



NATURAL RESOURCES DEFENSE COUNCIL

February 22, 2011

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Office of Counsel
Chicago District, U.S. Army Corps of Engineers
111 N Canal, Suite 600
Chicago, IL 60606

**RE: Freedom of Information Act Appeal, Prairie Rivers Network
Request No. FP-11-00762, Regarding Smith-Root Inc. Report on Aquatic
Nuisance Species Electric Dispersal Barrier System Operating Parameters**

Dear Counsel:

Please be advised that I now represent the Prairie Rivers Network (“PRN”) with respect to a Freedom of Information Act (“FOIA”) request made by Clark Bullard of PRN on October 6, 2010 (FOIA Request No. FP-11-000762). Please direct all future correspondence regarding this FOIA request to me rather than to Dr. Bullard.

On behalf of PRN, I write to appeal the U.S. Army Corps of Engineers, Chicago District’s (“Army Corps”) denial of PRN’s October 6, 2010 FOIA request for a report by Smith-Root Inc. on operating parameters for the Army Corps’ Aquatic Nuisance Species Electric Dispersal Barrier System. A response denying this request was sent by letter dated February 1, 2010 from Kimberly Sabo, District Counsel, and also transmitted to Dr. Bullard by email on February 17, 2011, by Kevin J. Jerbi, Assistant District Counsel. *See* Attachment A (email correspondence between PRN and Army Corps); Attachment B (Army Corps denial letter).

As set forth below, the Army Corps’ February 1 letter incorrectly characterizes the agency’s obligations under FOIA, asserting that the requested report may be withheld because its release “would affect the decision-making process of the agency.” This is not the applicable test under FOIA. Although FOIA does recognize a narrow deliberative process privilege through Exemption 5, the privilege does not apply to purely factual information. To the extent that the requested report contains purely factual material that is reasonably segregable, those portions of the report cannot be lawfully withheld under FOIA and must be released without any further delay.

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NEW YORK * WASHINGTON DC * SAN FRANCISCO * LOS ANGELES * BEIJING

I. Factual Background

On October 6, 2010, Clark Bullard of PRN submitted a FOIA request to the Army Corps by e-mail. Attachment A at 4. Dr. Bullard stated:

Pursuant to the Freedom of Information Act I request a copy of the forthcoming report on barrier operating parameters. Apparently the report does not have a number to which I can refer, but it was described as follows by Chuck Shea in his recent email to me:

Clark,

Sorry for the delayed response; I had to consult with our lawyers.

The final report from Smith-Root on the barrier operating parameters research completed at ERDC is expected by the end of October. There will not be a public release as such, but once it goes final it can be requested via a FOIA.

If you want to attempt to acquire the draft you need to file a FOIA now. The legal team would then perform a review & determine what (all, none, partial) can be released prior to it going final.

The report describes tests conducted at ERDC Vicksburg aimed at optimizing effectiveness of the Asian Carp dispersal barriers. If it is legal for you to release the draft (all or partial as indicated above), I hereby request it. However if I must wait for the report to be finalized, please consider this as a request for that version.

Attachment A at 4.

Dr. Bullard also requested a fee waiver for search and production of the requested records, because disclosure of the information is in the public interest, is likely to contribute significantly to public understanding of the operations and activities of the Army Corps, and is not requested for a commercial purpose. *See* Attachment A at 4; 5 U.S.C. § 552(a)(4)(A)(ii)(II), (iii); 32 C.F.R. § 518.19(d).

In the February 1, 2011 denial letter, the Army Corps asserted that it was invoking the deliberative process privilege and withholding the requested report under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), on the ground that release of the report “would affect the decision-making process of the agency.” Attachment B at 1.

This appeal is timely, having been made within 60 days of the Army Corps’ February 1, 2011 letter.

II. Legal Background

As the Supreme Court has recognized, FOIA reflects a “general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal citations and quotations omitted); *see also U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). Specifically, once a responsive record is identified, FOIA requires an agency to provide it to the requester unless it is exempt from disclosure under one of the Act’s nine narrow exemptions. 5 U.S.C. § 552(b); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). These exemptions “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Thus, it is well settled that FOIA exemptions are to be construed narrowly. *See, e.g., Grand Cent. P’ship*, 166 F.3d at 478 (“[T]he Act is to be construed broadly to provide information to the public in accordance with its purposes; for the same reason, the exemptions from production are to be construed narrowly.”) (internal citations and quotations omitted).

