



Department of Energy
Washington, DC 20585

August 5, 2009

MEMORANDUM TO:

VERNON DAUB
FOIA/PRIVACY ACT OFFICER
CARLSBAD FIELD OFFICE

FROM:

ALEXANDER C. MORRIS
FOIA OFFICER
OFFICE OF INFORMATION RESOURCES

SUBJECT:

FOIA REQUEST OF THOMAS COLE

The attached Freedom of Information Act (FOIA) request submitted by Thomas Cole is transferred to your office for action. Mr. Cole submitted the request under the FOIA, 5 U.S.C. 552.

We have informed Mr. Cole that documents responsive to her request may be located at the NETL. Please conduct a search for responsive documents and inform Mr. Cole of the results of your search.

If you have any questions about this transmittal, please contact Ms Sheila Jeter of my staff on [REDACTED]

Attachments



Morris, Alexander

From: FOIA-Central@hq.doe.gov
Sent: Friday, July 31, 2009 5:05 PM
To: FOIA-Central
Subject: DOE Headquarters FOIA Request

Name: [Thomas J. Cole]

Organization: Albuquerque Journal

Address:

328 Galisteo St.
Santa Fe, NM, 87505

Phone: 505-690-3322

FAX: 505-992-6293

Email: tcole@abqjournal.com

Record Description:

This is a request to inspect documents related to the DOE decision in 2000 or 2001 to award a contract to Westinghouse Tru Solutions for operation of the Waste Isolation Pilot Plant. Specifically, this is a request for copies of the request(s) for proposals that led to issuance of the contract, Westinghouse's proposal(s), the evaluation of all proposals by the DOE Source Evaluation Board and its report to the Selecting Official and the Selecting Official's decision memo.

Preferred Form or Format: Mailed copies of documents.

Type of Requester (if provided):

Fees and Fee Waivers:

I request a waiver or reduction of fees.

Waiver or Reduction of Fees Factors (if provided):

3. The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account your ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter.

The material is to be used in writing a newspaper story that would contribute to the public's understanding of the contracting process in this particular case.

Expedited Processing:

I believe a compelling need exists to warrant expedited processing because there is:

an urgency to inform the public concerning actual or alleged Federal Government activity exists (this option available ONLY for requesters primarily engaged in disseminating information)

Specific Justification for Expedited Processing:

Given that the contract is already years old, I believe it is important to inform the public as soon as possible about the contracting process.

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SCIENTIFIC/EDUCATIONAL/NEWS/FOIA
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FOIA-2009-000630

Sheil



Department of Energy
Washington, DC 20585

August 5, 2009

Thomas J. Cole
Albuquerque Journal
328 Galisteo St.
Santa Fe, NM 87505

Re: FOIA-2009-000630

Dear Mr. Cole:

This is in further response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. You asked for documents that relate to the DOE decision in 2000 or 2001 to award a contract to Westinghouse Tru Solutions for operation of the Waste Isolation Pilot Plant. You specifically asked for copies of the request for proposals that led to issuance of the contract, Westinghouse's proposal, the evaluation of all proposals by the DOE Source Evaluation Board in its report to the Selecting Official and Selecting Official's decision memo.

Any documents that exist are under the jurisdiction of the Carlsbad Field Office. For this reason, the request has been sent to the FOIA Officer at the Carlsbad Field Office to conduct a search of its files and provide a response to you.

If you have any questions about the processing of the request by the Carlsbad Field Office, you may contact Mr. Vernon Daub, U.S. Department of Energy, Carlsbad Field Office, P.O. Box 3090, Carlsbad, NM 88221. He also can be reached on (575) 234-7208.

I appreciate the opportunity to assist you with this matter. If you have any questions about this letter, you may contact Ms. Sheila Jeter of my staff on (202) 586-5061.

