the agency’s decision-making process is still valid so as to ensure protection of and integrity to the process of the *agency* (emphasis mine) and not the forest, issuing a final decision. Until that time, the decision making process of the agency incorporates the forest’s final list of proposed projects for ARRA funding.

The withheld spreadsheets are also deliberative because it “makes recommendations or [expresses] opinions on legal or policy matters.” Vaughn, 523 F.2d 1136 at 1143-44. Release of the proposed list of projects not currently approved, such as those the subject of this appeal, would likely lead to public confusion that might result from disclosure of ranking, reasons and rationales that were not in fact ultimately the grounds for the agency’s action. Even a final decision, i.e., a final list of proposed projects submitted by a lower level field unit or component for final decision by a higher authority within that agency, is only an opinion of value, providing pre-decisional advice to management. See Brownstein Zeidman & Schomer v. Dep’t of the Air Force, 781 F. Supp. 31, (D.D.C. 1991). Based on the above, the withheld spreadsheets continue to qualify for protection under FOIA Exemption 5.

Therefore, for the reasons stated above, your appeal is denied in full.

This is the agency's final determination of your FOIA appeal. You may seek judicial review of this determination in an appropriate United States District Court pursuant to 5 U.S.C. 552(a)(4)(B).

Sincerely,

*Gloria Manning*

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JOEL D. HOLTRIP  
Deputy Chief for National Forest System

cc: Pacific Southwest Regional FOIA Coordinator  
Los Padres National Forest