“Consistently with [the Act’s] purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of *any* requested documents.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citing 5 U.S.C. § 552(a)(4)(B)) (emphasis added). Moreover, even where withholdings of material found in agency records are appropriate, FOIA places an affirmative duty on agencies to provide any “reasonably segregable” non-exempt portion of an otherwise exempt record. 5 U.S.C. § 552(b).

The general principle that FOIA exemptions are to be construed narrowly has been applied with particular fidelity to withholdings under FOIA Exemption 5, which permits agencies to withhold “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). Courts have “‘emphasiz[ed] the narrow scope of Exemption 5. . . . The exemption is to be applied as narrowly as consistent with efficient [g]overnment operation.’” *Lee v. Fed. Deposit Ins. Corp.*, 923 F. Supp. 451, 457 (S.D.N.Y. 1996) (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d. 854, 868 (D.C. Cir. 1980)) (other internal quotation marks omitted).

“In order for a document to be protected by deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) ‘predecisional’; and (3) ‘deliberative.’” *Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). For withheld material to qualify as “predecisional,” it must relate to a discrete agency decisionmaking process, and it must have been “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975). Further, “the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formation or exercise of policy-oriented judgment.” *Grand Cent. P’ship*, 166 F.3d at 482 (quoting *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994)). In order to be found “deliberative,” the withheld material must “‘actually [be] related to the process by which policies are formulated.’” *Hopkins v. Dep’t of Housing & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991) (quoting *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir.

1978) (en banc)). Accordingly, the “privilege ‘focuses on documents reflecting advisory opinion[s], recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,’” and the “privilege does not, as a general matter, extend to purely factual material.” *Id.* at 84-85 (quoting *Nat’l Labor Relations Bd. v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975)) (other internal citation omitted).

III. The Army Corps’ Failure to Justify Its Withholdings Violates FOIA


In its February 1, 2011 letter, the Army Corps notified PRN that it was withholding the Smith-Root Inc. report on electric dispersal barrier operating parameters pursuant to FOIA Exemption 5, but the letter does not correctly or sufficiently invoke the deliberative process privilege and fails to provide a detailed justification or explanation sufficient to support denial of PRN’s FOIA request. The Army Corps has not met its burden to establish that the document may be withheld in its entirety. Even if the Army Corps could demonstrate that portions of the document contain “advisory opinion[s], recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,” *Hopkins*, 929 F.2d at 84 – which the Army Corps has not yet done – such a showing would only justify redacting those portions, not withholding the document in its entirety. To the extent that any or all of the report does not meet all of the criteria necessary to be eligible for the deliberative process privilege, it is not privileged and must be released. At a minimum, the Army Corps must release without any further delay those reasonably segregable portions of the report that contain purely factual material to which the deliberative process privilege does not apply.

Accordingly, the Army Corps must release any portions of the Smith-Root Inc. report for which it is unable to provide a detailed justification for withholding within 20 business days, as required by FOIA and the Army Corps’ FOIA regulations. 5 U.S.C. § 552(a)(6)(A)(ii); 32 C.F.R. § 518.16(i)-(j).

IV. Conclusion

Unless the Army Corps provides additional information sufficient to justify its withholding under FOIA Exemption 5 of the Smith-Root Inc. report requested by PRN’s October 6, 2010 FOIA request, those records should be released within 20 business days.