Sincerely,

Alexander C. Morris
FOIA Officer
Office of Information Resources





Department of Energy
Carlsbad Field Office
P. O. Box 3090
Carlsbad, New Mexico 88221

AUG 06 2009

CERTIFIED MAIL-RETURN RECEIPT

Albuquerque Journal
Attention: Mr. Thomas J. Cole
328 Galisteo Street
Santa Fe, NM 87505

Subject: Freedom of Information Act 09-004

Dear Mr. Cole:

The Carlsbad Field Office received your Freedom of Information Act (FOIA) request dated July 31, 2009, which was received by this office on August 3, 2009 from the Department of Energy (DOE) Headquarters Office requesting to inspect documents related to the DOE decision in 2000 or 2001 to award a contract to Westinghouse TRU Solutions for operation of the Waste Isolation Pilot Plant. Specifically, this is a request for copies of the request(s) for proposals that led to issuance of the contract, Westinghouse's proposal(s), the evaluation of all proposals by the DOE Source Evaluation Board and its report to the Selecting Official and the Selecting Official's decision memo.

If you have any questions or need additional assistance regarding this FOIA request, please contact Ms. Sharon Warren-Briggs, FOIA contact person, at (575) 234-7406 or sharon.warren.briggs@wipp.ws. Please refer to FOIA 09-004 in any correspondence regarding this request.

Sincerely,



Vernon Daub
Freedom of Information Act Public Liaison

Enclosure

cc: CBFO M&RC
File: FOIA 09-004



Department of Energy
Carlsbad Field Office
P. O. Box 3090
Carlsbad, New Mexico 88221
August 31, 2009

CERTIFIED MAIL-RETURN RECEIPT

Albuquerque Journal
Attention: Thomas J. Cole
328 Galisteo Street
Santa Fe, NM 87505

Subject: Freedom of Information Act (FOIA) 09-004

Dear Mr. Cole:

This is the final response to your Freedom of Information Act (FOIA) request referenced above to inspect documents related to the Department of Energy (DOE) decision in 2000 or 2001 to award a contract to Westinghouse TRU Solutions for operation of the Waste Isolation Pilot Plant. Specifically, the request for copies of the request(s) for proposals that led to issuance of the contract, Westinghouse's proposal(s), the evaluation of all proposals by the DOE Source Evaluation Board and its report to the Selection Official and the Selecting Official's decision memo.

The FOIA generally requires that records held by federal agencies be released to the public upon request, however, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. After careful consideration it has been determined that part of the information you have requested is exempt from disclosure in its entirety pursuant to Exemption 3 and Exemption 5.

The Westinghouse TRU Solution proposals have been withheld in their entirety under Exemption 3 [5 U.S.C. 552(b) (3)] of the FOIA allows agencies to withhold requested information if specifically authorized by another statute. The withholding statute must meet strict statutory guidelines. An agency can invoke Exemption 3 only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the exemption's coverage if it satisfies either of its standards. Exemption 3 analysis under the FOIA is not dependent on the factual content of the documents at issue; instead "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage."

The Supreme Court has established a two-prong standard of review for Exemption 3 cases. First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute. The National Defense Authorization Act (NDAA). Section 821(b)(1), codified at 41 U.S.C. § 253b(m), is a federal statute that contains language specifically prohibiting the

release of protected information. The pertinent part of the NDAA states that "[e]xcept as provided..., a proposal in the possession or control of an executive agency may not be made available to any person under section 552 or title 5, United States Code." The statute states, however, that it "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." Since the NDAA allows no discretion in withholding certain types of information, it meets the subpart (A) requirement of Exemption 3.

To satisfy the criteria of Exemption 3, the proposal must meet the criteria laid out above in the NDAA. The requested document is a "proposal in the possession or control" of the Department of Energy (DOE) submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." The final contract between the DOE and the Washington TRU Solutions (WTS) does not incorporate by reference any part of the Proposal. The NDAA is a statute of exemption. The document withheld satisfies the criteria of the statute. Accordingly, DOE is required to withhold the winning proposal in its entirety pursuant to Exemption 3 of the FOIA.

