



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Appeal No. 2015-078

April 28, 2015

Jonathan B. Ratner
Western Watersheds Project
P.O. Box 1160
Pinedale, WY 82941

Dear Mr. Ratner:

This responds to the March 22, 2015, Freedom of Information Act (“FOIA”) appeal that you filed with the Department of the Interior (“Department”), which the Department received on March 23, 2015,¹ and that it assigned as **Appeal Number 2015-078**. Your appeal concerns your December 23, 2014, FOIA request to the National Park Service (“NPS”) that sought nine categories of documents generally pertaining to the “range program” at Capitol Reef National Park in Utah. You filed the appeal to challenge the NPS’s decision to withhold in full, pursuant to the deliberative process privilege of FOIA exemption (5),² documents that are responsive to Item 4 of your FOIA request, which sought:

All documents, meeting notes, emails, conversation records or other documents related to range [National Environmental Policy Analysis (“NEPA”)] analysis, including but not limited to the Park-wide grazing management plan NEPA between 12/1/2013 and the date this request is fulfilled.

In the appeal, you also challenge whether the NPS segregated and released all of the non-exempt information that may be contained in the responsive documents.³

After fully reviewing this matter, the Department concludes that it is necessary for it to **REMAND** Item 4 of the FOIA request to the NPS for re-processing, as the Department learned of a procedural deficiency in the NPS’s processing of this item. Specifically, the NPS did not conduct a line-by-line, page-by-page review of each of the responsive documents for Item 4 that it withheld under exemption (5) to determine which, if any, portions of the documents are actually protected from disclosure by the exemption. Because of this deficiency with the NPS’s processing of Item 4 of the request, the

¹ The Department’s FOIA regulations state that “Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.” 43 C.F.R. § 2.58(e). Since your appeal arrived in the FOIA Appeals Office’s e-mail on Sunday, March 22, 2015, at 5:37 PM, the Department deems your appeal as received on the next workday, March 23, 2015.

² 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). The exemption incorporates several of the government’s common law privileges from discovery in litigation, including the deliberative process privilege, which protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). See also *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004).

³ See 5 U.S.C. § 552(b), discussion after exemptions (requiring an agency to release “any reasonably segregable portion of a record” after appropriate application of one of the FOIA’s nine exemptions). See also 43 C.F.R. § 2.25 (requiring a bureau to segregate and release non-exempt information in a responsive document).

Department cannot at this time evaluate the propriety of the NPS's determination to invoke exemption (5) as a basis to withhold any of the responsive documents.

The Department concludes that a remand of Item 4 of the request to the NPS for re-processing is necessary because its correction of the deficiency could resolve the issue in the appeal of its use of exemption (5) as a basis to withhold the responsive documents for this item. For example, the NPS's actual review of each responsive document for Item 4 to determine which, if any, portions are protected from disclosure by a FOIA exemption could result in the NPS concluding that none of the information is protected. Further, the NPS's line-by-line, page-by-page review of the documents in connection with a remand will also resolve the other issue that you raise in the appeal regarding whether the NPS segregated and released all of the non-exempt information.

Accordingly, to resolve the deficiency with the NPS's processing of Item 4 of the request, **by copy of this letter, the Department will remand this matter to the NPS for it to:**

- **Conduct a line-by-line, page-by-page review of the responsive documents for Item 4 of the request to determine which, if any, portions contain information that is protected from disclosure by exemption (5).**
- **Release to the Appellant any documents (or portions of documents) that are not protected from disclosure.**
- **Within 22 workdays of the date of this decision, correspond directly with the Appellant regarding the Department's remand of Item 4 (with a copy to this Office), including releasing the non-exempt portions of responsive documents.**
 - The NPS's letter to the Appellant will also apprise him anew of his right to file an appeal with the Department regarding any response that invokes a FOIA exemption as a basis to continue to withhold responsive documents in full or in part.

Because the nature of the documents that you seek in Item 4 of the request likely yielded a voluminous amount of responsive documents, the Department recognizes that it may be necessary for the NPS to stagger the release of any non-exempt materials as they become available. Regrettably, the Department cannot at this time offer you an estimate of the volume of the information that the NPS withheld in response to Item 4, as the NPS did not include such information in its response to the request in accordance with the requirements set forth in the FOIA and the Department's FOIA regulations.⁴ To resolve this oversight, **should the NPS determine to continue to withhold documents (or portions thereof) in connection with processing the remand, the NPS will:**

- **Provide the Appellant with a reasonable estimate of the volume of documents that it continues to withhold in response to Item 4 of the request or explain how providing such an estimate will harm an interest protected by the exemption it invoked.**

⁴ 5 U.S.C. § 552(a)(6)(F) (requiring an agency to provide a FOIA requester with an estimate of the volume of withheld information in any response that advises of a decision to withhold documents in full or in part unless doing so would harm an interest protected by the exemption used to withhold the information). *See also* 43 C.F.R. § 2.24(b)(3).

Further, should the NPS determine that it is necessary for it to stagger the release of the documents that are responsive to Item 4 because the materials are voluminous, the NPS will:

- Advise the Appellant of this need in the correspondence that it sends to him regarding the remand and ensure that its first release of any responsive documents (or portions thereof) occurs no later than 22 workdays from the date of this decision.
 - Any such correspondence from the NPS will also include the anticipated schedule it plans to follow in releasing the materials.

This completes the Department's response to your appeal. 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: Charis Wilson, FOIA Officer, NPS (**FOR ACTION**)
Leah McGinnis, Superintendent, Capitol Reef National Park
Kevin Jones, Attorney-Advisor, SOL-Intermountain Region
Cindy Cafaro, Department FOIA Officer