

August 13, 2009
FOIA Officer (2822T)
USEPA
Ariel Rios Bldg.
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

SENT BY FAX 202 566-2147 and e-mail to hq.foia@epa.gov

Re: Appeal of Freedom of Information Act (FOIA) Request 06-RIN-00396-09

Dear Sir/Madame,

Citizen Action New Mexico appeals the July 20, 2009 denial letter by Lynda F. Carroll, Assistant Regional Administrator for Management, EPA Region 6, 1445 Ross Ave., Suite 1200, Dallas, TX 75202-2733. Citizen Action objects to the withholding of FOIA materials under both the 42 U.S.C. § 552 (b)(5) exemption for pre-decisional materials and the attorney client work-product privilege. Current FOIA policy provides a “presumption in favor of disclosure” of the requested FOIA documents.

Under the Freedom of Information Act, 5 U.S.C. § 552, Citizen Action New Mexico requested on June 24, 2009:

1. Full and complete copies of the review(s) or report(s) that were prepared by EPA Region 6 Staff (Richard Mayer and others on his team) 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.
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Background

A June 21, 2007 letter from EPA Administrator Richard E. Greene to Senator Jeff Bingaman stated in pertinent part:

“In our oversight capacity, the EPA is currently conducting an internal review of all well monitoring information, including well logs, site geology, and groundwater sampling results. The data for this site extends back more than two decades so there is a considerable amount of information to analyze. We intend to contact the EPA Risk Management Research Program Groundwater and Ecosystem Restoration Research Laboratory in Ada, OK, if necessary, to provide additional technical assistance.”

The grounds for the appeal are:

1. The EPA Region 6 denial letter of July 20, 2009, now identifies 21 “various internal analyses of the well monitoring network at the Sandia MWL” as being conducted by Region 6 technical staff.
2. In the August 7, 2008 FOIA denial letter the 21 documents were not previously identified as analyses by technical staff that could contain factual information or data.

3. The 21 referenced documents that were possibly written by Richard Mayer, Troy Hill possibly along with others on the Region 6 technical staff are likely to contain technical and factual data related to a review of the well monitoring network at the Sandia National Laboratories' Mixed Waste Landfill (MWL).
4. The EPA purported to perform a technical "review" of documents which was supposedly based upon the type of material stated to Senator Bingaman by Richard A. Greene. EPA sent out a letter on December 13, 2007 asserting that "EPA reviewed the overall MWL groundwater monitoring system in order to determine its efficacy in detecting contamination."
5. Thus, the factual materials that were referred to and constituted the review for the efficacy of the ground water monitoring network based on "all well monitoring information, well logs, site geology, and groundwater sampling results" should be made available.
6. Factual materials contained in the above withheld 21 documents must be segregated and provided as a matter of law. EPA stated, "We reviewed well locations, depths of wells and well screens, purging and sampling methods, downhole videos, and analytical results. We also consulted with the NRML on various technical ground water issues." Under the FOIA, EPA must furnish these many factual documents that were part of its "review," including the reviews of its technical staff.
7. The documents that are being withheld must be specifically identified. The broad generic categories, without any detailed explanation in support of exemption for each document, are insufficient and effectively preclude Citizen Action from contesting the decision to withhold the information and shifts the burden of segregating out non-exempt information to the courts. See Vaughn v. Rosen 484 F.2d at 825-28. The categories and stated reason for Exemption b5 are mere "barren assertions" that the documents are exempt.
8. To qualify for Exemption b5, EPA does not identify the withheld documents or show that the withheld documents are both pre-decisional and deliberative. (*See, Access Reports v. Dept. of Justice*, 147 F.2d 1192 (D.C. Cir. 1991)).
9. The December 13, 2007 letter incorporates underlying documents and memoranda which EPA has in its possession that must be disclosed because the documents contain technical information and data. EPA has not shown that the data and information is of the type that would not flow freely within the agency unless protected from public disclosure. Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (rejecting conclusory affidavits submitted in support of a claim of the deliberative process privilege).
10. According to the December 13, 2007 response letter to Citizen Action, the New Mexico Environment Department "directed Sandia National Laboratories (SNL) to replace a number of Mixed Waste Landfill (MWL) monitoring wells due to factors such as screen corrosion and dropping water levels." EPA staff informed the NMED that at least three of the monitoring wells at the MWL needed to be replaced based on information provided by Citizen Action and Registered Geologist Robert Gilkeson. The information, much of it gathered from the administrative record for the MWL by McCoy and Mr. Gilkeson, indicated monitoring wells and well screens were in the wrong locations, that the