Subsequently the evaluation of the WTS proposals by the DOE Source Evaluation Board (SEB) and reports to the Selection Official and the Source Selection Decisions are exempt under Exemption 5 of the FOIA encompasses certain distinct privileges, one of which is the Deliberative Process Privilege. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F. R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions policies are formulated. *Sears*, 421 U.S. at 150. This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. *EPA v. Mink*, 410 U.S. 72, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. V. United States*, 157 F. Supp. 939 (Cl. Ct. 1958) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to question must be both predecisional and deliberative.

Thus, concern is not just for protection of documents per se, but also for the integrity of the decision-making process itself. In this instance you are seeking DOE's evaluation of all proposals including Westinghouse's by the DOE Source Evaluation Board (SEB). We have consistently found that the evaluation portions of the SEB report meet the Exemption 5 criteria and therefore may be withheld. This information reflects the SEB opinions on the relative merits of the proposal. This information is deliberative and is exempt from mandatory disclosure under Exemption 5.

The purpose of the deliberative process privilege is to protect the free flow of information within the government. This free flow of information can be inhibited not only by fear of the personal revelations, but also by concerns such as publicizing preliminary ideas which are never adopted and misleading the public. These concerns would not be mitigated by merely withholding the names of government employees involved in the decision-making process.

Moreover, the release of this information would not be in the public interest because the ability and willingness of the evaluators to make honest and open recommendations could be compromised if they knew that this information would be released. 10 C.F.R. 1004.1. If employees were to become inhibited in their recommendations, the agency would be deprived of the benefit of their open and candid opinions. Consequently, the Carlsbad Field Office has properly withheld the evaluation portions of the SEB Report. The deliberative process privilege permits the government to withhold document that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. It is a privilege developed primarily to promote frank and independent discussions among those responsible for making government decisions and to protect the quality of the agency decisions.

The source evaluation report and decisions covers the support services for the Carlsbad Field Office. The portions of the report that contains advice, recommendation for management action, and opinions of the Evaluation Panel Members that are subject to further agency review, is considered pre-decisional and, therefore, exempt in its entirety from disclosure pursuant to Exemption 5.

The report consists of advisory opinions, findings and recommendation to the Evaluation Panel members or advisors to the Evaluation Committee. The findings of the report summarize the personal opinions of the panel members. The findings are only recommendations to the panel. The Evaluation Panel members have no authority to make a decision concerning the award of the contract; therefore, their findings are predecisional and deliberative.

Accordingly, we have withheld only the pre decisional/deliberative portions of the report. The withheld information does not shed light on the general operations or policy of DOE. We conclude that the release of the withheld information would result in foreseeable harm to the interests protected by the deliberative process privilege so that information is being withheld.

The WTS Solicitation is being provided to you and released in their entirety.

Pursuant to 10 CFR 1004.7(b)(2), I am the Denying Officer responsible for approval of the above redactions. You may appeal my withholding of information pursuant to 10 CFR, Part 1004.8. Any appeal must be made in writing within 30 calendar days after receipt of this letter. The appeal should be addressed to the Director, Office of Hearings and Appeals, HG-1, U.S. Department of Energy, 1000 Independence Avenue

Mr. Thomas J. Cole

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August 31, 2009

SW, Washington, D.C. 20585. Your appeal must contain a concise statement of the grounds for the appeal and a description of the relief sought. Please submit a copy of this letter with the appeal and clearly mark both the envelope and the letter "Freedom of Information Appeal." Thereafter, judicial review will be available to you in either the District of Columbia, the district where you reside or where you have your principal place of business, or where the Department's records are situated.

No fees will be charged to you in association with the processing of this FOIA request. If you have any questions or need additional assistance regarding this FOIA request, please contact Ms. Sharon Warren-Briggs, FOIA contact person, at (575) 234-7406, or sharon.warren.briggs@wipp.ws. Please reference FOIA 09-004 in any correspondence regarding this request.

Sincerely,



Vernon Daub
Freedom of Information Public Liaison
Denying Official

Enclosures

cc: CBFO M&RC
FOIA File 09-004