



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

April 3, 2015

IN REPLY REFER TO:  
Appeal No. 2015-007

Scott Muir

(b) (6)

Dear Mr. Muir:

This responds to the October 20, 2014, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”) on behalf of Daylight Tree Service & Equipment, LLC, and Daylight Vegetation Management, LLC, which the Department assigned as **Appeal Number 2015-007**. Your appeal concerns a September 6, 2012, FOIA request that you submitted to the Bureau of Land Management (“BLM”) seeking copies of e-mail messages “sent and received by Rosiland Davis and Julia Lang that contain[] Scott Muir or the word Daylight or Daylight Tree Service.” You filed the appeal to challenge the BLM’s decision to withhold, pursuant to FOIA exemptions (3),<sup>1</sup> (5),<sup>2</sup> (6),<sup>3</sup> and (7)(C),<sup>4</sup> certain information from documents that are responsive to your FOIA request.

Your appeal is **DENIED**.

After reviewing the issues presented in the appeal, the withheld information, and relevant case law, the Department concludes that the BLM properly relied on 41 U.S.C. § 4702(b)<sup>5</sup> as a basis to invoke exemption (3) to withhold the identifying information of an unsuccessful offeror for a contract and information that derived from a proposal that the unsuccessful offeror submitted. The BLM also properly invoked the deliberative process privilege of exemption (5)<sup>6</sup> as a basis to withhold employees’ predecisional opinions and recommendations on how to address the matters under discussion.

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<sup>1</sup> Exemption (3) allows the withholding of information “specifically exempted from disclosure by statute (other than [the FOIA])...” 5 U.S.C. § 552(b)(3).

<sup>2</sup> Exemption (5) protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency.” 5 U.S.C. § 552(b)(5).

<sup>3</sup> Exemption (6) allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

<sup>4</sup> Exemption (7)(C) allows the withholding of records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

<sup>5</sup> 41 U.S.C. § 4702(b) prohibits an agency from releasing information from a proposal that is not “set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.” This prohibition on release extends to the names and identifying information of unsuccessful offerors.

<sup>6</sup> The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004).

The Department also concludes that the BLM properly invoked exemptions (6) and (7)(C) as bases to withhold certain information compiled for law enforcement purposes, i.e., personal identifying information of individuals named in some of the documents. The documents from which the BLM redacted this information meet the exemption (6) threshold requirement of being “similar files” within the meaning of the exemption, as they contain information that can be identified as applying to a particular individual (e.g., a person’s name). The redacted information also meets the exemption (7) threshold of being information compiled for law enforcement purposes in that it reflects information compiled in connection with an enforcement action involving potential debarment proceedings against your company.

In addition to meeting the threshold requirement of both exemptions, this redacted information also satisfies the requirements for protection under each one, i.e., disclosure could cause an unwarranted invasion of personal privacy. The individuals whose information the BLM redacted in the context of the enforcement action have substantial privacy interests in withholding their identifying information because disclosure could result in embarrassment, harassment, unofficial questioning, or unwanted public attention.

To overcome the significant privacy interests that these individuals have in withholding their identifying information, you must establish that the names and other personal identifying information of the individuals is needed to confirm or refute compelling evidence of agency misconduct.<sup>7</sup> Absent a showing of compelling evidence of agency misconduct, the privacy interests in withholding identifying information in law enforcement files will always outweigh the insubstantial public interest in disclosure.<sup>8</sup>

In this case, you have offered no such evidence. Instead, you provide vague and conclusory assertions and allegations of potential misconduct and unprofessionalism on the part of government employees, none of which amount to the type of compelling evidence of agency misconduct that you must show in order to obtain disclosure.

Since you have not put forth any compelling evidence of agency misconduct, the Department concludes that, on balance, the substantial privacy interests that the individuals have in withholding their identifying information outweigh the insubstantial public interest in disclosure. As a result, the Department concludes that the BLM properly withheld, pursuant to exemptions (6) and (7)(C), the names and other personal identifying information of individuals whose information was compiled for law enforcement purposes. Thus, this information that the BLM redacted from the documents will continue to be withheld.

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<sup>7</sup> See *National Archives and Records Administration v. Favish*, 541 U.S. 157, 174-75 (2004) (requiring requesters to “establish more than a bare suspicion [that responsible officials acted negligently or otherwise improperly in the performance of their duties] in order to obtain disclosure” and finding requesters “must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”).

<sup>8</sup> Exemptions (6) and (7) (C) require identifying and balancing relevant privacy and public interests to determine whether disclosure is appropriate. See *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.

This completes the Department's response to your appeal. You have a right to seek judicial review of this decision under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn  
FOIA Appeals Officer  
Department of the Interior

cc: Ryan Witt, FOIA Officer, BLM

Kathleen Christian, California State Office FOIA Coordinator, BLM

Veronica Rowan, Assistant Regional Solicitor, SOL-Pacific Southwest Regional Office

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