Respectfully submitted,



Thomas Cmar
Midwest Program Attorney
Natural Resources Defense Council
(312) 651-7906
tcmr@nrdc.org

CC (via electronic mail):

Kevin J. Jerbi
Assistant District Counsel
Chicago District, U.S. Army Corps of Engineers
Kevin.J.Jerbi@usace.army.mil

Clark Bullard
Prairie Rivers Network
cwbullard3@comcast.net

Attachment A

Cmar, Thomas

From: Clark Bullard [cwbullard3@comcast.net]
Sent: Thursday, February 17, 2011 3:43 PM
To: Cmar, Thomas
Subject: FW: Smith-Root report on carp barrier (UNCLASSIFIED)
Attachments: Response letter.pdf

Importance: High

-----Original Message-----

From: Jerbi, Kevin J LRC [mailto:Kevin.J.Jerbi@usace.army.mil]
Sent: Thursday, February 17, 2011 2:56 PM
To: Clark Bullard
Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Dr. Bullard,

I apologize for the mix-up. We sent you a letter via mail a few weeks ago. I'm not sure why you never received it. In any case, I've attached the letter to this email.

Please let me know if you have any questions.

Thanks,

Kevin J. Jerbi
Assistant District Counsel
Chicago District, U.S. Army Corps of Engineers
111 N Canal, Suite 600
Chicago, IL 60606
Phone: 312-846-5352

-----Original Message-----

From: Clark Bullard [mailto:cwbullard3@comcast.net]
Sent: Thursday, February 17, 2011 2:42 PM
To: Jerbi, Kevin J LRC
Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)
Importance: High

Kevin

This is the last I heard from you. Perhaps you sent material a couple of months ago and I missed it. Could you please advise me of the current status of my FOIA request?

Thanks,

Clark

-----Original Message-----

From: Jerbi, Kevin J LRC [mailto:Kevin.J.Jerbi@usace.army.mil]
Sent: Friday, December 17, 2010 10:13 AM
To: Bullard, Clark W

Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Dr. Bullard,

Exemption 5 of the Freedom of Information Act generally allows an agency to withhold from release predecisional or draft documents. That exemption also includes documents that are prepared by contractors as part of an agency's decision-making process.

With that said, there may be portions of even a draft report that can still be released. Because you would like us to release a draft document rather than wait for the final report (which would typically be released in its entirety), I will review the draft and release the portions I am able to release. As soon as I complete that review, I will send you the releasable portions of the report via email.

If you have any questions, please feel free to contact me via email or phone.

Respectfully,

Kevin J. Jerbi
Assistant District Counsel
Chicago District, U.S. Army Corps of Engineers
111 N Canal, Suite 600
Chicago, IL 60606
Phone: 312-846-5352

-----Original Message-----

From: Bullard, Clark W [mailto:bullard@illinois.edu]
Sent: Friday, December 17, 2010 9:24 AM
To: Jerbi, Kevin J LRC
Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)

Kevin

Is there anything in the Freedom of Information Act that prevents you from forwarding a copy of the latest draft of the report that I originally requested on October 6? It was my impression that the report enters the public record when it is received from the contractor.

If necessary, please consider this as a FOIA request for the latest version that you can legally release, and send it to me via email if possible. Rest assured that I will respect its 'draft' status.

Thanks very much,

Clark

-----Original Message-----

From: Jerbi, Kevin J LRC [mailto:Kevin.J.Jerbi@usace.army.mil]
Sent: Thursday, December 16, 2010 1:38 PM
To: Clark Bullard
Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Mr. Bullard,

I wanted to update you on the status of the request under the Freedom of Information Act that you made in October.

Although at the time I believed the final report would be available by the end of October, the release date of the report continues to be pushed back. I now anticipate that the report will not be available for release until mid-January.

I apologize for the delay and for not getting back in touch with you sooner about the status of your request. Nevertheless, please be assured that I have not forgotten your request and I will forward you a copy of the final report the moment it is available for release.

As always, if you have any questions about your request, feel free to contact me by email or phone.

Respectfully,

Kevin J. Jerbi
Assistant District Counsel
Chicago District, U.S. Army Corps of Engineers
111 N Canal, Suite 600
Chicago, IL 60606
Phone: 312-846-5352

-----Original Message-----

From: Jerbi, Kevin J LRC
Sent: Wednesday, October 13, 2010 12:01 PM
To: Clark Bullard
Subject: RE: Smith-Root report on carp barrier (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Mr. Bullard:

This is in response to your FOIA request dated October 6, 2010, to the U.S. Army Corps of Engineers, Chicago District. We received a copy of your request and assigned it control number FP-11-000762. Please reference this number in any future communication with our office about your request.

