

# Friends of Blackwater Canyon

February 2, 2007

Attn: FOIA Appeals Officer  
Department of the Interior  
1849 C Street, NW  
Mail Stop 6556  
Washington, DC 20240

**Re: FREEDOM OF INFORMATION ACT APPEAL  
[FOIA # 2006-00988]**

Dear FOIA Appeals Officer:

In a letter dated December 20, 2006 and received on December 22<sup>nd</sup>, the Fish and Wildlife Service notified Friends of Blackwater (FOB) that it was withholding 171 documents containing 2,325 pages, pursuant to the deliberative process privilege in Exemption 5 of the FOIA (5 U.S.C. §552(b)(5) and its implementing regulations (43 C.F.R. Part 2, Appendix E(5) regarding FOB's 9/12/06 FOIA request on the Five Year Review and the proposed delisting of the West Virginia Northern flying squirrel (*Glaucomys sabrinus fuscus*). [FOIA # 2006-00988]

We hereby appeal this decision on the following grounds. The US Fish and Wildlife Service (FWS), in withholding the above material:

- Failed to provide sufficient detail on the nature of each of the 171 withheld documents, such as the title, subject matter, names of the author and recipients of each of the documents.
- Failed to provide sufficient detail as to the pre-decisional and deliberative nature of the withheld materials.
- Failed to identify the specific agency decision process for which the withheld documents are pre-decisional.
- Failed to segregate and release all factual portions of the withheld documents.

Each of these points is explained in more detail below.

### ***Lack of Sufficient Detail on Each Document Withheld***

In order to shoulder its burden of demonstrating that a FOIA exemption applies, the agency must explain with specificity and detail why each document, or portion of the document, should be exempt. *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973) cert. denied by *Rosen v. Vaughn*, 415 U.S. 977 (1974) (agency's burden cannot be satisfied by the sweeping and conclusory citation of an exemption); *Mead Data Central*, 566 F.2d at 258; *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir. 1980) (given that the "overwhelming thrust of FOIA is toward complete disclosure," Exemption 5 claims must be supported by "specificity and detail"). The agency's detailed explanation is necessary to compensate for the fact that the party seeking disclosure lacks knowledge about the withheld documents. *Vaughn*, 484 F.2d at 823-25; see also *Ethyl Corp. v. U.S. Environmental Protection Agency*, 25 F.3d 1241, 1249-50 (4<sup>th</sup> Cir. 1994) (absent detailed information about withheld information, the requester would be "helpless as an adversary").

In addition, agencies must provide more than the "document's issue date, its author and intended recipient, and the briefest of references to its subject matter." *Senate of the Commonwealth of Puerto Rico v. U.S. Dept. of Justice*, 823 F.3d 574, 585 (D.C. Cir. 1987) (footnote omitted). In describing withheld documents, the agency must "disclos[e] as much information as possible without thwarting the exemption's purpose." *King*, 830 F.2d at 224.

However, in the FOIA request at hand, the FWS failed to provide any specificity as to the nature of each of the withheld documents. The entirety of the Service's explanation of the withheld documents is found in just two sentences in their letter of December 20, 2006. "The majority of these documents are internal agency drafts of the 5-year review, proposed rule, and associated electronic mails." (pg 2) "The withheld records incorporate such advisory opinions, preliminary staff recommendations, and deliberations, including editorial judgments about revision to the draft 5-year review and proposed delisting rule." (pg 3)

The FWS must correct this deficiency by providing specific information on each of the 171 withheld documents. The Service should compile and disclose a "Vaughn Index", or a reasonable facsimile, that "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central*, 566 F.2d at 250-51; see also *King v. U.S. Dept. of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

The FWS must provide an index that explains with specificity and detail why each document, or portion of the document, should be exempt from disclosure. See *Commonwealth of Puerto Rico*, 823 F.2d at 585 ("conclusionary assertions of privilege will not suffice to carry the agency's burden") (quotation and citation omitted). An

agency must show "by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." Mead Data Central, 566 F.2d at 258. Thus, an adequate index must provide much more than the basic elements of "who, what, and when." Coastal States, 617 F.2d at 861 (Vaughn Index "patently inadequate" where it merely "identifies who wrote the memorandum, to whom it was addressed, its date, and a brief description of the memorandum"); see also Oglesby v. U.S. Dept. of the Army, 79 F.3d 1172, 1180 (D.C. Cir. 1996) ("Vaughn and its progeny require that an agency itemize each document and explain the connection between the information withheld and the exemption claimed") (emphasis in original).

