



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUL 20, 2009

Mr. David B. McCoy, Director
Citizen Action New Mexico
P.O. Box 4262
Albuquerque, NM 87196-4276

Re: Freedom of Information Act (FOIA) Request No. 06-RIN-00396-09

Dear Mr. McCoy:

This letter is in response to your FOIA Request, received on June 24, 2009, which we numbered 06-RIN-00396-09. Please refer to that number in all communications regarding your most recent request. You again requested copies of the reviews or reports prepared by the U.S. Environmental Protection Agency (EPA) Region 6 staff (including environmental scientist Richard Mayer, and others) "in response to a complaint that was filed with EPA Region 6 about the defective monitoring well network at Sandia National Laboratories' Mixed Waste Landfill (MWL)."

The subject documents have already been addressed in our January 24, 2008, response to your December 7, 2007, FOIA Request. You appealed that response on February 15, 2008, and Kevin Miller, EPA Assistant General Counsel for Information Law, answered your appeal on August 7, 2008. Region 6's initial January 24, 2008, FOIA response was upheld on appeal. That decision stands and applies to additional FOIA requests from you for the same information, including this one.

In the course of preparing a response to your letter of March 1, 2007, Region 6 technical staff conducted various internal analyses of the well monitoring network at the Sandia MWL. Region 6 staff analyzed the site in various internal draft documents, refining their analyses over time, which resulted in several deliberative drafts. Region 6 reviewed these deliberative drafts for your previous FOIA requests. These documents make up the twenty-one internal draft summary documents referenced in the February 15, 2008 response letter. The drafts are exempt from mandatory release because they are protected by Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5).

Your recent letter states that you "were informed by Mr. Mayer that he had completed his technical report and that the report was sent to the EPA Region 6 attorney." Mr. Mayer is a valued technical employee, and he contributed to the discussion in question. However, verbal statements made prior to the final Agency decision about potential options do not represent the Agency's official position. Further, any draft(s) of the document that Mr. Mayer

may have sent to Agency legal staff for review does not constitute the Agency's position. Such a draft is subject to deliberative process privilege and attorney-client privilege under Exemption 5. The deliberative process privilege protects documents that are both predecisional and deliberative. The fact that an agency has subsequently made a final decision does not alter the predecisional character of a document, and protection extends to records that are part of a decisionmaking process even where that process does not produce an actual agency decision. Release of this material would discourage open, frank discussions on matters of policy between subordinates and superiors, prematurely disclose proposed policies before they are finally adopted, and cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA's action.

Additionally, any drafts reviewed by Region 6 legal staff are subject to attorney-client privilege under Exemption 5. The attorney-client privilege protects confidential communications between an attorney and his/her program client relating to the matter for which the client has sought professional advice. The privilege applies to facts the client divulges to the attorney, opinions that the attorney gives to the client based upon those facts, and communications between attorneys that reflect client-supplied information. Release of this withheld material would allow scrutiny of sensitive, confidential communication between the attorney and the client.

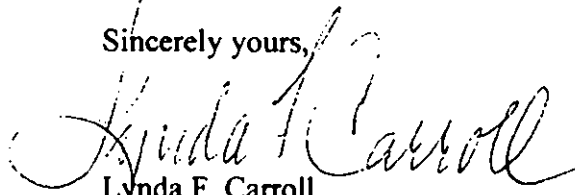
The same staff members that participated in the earlier analyses fully explained Region 6's position on these issues in the Agency's response letter to you dated December 13, 2007, which was reviewed and signed by the Director of the Multimedia Planning and Permitting Division. That letter contains Region 6's technical conclusions in response to your March 1, 2007, letter. The December 13, 2007, letter is a final, comprehensive, stand alone document designed to provide a timely and complete response to an inquiry from a member of the public.

We are fully aware of updated national policies encouraging increased discretionary disclosure, but convinced of the appropriateness of these denials to date, given the apparent harms that would accompany the release of these internal, deliberative materials. Such harms include the chilling of the deliberative process among technical staff and confusion to the general public. As recently observed by the Ninth Circuit Court of Appeals, the release of predecisional and deliberative documents would "expose the agency's internal deliberations in such a way that would discourage candid discussion and effective decisionmaking." *Lahr v. NTSB*, Nos. 06-56717, 06-6732, 07-55709, 2009 WL 1740752, at *15 (9th Cir. June 22, 2009).

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, Records, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, D.C. 20460, FAX: (202) 566-2147, E-mail: hqfoia@epa.gov. The appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter.

The appeal letter should include the RIN listed above. For the quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal." Please contact attorney Carrie Thomas of our Office of Regional Counsel at (214) 665-7121, if you need additional information on this response.

Sincerely yours,

A handwritten signature in cursive script, reading "Lynda F. Carroll". The signature is written in dark ink and is positioned above the printed name and title.

Lynda F. Carroll

Assistant Regional Administrator
for Management Division