

February 2, 2010
Counsel to the Inspector General,
Office of Counsel,
Office of Inspector General
1200 Pennsylvania Avenue, N.W. Mail Code (2411T)
Washington, DC 20460

Appeal of Denial of Freedom of Information (FOIA) Request RIN 01862-09
Appeal sent by: Fax 202 566-0870 and Email oig.foia@epa.gov

**APPEAL OF THE DENIAL OF DOCUMENTS UNDER THE FREEDOM OF
INFORMATION ACT TO COVER UP AN INVESTIGATION OF
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL**

Background

In October 2008, the Environmental Protection Agency (EPA) Office of Inspector General (OIG) sent a three-man investigative team comprised of OIG inspectors general, Mssrs. Larry Dare, John Coll and Edward Baldinger, to investigate a hotline complaint of Citizen Action and Registered Geologist Robert Gilkeson regarding: 1) the inadequate well monitoring network at Sandia National Laboratories' Mixed Waste Landfill (MWL), and, 2) lack of EPA Region 6 oversight for the Resource and Conservation Recovery Act (RCRA) program run by the authorized state agency, the New Mexico Environment Department (NMED). **A report was produced by the EPA OIG investigative team. Citizen Action seeks that report and accompanying schedules, documents and work papers.**

Under the Freedom of Information Act, 5 U.S.C. § 522, Citizen Action New Mexico requested "access to a full and complete copies of all work papers and documents containing factual information including the report prepared for the investigation including all documents in any form, whether from schedules, correspondence, memoranda, tape recordings, electronic or handwritten communications, notes or handout documents used to prepare the report."

The January 11, 2010 EPA OIG denial response to Citizen Action's August 17, 2009 FOIA request is under 5 U.S.C. 552 Section (b)(5) for inter and intra-agency memoranda or letters and states, "OIG is invoking this exemption because the analysis of this project is not complete nor have either a draft or final report been issued."

The three-man investigative team did issue a report that contains factual investigative information along with the factual information contained in documents that were reviewed for making the report. By direction of Assistant Director Wade Najjum and Eric Lewis, Director for Special Reviews, the OIG has actually deliberately and indefinitely suspended or halted the investigation and are suppressing both the report(s) and supporting documents produced by the three-man investigative team.

The investigatory report and supporting documents are not predecisional to any policy making function but constitute factual material examining the RCRA oversight function of EPA Region 6. The deliberative process privilege only applies to the opinion or recommendatory portions of a document and not to the factual information which is contained in the document. (*See, Coastal States Gas Corp. v. DOE*, 617 F.2d at 867; *ITT World Communications, Inc. v. FCC*, 699 F.2d at 1236; *Playboy Enterprises, Inc. v. DOJ*, 677 F.2d at 935.

Mr. Edward Baldinger, a retired member and team leader of the OIG team that investigated the complaint of Citizen Action, informed Director David McCoy in February 2009 that the three man team did in fact prepare, complete and submit their report to EPA OIG Director for Special Reviews, Mr. Eric Lewis. Mr. Baldinger further informed Mr. Jonathan Epstein (Senator Bingaman's Staff) and Citizen Action that:

“Since our conversation matters regarding Mr. McCoy's hotline complaint have taken a decidedly horrific turn of events. All the original members of the assignment have been taken off the review by Mr. Lewis, OIG OPE Director for Special Reviews (grade 15) and Mr. Najjum, OIG OPE Assistant Inspector General (SES). These individuals have tasked an individual with less than 1 year experience, no knowledge of RCRA, or issues concerning [the Sandia] MWL to write the report in response to Mr. McCoy's hotline complaint. The individual has also been directed by Mr. Lewis to make statements in the report that cannot be supported by the work papers prepared by me and other team members.”

During the weeklong meeting with Citizen Action the OIG team photocopied and reviewed with Citizen Action and Mr. Gilkeson 1) hundreds of technical documents and 2) an NMED report entitled *Evaluation of the Representativeness and Reliability of Groundwater Monitoring Well Data, Mixed Waste Landfill, Sandia National Laboratories* by William Moats *et al.* (the Moats Evaluation). The investigative team members informed Citizen Action that factual reasons exist for sending the Moats Evaluation for review by the EPA Kerr Laboratory in Ada, Oklahoma.

