



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 23, 2020

Erin Thomas
Center for Regulatory Reasonableness
1629 K Street NW
Suite 220
Washington, DC 20006

Re: Freedom of Information Act Appeal No. EPA-HQ-2020-003853 (Request No. EPA-R1-2020-002657)

Dear Ms. Thomas:

I am responding to your March 26, 2020 Freedom of Information Act (FOIA) appeal. You appealed the March 20, 2020 decision of Ken Moraff (“decision”), Water Division Director, Region 1, of the U.S. Environmental Protection Agency (EPA or Agency), to partially deny the request you submitted to EPA on January 31, 2020. Your request sought records related to the Draft NPDES Great Bay General Permit. The Center for Regulatory Reasonableness has had access to the administrative record for this draft permit. Specifically, the request sought, “all communications between EPA Region 1 and any “outside experts” (e.g., Drs Latimer, Valiela, or Cole) whose publications are being used as the scientific basis of the General Permit.” Request at 1.

The decision stated that the Agency uploaded 42 non-privileged responsive records to FOIAonline and 42 additional were withheld in part while 3 records were withheld in full. Decision at 1. Your appeal states that: “[the Center for Regulatory Reasonableness] hereby appeals as arbitrary and capricious (1) EPA’s improper withholding of records responsive to FOIA Request EPA-R1-2020-002657, and (2) imposition of excessive fees in violation of FOIA.” Appeal at 2.

I have carefully considered your request, EPA’s decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, partially denied.

The Agency Properly Applied Exemption 5.

Your appeal challenges withholdings associated with 28 records that were withheld in part pursuant to 5 U.S.C. § 552(b)(5). *Id.* at 2-5. Information subject to the deliberative process privilege must be both pre-decisional and deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). With the exceptions noted below, the withheld portions of these records fall within the deliberative process privilege.¹ As explained in the decision, the withheld information,

¹ There are also records where attorney-client privilege also applies to withheld information. See documents “RE_(5)_Redacted,” “RE_6_Redacted,” and “RE_Great Bay Region 1 nitrogen management (4)_Redacted.”

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“includes internal, pre-decisional records concerning the development of the draft NPDES general permit for the Great Bay Estuary and communications and pre-decisional records exchanged between EPA and the New Hampshire Department of Environmental Services used to inform and improve the Agency’s decision-making and issuance of this draft permit.” Decision at 1.

Your appeal alleges that withheld information in 18 of the responsive records is purely factual and scientific, and therefore that EPA may not withhold the information under the deliberative process privilege. Appeal at 2-4. I have found that two of these records contain segregable, non-exempt material and must be re-reviewed and re-produced by Region 1. These records are “RE_my responses to questions_Redacted” and “RE_(6)_Redacted.” The remaining 16 records contain proper withholdings. To the extent the withheld information contains facts, they are inextricably intertwined with the deliberative discussions concerning the Agency’s ongoing development of the Draft Great Bay General Permit. *See Mead Data Center, Inc. v. Department of the Air Force* 566 F.2d 242, 260 (D.C. Cir. 1977). Further, any factual or scientific information contained in the withheld portions of these documents reflects the author’s selection of facts from a broad range of available information to advise Agency decision-makers during the deliberative process associated with drafting the NPDES permit.

Your appeal further alleges that withheld information in 7 of the responsive records contain the Agency’s basis for the decision to issue the Draft NPDES General Permit and that the Agency may not withhold the complete basis and explanation for a final agency decision. Appeal at 4. In general, these withholdings are properly withheld as described in the Decision and above. The basis for the Agency’s permitting decision is contained in the administrative record. However, three records contain segregable, non-exempt material and must be re-reviewed and reproduced by Region 1. These records are: “FW_Great Bay Coalition NPDES Permitting_Redacted,” “FW_Review of Coalition Letter_Redacted,” and “RE_Review of Coalition Letter_Redacted.”

Your appeal alleges that three additional records do not fall within the scope of Exemption 5. *Id.* at 4-5. First, you allege that withholdings in “RE_Great Bay Estuary – Governor Sununu 11.7.2019 (2)_Redacted” include material that is published in the final fact sheet. This draft language is properly withheld. *See Reliant Energy Power Generation, Inc. v. F.E.R.C.*, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (an agency need not demonstrate the extent to which the draft differs from a final document.). Second, you allege that two records contain the author’s summary or description of material that is fully released, and therefore, the author’s summary or description must also be released. Appeal at 4-5. In these records, the author’s characterization and analysis is properly withheld as deliberative. *See Reliant Energy* 520 F. Supp. 2d at 205 (opinions and recommendations of agency staff members are protected by Exemption 5 because they reveal the agency’s deliberative process).

Your appeal of the Agency’s withholdings is therefore partially granted and partially denied. Region 1 will contact you within 10 days to discuss the timeframe for producing the records which contain segregable, non-exempt material.

The Agency’s Fee Assessment Was Appropriate.

The appeal alleges that the assessed fees of \$245.00 are excessive and arbitrary and capricious. Appeal at 5. On February 24, 2020, the Agency provided you with a fee estimate of \$250 to process this request. On February 28, 2020, you provided an assurance of payment for that amount. I have confirmed that the 8.75 hours of time billed to respond to this request are reasonable. I also understand the Region

did additional work on your request that was not billed. Your appeal of the Agency's fee assessment is denied.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 202-741-5770 or 1-877-684-6448; and fax, 202-741-5769.

Should you have any questions concerning this matter, please contact Peter Bermes of my staff at bermes.peter@epa.gov.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Ken Moraff, Director, Water Division, EPA Region 1
Cris Schena, EPA Region 1 FOIA Officer