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Maya L. Kane, Principal
(970) 426-5480
mkane@swpropertylaw.com
www.southwestpropertylaw.com

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Chief, USDA, Forest Service
USDA Forest Service, FOIA Service Center
1400 Independence Avenue SW
Mail Stop: 1143
Washington, DC 20250-1143
(202) 205-1542
Submitted via Electronic Mail: SM.FS.WOFOIA@usda.gov

RE: FOIA APPEAL 2020-FS-R5-04649-F

Dear FOIA Appeals Officer,

On behalf of Los Padres ForestWatch (“LPFW”), I hereby appeal the United States Department of Agriculture, (“USDA”) Forest Service’s October 29, 2020, final determination of LPFW’s Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, request 2020-FS-R5-04649-F (“Request”). 7 C.F.R. § 1.9. The USDA Forest Service improperly denied a portion of LPFW’s Request. The Forest Service has twenty (20) working days to respond to this appeal. 5 U.S.C. § 552 (a)(6)(A)(ii); 7 C.F.R. § 1.9(b). You are advised that LPFW intends to pursue legal action if the USDA Forest Service does not search for, and disclose, all responsive records immediately, in accordance with FOIA’s statutory mandate.

Factual Background

On June 4, 2020, LPFW submitted a FOIA request to the USFS seeking the following records for the Reyes Peak Project:

1. All GIS data used, including but not limited to the project area shapefile, Forest Service-administered land shapefiles, wilderness area shapefiles, and inventoried roadless area shapefiles.
2. Any specialist reports that have already been completed for this project specifically or that have been completed previously and which the agency intends to use for this project.
3. All tree stand data including but not limited to files containing trees per acre and basal area per acre.

Exhibit A.

On June 5, 2020, Mr. Madsen, Public Affairs Officer for the Los Padres National Forest, confirmed that the Request had been received. Exhibit B. On June 17, 2020, Latanga Rush, Pacific Southwest Region FOIA Coordinator, USFS Region 5, notified LPFW that the request had been referred to the regional office for processing and stated “[c]urrently, no specialist reports have been completed for the project and the Forest is in the process of coordinating with the contractor to obtain any tree stand data. I think I should be able to get you a final response fairly quickly once I have the response from the contractor.” Exhibit C. Ms. Rush subsequently provided GIS data responsive to Part 1 of the FOIA Request.

On June 24, 2020, Ms. Rush stated “[t]he Forest is still waiting on the response from the contractor regarding the tree stand data. Once we have that response, you will receive a final response to your FOIA request.” Exhibit D.

On July 2, 2020, the USDA Forest Service, through Kevin Elliot, stated that the records responsive to this request had been assembled and shared with the regional office FOIA staff. Exhibit E.

On October 29, 2020, LPFW received a letter (“Final Determination Letter”) from the USDA Forest Service stating that it was denying Part 3 of LPFW’s FOIA request seeking tree stand data.¹ Exhibit F. The letter stated that these data were being reviewed for “accuracy and sufficiency,” and that premature release of this data will result in public confusion as the data in its current format will not inform our actions. *Id.* The letter indicated that once data were finalized, they would be available for release. *Id.*

Analysis

A. The USDA Forest Service unlawfully withheld responsive tree stand data under Exemption 5’s deliberative process privilege.

The USDA Forest Service withheld in full all responsive records for Part 3 of LPFW’s FOIA request, which asked for all tree stand data, including files containing trees per acre and basal area per acre, for the Los Padres National Forest Reyes Peak Project under Exemption 5’s deliberative process privilege to shield these responsive records in their entirety. Exhibits A & F. The deliberative process privilege cannot be used to shield these records and this withholding constitutes an improper denial of the FOIA request.

FOIA embodies a “strong presumption in favor of disclosure” such that responsive records must be disclosed unless they fall “squarely within one of [FOIA’s enumerated] exemptions.” *Judicial Watch, Inc. v. Dep’t of Commerce*, 375 F. Supp. 3d 93, 98 (D. D.C. 2019), citing *Burka v. U.S. Dep’t of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). In this regard, exemptions have “been consistently given a narrow compass.” *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). The agency bears the “burden of demonstrating that ‘each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the

¹The October 29, 2020, Final Determination Letter confirmed that no specialist reports had been completed for the project, which is responsive to Part 2 of the Request.

Act's inspection requirements.” *Judicial Watch, Inc. v. Dep't of Commerce*, 375 F. Supp. 3d 93, 97 (D. D.C. 2019) (quoting *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978)).

The deliberative process privilege protects from disclosure “documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). A record only qualifies for withholding under this privilege if it is both “predecisional,” meaning it was created “before the adoption of an agency policy,” (*Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F. 2d 854, 866 (D.C. Cir. 1980)) and “deliberative,” such that it “makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). See also *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

The agency bears the burden of demonstrating the exemption is available. See *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). “The D.C. Circuit ... employs a functional approach to application of the deliberative process privilege, instructing that ‘the legitimacy of withholding does not turn on whether the material is purely factual in nature ... but rather on whether the selection or organization of facts is part of an agency's deliberative process.’” *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 164 (D. D.C. 2017) (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (citation omitted)). Under the functional test described in *Hardy*, to shield purely factual material under the deliberative process privilege the agency must show that, if disclosed, the factual information would reveal something about the agency's deliberative process, or that factual information is “inextricably intertwined with the deliberative sections of documents.” *Hardy*, 243 F. Supp. 3d at 165 (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

In this case, the USDA Forest Service cannot use the deliberative process privilege to shield tree stand data for the Los Padres National Forest Reyes Peak Project. There is no doubt that the raw dataset, including data describing trees per acre and basal area per acre, is “purely factual.” See *EPA v. Mink*, 410 U.S. at 73, 93 (1973). Weighing the rationale supplied by the USDA Forest Service against the functional test described in *Hardy*, these data cannot be considered deliberative for three reasons. First, the Final Determination Letter does not state that selection or organization of these data has occurred other than review for “accuracy and sufficiency.” Exhibit F. Second, the agency does not claim that, if disclosed, tree stand data would reveal information about the deliberative process, nor does it specify any specific deliberative process to which these data relate. Rather, the agency confirms that these data are *not* deliberative by explaining “data in its current format will not inform [the agency’s] actions.” Exhibit F. Finally, these data cannot be intertwined with deliberative sections of responsive records because LPFW has requested only the raw dataset and not analyses or reports based on such data. Because these data do not represent a selection or organization of facts used to inform decision-making, they cannot be considered deliberative within the meaning of the privilege.