- background well BW1 never was properly located and had also gone dry along with MW3, improper well construction with bentonite clay and organic drilling fluids that hide knowledge of contamination, improper sampling techniques, corrosion of well screens and evidence of contamination of groundwater at the MWL by high levels of nickel and chromium exceeding state and federal drinking water standards.
11. Exemption b5 can never apply to final opinions or dispositions. 421 U.S. at 155-159. Even if a document were pre-decisional, “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 Gas Corp. v. DOE*, 617 F.2d at 867. Here a letter of December 13, 2007 was purportedly based on the analyses performed by Region technical staff based on technical factors cited above in the EPA letter to Senator Bingaman.
 12. Generally, facts in a pre-decisional document must be segregated and disclosed unless they are inextricably intertwined with exempt portions. *Ryan v. DOJ*, 617 F.2d 781, 790-91 (D.C. Cir. 1980). But where an agency adopts the recommendations of an otherwise pre-decisional document, the “chilling effect” of disclosure on agency decision-making is no longer a concern. On the contrary, disclosure serves the public interest. Additionally, as argued below, current FOIA policy favors a “presumption of disclosure.” EPA Region 6 claims (December 13, 2007) that “We reviewed well locations, depth of wells and well screens, purging and sampling methods, downhole videos, and analytical results.” These are factual inquiries that the technical staff would have addressed. None of the factual information withheld in the 21 documents by the EPA may properly be withheld under Exemption 5 that is factual. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975).
 13. Citizen Action seeks the factual and other non-decisional materials produced by its technical staff and withheld by EPA Region 6. The EPA did not provide the above 21 records that would be responsive to the request. The July 20, 2009 letter of denial is without justification, explanation, or reasonable description of the materials being redacted wholesale from the records provided. The withholding of documents made under Exemption b5 are not explained in the determination letter. The withholding of the numerous documents is not justified by identification of what decision exists, what pre-decisional/deliberative process existed and why the factual and other materials cannot be provided.
 14. The claim of attorney-client privilege for protection of the documents is unsupportable. No litigation was pending with EPA Region 6, nor was the technical staff seeking advice regarding any pending litigation from EPA attorneys. There was no basis to determine that litigation was pending from Citizen Action. In fact, EPA was responding to Citizen Action through a request from Senator Bingaman. Citizen Action was attempting to pursue an administrative channel, not a path involving litigation, with EPA Region 6 for review of the monitoring wells at Sandia National Laboratories. Is EPA Region 6 now claiming that the December 13, 2007 letter was prepared in contemplation of litigation? The Region 6 December 13, 2007 letter was not issued in anticipation of litigation but came only after a response to Senator Bingaman. (See November

14, 2007 letter from Senator Jeff Bingaman to Richard E. Greene with attached letter from November 13, 2007 to Senator Bingaman from McCoy and Gilkeson). Rather than showing the presence or anticipation of any litigation, the December 13, 2007 letter defers any legal issues to “the State judicial process.” Applying the broad standard of the attorney-client privilege where no litigation was pending or anticipated “would hinder the openness that Congress envisioned in enacting FOIA and shield from disclosure documents that would aid in understanding the decision making process of an agency.” (See, State of Maine v. United States Department of Interior, 2002 WL 499331 (1st Cit. 2002).

15. EPA Region 6 should apply the new FOIA policy of President Obama’s administration and provide the documents “as servants of the public”:
“Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

“All agencies should adopt a **presumption in favor of disclosure**, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” (Emphasis supplied).

Region 6 has not provided a presumption in favor of disclosure to Citizen Action for the above documents. Nor has Region 6 demonstrated that the deliberative process would be chilled by the provision of the 21 documents. Rather, what is chilled is the ability of the public to monitor government operations required for protection of the public from the Mixed Waste Landfill as a dangerous radioactive and hazardous waste dump.

CONCLUSION

There is no basis for denial of the 21 documents by Exemption b5 for pre-decisional material or the attorney-client work product privilege. The policy of FOIA disclosure is a “presumption of disclosure” that Region 6 is not observing. The EPA FOIA Office should be required to examine the record, identify the specific documents withheld, provide the reason for withholding each document and why each document is pre-decisional and deliberative, and segregate factual material from opinion by redaction and provide the materials that have been improperly withheld.

Respectfully submitted,

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