



Reply to  
Attention of:

**DEPARTMENT OF THE ARMY**  
SOUTHWESTERN DIVISION, CORPS OF ENGINEERS  
1100 COMMERCE STREET  
DALLAS, TEXAS 75242-0216  
April 9, 2013

Office of Counsel

SUBJECT: Freedom of Information Act Requests, Central Texas Airport

Dear :

On March 29, 2013, I received your Freedom of Information Act (FOIA) request submitted to the Fort Worth District. Your request is for information related to the subject matter as follows:

1. Any and all correspondence between the USACE and the developer (Carpenter & Associates, or their appointed representative) from May 1, 2012 to the present.
2. Any and all submissions from Integrated Environmental Solutions (IES) to the USACE on behalf of CTA, LLC, Carpenter & Associates, or their appointed representatives regarding permit Application No. SWF-2010-00506 from May 1, 2012 to the present.

Your request was forwarded by the Fort Worth District to my attention for a determination regarding release.

The policy of the Department of the Army is to release the maximum amount of information under the FOIA unless the information is exempt from release and a significant reason exists for non-disclosure. I have reviewed the documents responsive to your request and have determined to withhold a portion of the documents (1 page) pursuant to Exemption 5 of the FOIA, 5 United States Code 552(b)(5) and withhold a portion by redaction pursuant to Exemptions 5 and 6 of the FOIA, 5 United States Code 552(b)(5) and 552(b)(6).

**Exemption 5**

The threshold requirement of Exemption 5 protection is that documents must be inter-agency or intra-agency memorandums or letters and 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).

The withheld document and redacted portions of documents are intra-agency documents and responsive to Item 3 as stated above. Intra-agency documents have been broadly defined to include "any agency document that is part of the deliberative process" and those of "outside consultants as part of the deliberative process". Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980). This document and portions of documents are intra-agency documents which are part of the deliberative process for a pending regulatory permit action. Therefore this information meets the first qualification for Exemption 5 protection.

Exemption 5 allows materials to be exempt from release when such material falls under the deliberative process privilege. Jordan v. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978). NLRB v. Sears Roebuck & Co., 421 U.S. 131 (1975). The deliberative process privilege under Exemption 5 of the FOIA was designed to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

Under the deliberative process privilege of Exemption 5 of the FOIA, there are 3 policy purposes that form the bases for this exemption. They are (1) to encourage open and frank discussions on matters of policy between subordinates and their superiors; (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 grounds for the agency's action. See Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978 ) (en banc).

Courts have established two requirements for the deliberative process privilege to be invoked. The qualifications for this privilege are set forth in Norton v. Arizmedi, 108 F.R.D. 647 (July 15, 1985), as follows:

The deliberative process privilege, a sub-category of the executive or Governmental privilege, rests on the policy of protecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Mobil Oil Corp. v. Dept. of Energy, supra. The purpose of the privilege is to encourage frank discussions of ideas and policies among Governmental officials, thereby ensuring the quality of Governmental decision making. Environmental Protection Agency, v. Mink, 410 U.S. 73, 87, 93 S.Ct. 827, 836, 35 L.Ed. 2d 119 (1973). The documents must meet two requirements for the deliberative process privilege to apply. First, the document must be predecisional, that is it must have been generated before the adoption of an Agency decision. Secondly, the document must be deliberative in nature, containing opinions, recommendations or advice regarding matters pending before the Agency. F.T.C. v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984). The privilege is to be narrowly construed. It does not include purely factual material. Mink, supra, 410 U.S. at 87-89, 93 S.Ct. at 836.

In examining the Act's legislative history of Exemption 5, the Supreme Court, in Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), at 359, relied upon a House Report which states:

Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation.

The document and withheld portions of documents satisfy the second qualification for Exemption 5 protection. The single withheld page is proposed revisions to the EID and the withheld portions of other enclosed documents are part of a pending regulatory permit action at

the Fort Worth District. They are deliberative and pre-decisional and part of the agency's process. No final determination has been made regarding the permit. After my review of this information and the case law as stated above, I have concluded that release would be harmful to the process and would impede the free flow of frank and honest opinions and discussions as they occur in this process. If the information was released, this free flow of opinions and discussions would be greatly diminished or no longer take place. Therefore, I must withhold the single page and the redacted portions of documents under the deliberative process privilege of Exemption 5.

#### **Exemption 6**

Exemption 6 provides for the exemption of "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is applied broadly to "information which applies to a particular individual." The Supreme Court issued a 1989 decision that contains 5 principles to apply when determining the release of records under Exemptions 6 and 7(c). United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). These five (5) are:

1. substantial privacy interests can exist even though the information has been made available to the general public at some other place and time,
2. the identity of a requester under FOIA cannot be used in the determination to make a release,
3. whether any public interest will be served by the release and not the purpose of the request,
4. a narrower scope of public interest limited to the true intention of FOIA which is to allow the public to see how the Government conducts its business,
5. a determination that there is certain types of information that is always protectible without regard to individual circumstances.

Per the Reporters Committee decision, the analysis for release must consider the documents and their relationship to the purpose of the FOIA. My review of the documents brings me to the conclusion that releasing the names of Corps employees contained in the enclosed documents has no bearing on how the Government conducts business. The following language from Reporters Committee, 489 U.S. at 1485, is particularly persuasive in my determination that this information should not be released:

The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(c) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.

...


Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Even though the above quotes references Exemption 7(c) records specifically, the principle has been applied by the courts to both Exemptions 6 and 7(c). Additionally, court decisions have upheld the withholding of information regarding Department of Defense employees. Center for Public Integrity v. U.S. Office of Personnel Management, Slip Copy, 2006 WL 3498089 (D.D.C.); Deichman v. United States, No. 05-680, 2006 WL 3000448 (E.D. Va. Oct. 20, 2006).

Applying this court ruling and the provisions of Exemption 6 of the FOIA, I find that no public interest as to the agency's performance would be served by the release of the names of Corps employees. Making such a release would constitute a clearly unwarranted invasion of the privacy rights of those individuals.

I trust that you will appreciate the consideration upon which this determination is based. However, because a portion of your request has been denied, you are advised of your right to appeal this determination through this office and we will forward it to our Washington Office for processing to the Secretary of the Army (Attn: General Counsel). An appeal must be received within 30 days of the date of this letter. The envelope containing the appeal should bear the notation, "Freedom of Information Act Appeal," and should be mailed to: U.S. Army Corps of Engineers, Southwestern Division, Attn: CECC-SWD, 1100 Commerce Street, Room 824, Dallas, Texas, 75242.

Sincerely,



Mark B. McMurry  
Assistant Division Counsel

Enclosure

Copy furnished (without enclosure):

Fort Worth District FOIA Officer