We anticipate your request will require 15-20 business days to respond, during which time we expect that the final report will be available. If you have any questions about the status of your request, please contact me at (312) 846-5352 or by email at kevin.j.jerbi@usace.army.mil.

Sincerely,

Kevin J. Jerbi
Assistant District Counsel
Chicago District, U.S. Army Corps of Engineers
111 N Canal, Suite 600
Chicago, IL 60606
Phone: 312-846-5352

-----Original Message-----

From: Clark Bullard [mailto:cwbullard3@comcast.net]
Sent: Wednesday, October 06, 2010 8:27 PM
To: FOIA-LRC

Subject: Smith-Root report on carp barrier

Office of Counsel

U.S. Army Corps of Engineers

Chicago District

Pursuant to the Freedom of Information Act I request a copy of the forthcoming report on barrier operating parameters. Apparently the report does not have a number to which I can refer, but it was described as follows by Chuck Shea in his recent email to me:

Clark,

Sorry for the delayed response; I had to consult with our lawyers.

The final report from Smith-Root on the barrier operating parameters research completed at ERDC is expected by the end of October. There will not be a public release as such, but once it goes final it can be requested via a FOIA.

If you want to attempt to acquire the draft you need to file a FOIA now. The legal team would then perform a review & determine what (all, none, partial) can be released prior to it going final.

The report describes tests conducted at ERDC Vicksburg aimed at optimizing effectiveness of the Asian Carp dispersal barriers. If it is legal for you to release the draft (all or partial as indicated above), I hereby request it. However if I must wait for the report to be finalized, please consider this as a request for that version.

I request a waiver of fees for this request because disclosure of the requested information to me is in the public interest. It is likely to contribute significantly to the public understanding of the effectiveness of the Clean Water Act in protecting waters of the US in general, and national scenic rivers in particular. I have no commercial interest in the project, and I am making this request with the intention of serving the public interest by sharing the documents with two nonprofit organizations on whose boards of directors I serve: the National Wildlife Federation, and Prairie Rivers Network.

To minimize costs to the government, and to expedite delivery, I request that the materials be supplied in electronic form.

Thanks in advance for your prompt attention, and feel free to contact me if you need clarification.

Clark Bullard

Prairie Rivers Network

1902 Fox Drive

Champaign IL 61820

217 333 7734 (day)

217 337 1097 (eve)

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Attachment B



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO IL 60606-7206

REPLY TO
ATTENTION OF:

February 1, 2011

Office of Counsel

Clark Bullard
Prairie Rivers Network
1902 Fox Drive
Champaign, IL 61820

RE: Freedom of Information Act (FOIA) Request FP-11-000762

Dear Dr. Bullard:

I am writing in response to your request under the Freedom of Information Act dated October 6, 2010, to the U.S. Army Corps of Engineers, Chicago District. You requested the report from Smith-Root Inc. on the barrier operating parameters research completed at ERDC. This document is being withheld pursuant to exemptions 5 of the FOIA, as explained below.

Exemption 5 authorizes the withholding of information that is subject to a privilege. *See* 5 U.S.C. § 552(b)(5). Because release of this document would affect the decision-making process of the agency, the document may be withheld under the deliberative process privilege.

You have the right to appeal the denial of your request through this office to the Office of the Chief Counsel for the U.S. Army Corps of Engineers, and finally to the Secretary of the Army's office, which is the final decision authority for the Department of the Army. You must submit your appeal in sufficient time to reach the Secretary of the Army no later than 60 calendar days from the date of this letter. Your letter should bear the notation "Freedom of Information Act Appeal." The envelope containing the appeal should be addressed to Office of Counsel, U.S. Army Corps of Engineers, Chicago District, 111 N. Canal St., Suite 600, Chicago, IL 60606.

Pursuant to the FOIA, we are required to charge for the direct cost of processing your request. But because the cost of processing your FOIA request was nominal, no fees will be assessed.

If you have any questions about your request, please contact Kevin Jerbi of my office at (312) 846-5352 or by email at kevin.j.jerbi@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sabo', with a long horizontal flourish extending to the right.

Kimberly J. Sabo
District Counsel
Chicago District, U.S. Army Corps of Engineers