The OIG and EPA Region 6 documents are a retrospective evaluation of agency performance and also fall outside the (b)(5) exemption for inter and intra-agency documents. Several courts have required disclosure of the “factual, investigative and evaluative portions” of documents that “reveal whether the agencies’ policies are being carried out.” (*See e.g., Vaughn v. Rosen (II)*, 383 F. Supp. 1049 (D.C. Cir. 1975); *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019, 1028-29 (S.D.N.Y. 1980); *Union of concerned Scientists v. NRC*, 2 Med. L. Rpt. 1458 (D.D.C. 1977; *Soucie v. David*, 448 F. 2d at 1067, 1078 (D.C. Cir. 1971).

The documents sought by Citizen Action and Gilkeson are not documents that would be used for assisting formulation of policy. The documents were related to the investigation of EPA Region 6 performance of oversight duties and whether there was adherence to policies already formulated for compliance with RCRA by NMED and EPA Region 6. The request for review of the Moats Evaluation was to determine if it was accurate and if there is actual compliance with RCRA requirements for a reliable and representative well monitoring network at the MWL dump.

The OIG FOIA denial fails to: 1) provide documents that are factual and technical in nature, 2) segregate any opinion from the factual material and 3) to state any cognizable exemption for withholding the factual material from each of those documents or portions thereof in full. The EPA OIG has failed to provide any list of documents that it is withholding.

The OIG rationale that the “project is ongoing” is a façade to create the appearance of an ongoing investigation and does not relieve the OIG from supplying the documents requested and the factual material contained therein. The EPA OIG “ongoing” rationale is being used as a pretense, a vehicle to place the requested documents into a perpetual administrative limbo so that those records can never become available under the FOIA.

The “inter-agency or intra agency” exemption does not apply in this instance because the documents were generated as a result of hotline complaints filed by Citizen Action and Registered Geologist Robert Gilkeson. The requested documents are not documents made at the government’s request to outside parties as in *Ryan v. DOJ*. The hotline complaints made by Citizen Action and Gilkeson asked for investigation as to whether the EPA Region 6 was adequately performing its RCRA oversight duties for the NMED. Citizen Action and Gilkeson were not acting on behalf of EPA Region 6 and the EPA OIG agency. The factual investigative information was not prepared at the EPA Region 6 or EPA OIG for the benefit of their internal policy decision-making but was prepared to examine the allegations made by Citizen Action and Gilkeson as past and potential adversaries and self seeking petitioners with their own interests in mind, i.e., seeking enforcement of EPA Region 6 RCRA oversight duties and the investigation by the EPA OIG of that possible non-compliance. (See, Department of Interior v. Klamath Water Users Protective Association, 531 U.S. 425 (2001)).

The EPA OIG has made no showing of any reasonable likelihood that the Agency would be harmed by release of the requested documents or that production of the documents would be injurious to the “consultative functions of government.” (See, EPA v. Mink, 410 U.S. 73, 87 (1973)).

A presumption of disclosure exists for the FOIA under President Obama’s White House policy that agencies should take affirmative steps to make information public and thus encourage accountability through transparency thereby opening a new era of open government. Disclosure of the requested information would enhance public knowledge of operations of the government. OIG’s denial offers nothing to overcome the presumption of disclosure. The EPA OIG is not harmed by the release of investigative information relevant to whether EPA Region 6 is properly exercising oversight to protect the Albuquerque, New Mexico public from a dangerous nuclear waste dump lying above Albuquerque’s drinking water aquifer. The public is harmed by the EPA OIG secrecy, obstinacy and lack of transparency.

The denial for this FOIA request is untimely and the requested documents should have been furnished 6 months ago, within 20 days of the request.

Respectfully submitted,

David B. McCoy, Executive Director
Citizen Action New Mexico
POB 4276
Albuquerque, NM 87196-4276
505 262-1862 dave@radfreenm.org

Cc: President Barack Obama, Attorney Richard Mietz