The Final Determination Letter additionally states that “once analysis is complete and finalized the data will be available for release.” Exhibit F. But FOIA does not permit agencies to withhold

responsive records simply because they are not final. See, e.g. *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 261 (D. D.C. 2004) (draft records are not *per se* exempt from disclosure under FOIA nor are they presumptively privileged) (citing *Arthur Andersen and Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982)). Further, such an assertion does not supplant the agency's obligation to establish, as a threshold matter, that responsive records are deliberative in the first place.

Taken together, the USDA Forest Service has failed to establish that tree stand data responsive to the FOIA Request are deliberative. Because the privilege does not apply, the agency has unlawfully withheld these responsive records from LPFW.

B. USDA Forest Service failed to demonstrate foreseeable harm associated with release of timber stand data.

In 2016 Congress passed the FOIA Improvement Act, which codified a “foreseeable harm” standard for all withholdings. *Judicial Watch, Inc. v. Dep't of Justice*, 375 F. Supp. 3d. at 97, citing Pub. L. No. 114-185, 130 Stat. 538. Under the amended FOIA, an agency shall withhold responsive material “only if ... the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption ... or disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A); see also FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538; *Rosenberg v. U.S. Dep't of Def.*, 342 F. Supp. 3d 62, 77 (D. D.C. 2018), *on reconsideration in part*, 442 F. Supp. 3d 240 (D. D.C. 2020); *Judicial Watch Inc., v. Dep't of Commerce*, 375 F. Supp. 3d at 100 (The “text and purpose of the Act support a heightened standard for an agency's withholdings under Exemption 5.”).

The Act requires an agency to clearly “articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.” *Judicial Watch, Inc. v. Dep't of Commerce*, 375 F. Supp. 3d at 100. “This task 'requires more than speculation'— '[t]he question is not whether the purported harms could' occur, but whether 'it is reasonably foreseeable' that they will occur.” *Ctr. for Investigative Reporting v. United States Dep't of the Interior*, No. 18-CV-1599 (DLF), 2020 WL 1695175, at *3 (D. D.C. Apr. 7, 2020) quoting *Judicial Watch, Inc. v. Dep't of Commerce*, 375 F. Supp. 3d at 100.

Notwithstanding that the USDA Forest Service failed to establish that responsive records are deliberative, it has failed to prove that release of tree stand data would result in foreseeable harm to an interest protected by the privilege. The Final Determination Letter indicates that public confusion would result from “premature release” of these data. Exhibit F. While confusion may be a foreseeable harm, this statement is not a clear articulation of harm tied to the specific information being withheld, but rather a conclusory assertion that fails to meet the meaningful and heightened standard imposed by the Act. See *Judicial Watch, Inc.*, 375 F. Supp. 3d. at 100; *Judicial Watch, Inc. v. United States Dep't of Justice*, No. 19-CV-800 (TSC), 2020 WL 5798442, at *2 (D. D.C. Sept. 29, 2020). Further, risk of confusion must be tied to a specific deliberative process. See *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-773 (D.C. Cir. 1978) (describing protection from public confusion associated with “premature exposure to discussions occurring before the policies affecting it had actually been settled upon”) (citations omitted). In this case, there is no identifiable policy or decision-making process to which these data relate, and the agency has

affirmatively stated that requested data will not inform agency actions. Exhibit F. Therefore, no foreseeable harm exists with respect to public confusion associated with disclosure.

Conclusion

The USDA Forest Service violated FOIA by unlawfully withholding responsive records under FOIA Exemption 5's deliberative process privilege and failing to establish foreseeable harm in compliance with the 2016 FOIA Improvement Act. LPFW requests that the USDA Forest Service immediately disclose all tree stand data for the Los Padres National Forest Reyes Peak Project and provide an estimated date of completion for release. 5 U.S.C. § 552(a)(7)(B).

We look forward to the timely resolution of this matter within twenty (20) working days. 5 U.S.C. § 552 (a)(6)(A)(ii); 7 C.F.R. § 1.9(b). Please contact LPFW through Maya Kane with any questions regarding this appeal. All records and correspondence should be sent to my attention at the address below.

/s/ Maya L. Kane
Maya L. Kane
Southwest Water and Property Law LLC
10 Town Square, No. 422
Durango, CO 81301
(970) 946-5419
mkane@swpropertylaw.com

Attachments:

- Exhibit A, LPFW FOIA Request dated June 4, 2020.
- Exhibit B, Email dated June 5, 2020, from A. Madsen, USDA Forest Service.
- Exhibit C, Email dated June 17, 2020, from L. Rush, USDA Forest Service.
- Exhibit D, Email dated June 24, 2020 from L. Rush, USDA Forest Service
- Exhibit E, Email dated July 2, 2020, from A. Madsen, USDA Forest Service.
- Exhibit F, Final Determination Letter dated October 29, 2020 from USDA Forest Service.