



Reply to
Attention of:

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

December 5, 2011

Office of Counsel

SUBJECT: Freedom of Information Act Request, Additional Information for Permit Application
No. SWF-2010-00506, Letter to the Applicant

P.O. Box
Cedar Creek, TX 78612

Dear _____ :

On November 29, 2011, I received your Freedom of Information Act (FOIA) request for a copy of the subject document. 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 document responsive to your request and have determined to withhold the document, 3 pages in length, pursuant to Exemption 5 of the FOIA, 5 United States Code, Sections 552(b)(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 letter is an intra-agency document. 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 is an intra-agency document which is part of the deliberative process for a pending regulatory permit action. Therefore the document 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:

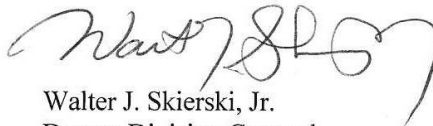
Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation.

The document satisfies the second qualification for Exemption 5 protection. This letter is part of a pending regulatory permit action at the Fort Worth District. The document is deliberative and pre-decisional and part of the agency's process. No final determination has been made regarding the permit. After my review of the document and the case law as stated above, I have concluded that the release of this document 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 document was released, this free flow of opinions and discussions would be greatly diminished or no longer take place. Therefore, I must withhold this document under the deliberative process privilege of Exemption 5.

I trust that you will appreciate the consideration upon which this determination is based. However, because 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,

A handwritten signature in dark ink, appearing to read "Walter J. Skierski, Jr.", with a stylized flourish at the end.

Walter J. Skierski, Jr.
Deputy Division Counsel

Copy furnished:

Fort Worth District FOIA Officer