



Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

May 3, 2012

CERTIFIED MAIL

Mr. Thomas Carpenter
Hanford Challenge
219 1st Avenue South, Suite 120
Seattle, Washington 98104

Dear Mr. Carpenter:

FREEDOM OF INFORMATION ACT REQUEST (FOI 2012-00870)

You requested, pursuant to the Freedom of Information Act (FOIA), the following records generated in connection with a surveillance report entitled, "Review of the 100 K Infrastructure Utilities Upgrade Project:"

1. "A copy of the Surveillance report."
2. "Any and all attachments and/or exhibits associated with the report."
3. "Any and all correspondence and/or memoranda related to or generated in connection with the Surveillance report."

In an e-mail dated March 14, 2012, I notified you that there have been numerous draft versions of the surveillance report. You responded and requested a copy of the first draft.

We responded to items 1 and 2 of your request on April 16, 2012, and notified you we were currently searching for documents responsive to item 3 of your request and would notify you when our search and review has been complete.

This is our final response to your request and enclosed are the remaining documents responsive to item 3. Certain deletions have been made in the documents pursuant to Exemption 5 of the FOIA. Exemption 5 shields from mandatory disclosure documents which are "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."

There are three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. In this case, we are invoking the deliberative process privilege. The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies.

The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. To qualify under the deliberative process privilege, the information must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decision maker in arriving at a decision. Predecisional information is also deliberative if it reflects the give-and take of the consultative process so that disclosure would reveal the thought process of the writer. Material determined to be exempt from mandatory disclosure may be released if disclosure is determined to be in the public interest.

The factors that are weighed to determine whether documents are protected by the deliberative process privilege include: (1) whether the documents are "deliberative" (i.e., whether it reflects the give-and-take of a consultative process); (2) whether the documents are so candid or personal in nature that public disclosure would stifle honest and frank communication in the future; and (3) whether the documents are recommendatory of what will become a final document.

We have determined the public interest is best served by non-disclosure because disclosure of the predecisional, deliberative material could adversely affect DOE's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. In addition, we do not believe that a discretionary release of the withheld material would be in the public interest.

Information has also been deleted from an e-mail message dated December 6, 2011, sent to Ms. Marla Marvin from Mr. Dale Jackson pursuant to Exemption 5 of the FOIA. The deleted material summarized communications between RL attorneys and their clients, provided RL management with recommendations for a decision, and was based upon expressed opinions on legal and policy matters. We have determined the information is protected from disclosure pursuant to the attorney-client and deliberative process privileges. Material determined to be exempt from mandatory disclosure may be released however, if disclosure is determined to be in the public interest. We have determined the public interest is best served by non-disclosure because disclosure of this information would harm the government by tending to inhibit free pre-decisional discussion of policy issues as well as candid attorney-client discussion of legal matters.

We have also deleted certain information from DOE Letter No. 12-EMD-0040 pursuant to Exemption 5. This letter was never sent to the contractor and therefore is considered predecisional and deliberative. Our rationale for invoking this Exemption is stated above.

Lastly, enclosed is DOE Letter 120EMD-0024. The attachment to this letter is Surveillance Report No. S-11-EMD-PRC-001. Within this attachment, this office has made certain deletions pursuant to Exemptions 5 and 6 of the FOIA.

Exemption 5 shields from mandatory disclosure documents which are "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." There are three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege.

For portions of Exhibit 28, we have deleted confidential communications between an attorney and his/her client relating to a legal matter for which the client sought professional advice. The withheld information summarized communications between attorneys and their clients and was based upon expressed opinions on legal and policy matters. We have determined the information is protected from disclosure pursuant to the attorney-client and deliberative process privileges.

Material determined to be exempt from mandatory disclosure may be released if disclosure is determined to be in the public interest. We have determined the public interest is best served by non-disclosure because disclosure of this information would inhibit pre-decisional discussion of policy issues as well as candid attorney-client discussion of legal matters.

In addition, we have deleted personal cell phone numbers located in Exhibits 7, 13, 28, 53 and 56 pursuant to Exemption 6 of the FOIA. Exemption 6 provides that an agency may protect from disclosure all personal information if its disclosure would constitute a clearly unwarranted invasion of privacy by subjecting the individuals to unwanted communications, harassment, intimidation, retaliation, or other substantial privacy invasions by interested parties.

In invoking Exemption 6 we considered 1) whether a significant privacy interest would be invaded by disclosure of information, 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government, and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. We have determined that the public interest does not outweigh the individuals' privacy interests.

All releasable information in the documents has been segregated and is being provided to you. The undersigned individual is responsible for this determination. You have the right to appeal to the Office of Hearings and Appeals, as provided in 10 CFR 1004.8, for any information denied to you in this letter. Any such appeal shall be made in writing to the following address: Director, Office of Hearings and Appeals (HG-1), U.S. Department of Energy, L'Enfant Plaza Building, 1000 Independence Avenue SW, Washington, D.C. 20585-1615, and shall be filed within 30 days after receipt of this letter. Should you choose to appeal, please provide this office with a copy of your letter.

Mr. Thomas Carpenter

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May 3, 2012

This letter completes our response to your request. If you have any questions regarding your request, please contact me at our address above or on (509) 376-6288.

Sincerely,



Dorothy Riehle
Freedom of Information Act Officer
Office of Communications
and External Affairs

OCE:DCR

Enclosures