This index of the withheld material must also include information on the author(s) and recipient(s), including job title and position, for each of the 171 documents. In determining whether a document is predecisional or deliberative, it is essential to examine the agency's administrative process and the role of the document in that process. See, e.g., Renegotiation Bd., 421 U.S. at 172-79. Here, that task is impossible without complete information about the withheld documents. In evaluating whether a document can be considered predecisional, the D.C. Circuit has stressed that "a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made." Coastal States, 617 F.2d at 868; see also Schlefer, 702 F.2d at 238. Thus, the Vaughn Index must "indicate[] the titles and positions of the documents' authors and recipients," see Animal Legal Defense Fund v. Dept. of the Air Force, 44 F. Supp. 2d 295, 300-301 (D.D.C. 1999), for otherwise it is impossible to determine whether in fact the records are deliberative or predecisional within the meaning of Exemption 5. See also Commonwealth of Puerto Rico, 823 F.2d at 586 (agency must explain the "nature of the decisionmaking authority vested in the officer or person issuing the disputed document," and "the relative positions in the agency's chain of command occupied by the document's author and recipient") (quotations and citations omitted).

### ***Pre-Decisional and Deliberative Nature***

The goal of the deliberative process privilege is to prevent injury to the quality of agency decisions. Sears, 421 U.S. at 151. The rationale is that the confidentiality of certain material connected with the government decision-making process ensures frank and open discussion among government officials, which in turn enhances the quality of government decision-making. However, the government's desire for secrecy must be balanced against FOIA's general policy of open government. Therefore, as the Supreme Court has recognized, Exemption 5 is to be construed "as narrowly as consistent with efficient Government operation." Mink, 410 U.S. at 87 (quoting S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965)).

Courts have adopted a two-part test when examining an agency's withholding of public information under Exemption 5: to be exempt from disclosure, a document must be both pre-decisional and deliberative. See National Assn. of Home Builders v. Norton,

309 F.3d 26, 39 (D.C. Cir. 2002), rehearing denied, 2003 U.S. App. LEXIS 1914 (D.C. Cir. Feb. 3, 2003).

The FWS has failed to explain in sufficient detail why each of the 171 withheld documents are both pre-decisional and deliberative. Their December 20<sup>th</sup> letter contains only a statement that materials are being withheld pursuant to the deliberative process privilege in Exemption 5 of the FOIA. The absence of specific rationale and explanation for each document must be corrected or the documents must be released.

### ***Specific Agency Decision Process***

In describing the pre-decisional prong of the deliberative process privilege, courts have recognized a distinction between pre-decisional documents, which are protected, and post-decisional documents, which are not protected. *Sears*, 421 U.S. at 151-53; see also *Commonwealth of Puerto Rico*, 823 F.2d at 585.

To be exempt from disclosure, a pre-decisional document must be a direct part of the decision-making process in that it makes recommendations or expresses opinions on legal or policy matters to be decided by the agency. See *ITT World Communications, Inc. v. FCC*, 699 F.2d 1219, 1235, 1239 (D.C. Cir. 1983), rev'd and remanded on other grounds, 466 U.S. 463. In determining whether a document is pre-decisional, it is essential to examine the agency's administrative process and the role of the document in that process. *Renegotiation Bd. v. Grumman Aircraft Eng. Corp.*, 421 U.S. at 168, 172-79; *Sears*, 421 U.S. at 138-44; *Schlefer v. United States*, 702 F.2d 233, 237-43 (D.C. Cir. 1983); *Playboy Enterprises, Inc. v. Dept. of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982); *Coastal States*, 617 F.2d at 866-67. In order to demonstrate the applicability of Exemption 5, government agencies must establish the existence of a genuine pre-decisional process by explaining how the decisions at issue are reached. *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1204-05 (D.C. Cir. 1991).

