



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Appeal No. 2018-120

May 15, 2018

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374

Dear Ms. Townsend:

This responds to the April 10, 2018, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”) on behalf of the Center for Biological Diversity, which the Department received on the same date and assigned as **Appeal Number 2018-120**. The appeal concerns your September 5, 2017, FOIA request to the Office of the Secretary (“OS”) that sought “from August 1, 2017 to the date of [the] search: all schedules, including but not limited to travel and/or meeting schedules, of the U.S. Deputy Secretary of the Interior David Bernhardt...and Mr. Bernhardt’s Chief of Staff.” OS responded to the FOIA request by advising you that “information responsive to your request is available in our FOIA library” and it provided you with a link to the webpage. Many of the records accessed through the OS-provided link contain redactions made under FOIA exemptions (5)¹ and (6).² However, OS’s letter responding to the FOIA request did not state that it invoked any FOIA exemptions as a basis to withhold any information from the records.

You filed this appeal to challenge OS’s withholding of information under exemption (5). You also challenge the adequacy of OS’s search for responsive documents, stating that OS’s “Final Response Letter lacks any detail about the scope and method of the search it conducted” and did not include “search terms or a description of its search.” As a remedy, through this appeal, you seek to have OS provide you with a description of the search it conducted for responsive documents.

As to your challenge of the exemption (5) withholdings, the Department concludes that this issue is not ready for review by the Department, as OS’s response to this matter is procedurally deficient. Specifically, OS did not include in its response any of the following information that the Department’s FOIA regulations (“regulations”) require a bureau to advise a requester of when it denies a request in part by withholding information from responsive documents³:

1. The name and title or position of the person responsible for the denial;
2. A statement of the reasons for the denial;
3. [A] reference to any FOIA exemption applied by the bureau to withhold records in full or in part, along with a statement that the bureau reasonably foresees that disclosure would harm an interest protected by the applied exemption(s) or disclosure is prohibited by law;

¹ 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).

² 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).

³ 43 C.F.R. § 2.23(a)(1) (stating that a decision from a bureau that a record is exempt in full or in part constitutes a denial of a request).

4. An estimate of the volume of any records withheld in full or in part...unless including an estimate would harm an interest protected by an exemption used to withhold the records and the bureau explains this harm to you;
5. The name and title of the Office of the Solicitor [(“SOL”)]...attorney consulted (if the bureau is...withholding all or part of a requested record); and
6. A statement that the denial may be appealed under [the subpart of the regulations pertaining to appeals, along with] a description of [those] procedures....⁴

While subsequent to its response to the FOIA request OS provided you with notice of your right to file an appeal (after you requested that it provide you with such information), it did not at any time provide you with any of the other above information that the regulations require a bureau to inform a requester of when it partially denies a request.

Thus, it is necessary for the Department to remand this matter to OS for it to correct the deficiencies with its response, as such a correction could render the challenge you raise regarding its withholding of information under exemption (5) moot. For example, OS providing the required “statement of the reasons for the denial” required in item 2 above could sufficiently explain to you the nature of the information it withheld, thereby resolving the questions you raise regarding the applicability of the exemption to the withheld information. Additionally, since OS did not include in its letter the name of the SOL attorney it consulted regarding the withholdings,⁵ the Department cannot determine at this time whether OS engaged in that required consultation. So, to the extent OS did not consult with SOL, a remand would resolve that deficiency as well, with such a consultation potentially resulting in OS concluding that some (or none) of the information is protected from disclosure by exemption (5).

Therefore, to resolve the deficiencies with OS’s response, **by copy of this letter, the Department will REMAND this matter to OS for it to respond to you anew. OS is directed to:**

- **Issue a response to the September 5, 2017, FOIA request that complies with the requirements of the regulations.**
- **Complete the processing of this remand within 15 workdays of the date of this decision, including releasing any information that is not exempt from disclosure under the FOIA.**
- **Correspond directly with the Appellant regarding the remand (with a copy of the letter to this Office).**

With regard to your request in the appeal for a description of the search OS conducted, the Department concludes that there is **NO ACTION** for it to take on this issue. As the Department noted in a decision on a previous FOIA appeal that you filed,⁶ there is nothing in the FOIA, the Department’s FOIA regulations,

⁴ 43 C.F.R. § 2.24(b)(1) – (6) (detailing what a bureau must include in the written notification it sends to a requester regarding any denial of a request). *See also* 43 C.F.R. § 2.21(a) (requiring bureaus to also include in letters they send to requesters informing them of the “decision to comply with a request” statements about the services offered by its FOIA Public Liaison and the Office of Government Information Services).

⁵ 43 C.F.R. § 2.23(c) (requiring a bureau to “consult with [SOL] before it...withholds all or part of a requested record.”).

⁶ *See* Department’s June 2, 2017, decision on FOIA Appeal No. 2017-130.

or current case law that requires an agency to provide a FOIA requester with the information you seek about the search OS conducted at the administrative stages of a FOIA request or an appeal.

In its previous decision, the Department noted that “there is no requirement that an agency provide a ‘search certificate’ [that details the scope and method of a search]...on an initial request for documents.”⁷ “The requirement for detailed declarations [containing this information]...is imposed [by a court] in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.”⁸ Since the case law on this issue has not changed, the Department again concludes that OS is not required to provide you with information detailing the search it conducted during the administrative stages of this matter.

If you are dissatisfied with the Department’s determination that OS is not required to provide you with a description of the search it conducted, you have a right to seek judicial review under 5 U.S.C. § 552(a)(4)(B).

As a final matter, the Department notes that the record before it does not show that OS addressed the aspect of the FOIA request that seeks the schedules of “Mr. Bernhardt’s Chief of Staff,” as none of the documents in the OS FOIA library pertain to a Chief of Staff for Mr. Bernhardt. So, **if OS did not address this item in the FOIA request, by copy of this letter, it is directed to do so in connection with the remand the Department directed above by:**

- **Releasing any responsive records it may have, invoking a FOIA exemption as a basis to withhold responsive records in full or in part, or advising the Appellant that it does not have or could not locate responsive records.**
 - If OS previously addressed the “Chief of Staff” item in the FOIA request, the letter it sends to the Appellant in connection with the remand will note this and include the date that OS communicated the information to the Appellant.

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: Clarice Julka, FOIA Officer, OS (**FOR ACTION**)
Cindy Cafaro, Departmental FOIA Officer

⁷ *Schwarz v. United States Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000).

⁸ *Id.*