The Supreme Court has noted that it would be reluctant to construe Exemption 5 to apply to post-decisional records, that is "statements of policy and interpretations which have been adopted by the agency" and "instructions to staff that affect a member of the public." *Sears*, 421 U.S. at 153. This is consistent with the principle that Exemption 5 does not protect "secret law" or an agency's "working law" such as orders, decisions, interpretations, instructions, and guidelines which have precedential weight and affect the public. See, e.g., *Schlefer*, 702 F.2d at 237. Therefore, when subordinates are obliged to follow opinions, such opinions will not be exempt. *Id.* at 237-38.

In addition, in determining if documents meet the requirements of the pre-decisional prong of the deliberative process exemption, several factors must be present, including: (1) a document must relate directly to a decision-making process, *Commonwealth of Puerto Rico*, 823 F. 2d at 585, and (2) a document must have assisted in the decision-making process and not have simply supported a decision already made. *Petroleum Info. Corp.*, 976 F. 2d at 1434.

In order for the deliberative process privilege to apply, the document must be predecisional, that is, it must be "(1) 'antecedent to the adoption of an agency policy,' and (2) 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" Evans, 276 F.Supp. 2d at 38 (citations omitted). A mere claim, such as that proffered by the FWS, that the withheld documents are part of some unarticulated decision-making process, is simply not enough to justify withholding under Exemption 5. Commonwealth of Puerto Rico, 823 F.2d at 585 ("a court must be able to pinpoint an agency decision or policy to which the document contributed") (quotation and citation omitted); see also Access Reports v. Dept. of Justice, 926 F.2d 1192, 1195-96 (1991) (agency must identify decisionmaking process even if it can not identify single, final agency decision).

In addition to failing to provide basic information on each of the 171 withheld documents, the FWS failed to explain the decisionmaking process and / or processes at issue in denying the release of material. The process of delisting would seem to entail a number of discrete decisions and decisionmaking processes, some of which may have already been completed. Further, as noted above, FOIA does not exempt an agencies' "working law" such as orders, decisions, interpretations, instructions, and guidelines. These represent decisions that have already been made and as such are not exempt. The FWS must provide information on the decisionmaking process at hand to explain their denial of material and review the withheld documents for the presence of non-exempt "working law".

### ***Segregation and Release of Factual Portions***

The Supreme Court has recognized a distinction between "materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other." Mink, 410 U.S. at 89. Thus, even if a document is predecisional, "the privilege applies only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document." Coastal States, 617 F.2d at 867. Generally, facts in a predecisional document must be segregated and disclosed unless they are "inextricably intertwined" with exempt portions. Ryan v. Dept. of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980) (quotation omitted).

The FWS failed to provide details on each of the documents withheld. We are left to guess as to whether factual details have been disclosed. Given that the Service's December 20<sup>th</sup> letter states that some of the withheld materials have to do with drafts of the 5 year review, a document presumed to contain facts about the state of the flying squirrel, it is reasonable to assume that there are facts contained therein that have not been disclosed. All reasonably segregable factual portions of documents withheld under exemption 5 must be released.

We hope that your review can be expedited based on the fact that the comment period on the Five Year Review for *Glaucomys sabrinus fuscus* is currently underway.

The withheld materials will no doubt help us and our many concerned colleagues shed light on the delisting proposal and enable us to provide more effective comment to the Fish and Wildlife Service. Absent release of each of the 171 documents we believe adequate explanation and information must be provided as we have explained above.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Judith Holyoke Schoyer Rodd". The signature is written in a cursive, flowing style.

Judith Holyoke Schoyer Rodd  
Director - Friends of Blackwater  
501 Elizabeth St., Room 3  
Charleston, WV 25311  
(304) 345-7663

enclosures

cc:  
Congressman Alan Mollohan  
Congressman Nick Rahall