



Federal Communications Commission
Washington, D.C. 20554

April 28, 2015

Nathan Paul Mehrens
Americans for Limited Government
10332 Main Street, No. 326
Fairfax, VA 22030
Via e-mail to Nathan@getliberty.org

Re: FOIA Control No. 2014-273

Mr. Mehrens:

This letter responds to your Freedom of Information Act (FOIA) request for records related to the Critical Information Needs (CIN) study. Your request has been assigned FOIA Control No. 2014-273. As noted below, if after reviewing these documents you wish for us to search for further documentation, please let us know no later than June 1, 2015.

In conversations with Commission staff, you requested that we send you documents related to the CIN study that were produced to Judicial Watch. We have given Judicial Watch all documents related to the CIN study, except for the following (which Judicial Watch stated they did not seek):¹

- Certain non-policy contract documents including:
 - o Records regarding costs of the study (e.g., cost breakdowns)
 - o Records regarding payment/reimbursement (e.g., expense reports, travel records)
 - o Technical proposals (i.e., documents explaining how a contractor would go about technically fulfilling the contract, such as the type of econometric analysis to be done, the types of personnel that would be assigned to the project)
 - o Records regarding technical acquisition matters (e.g., documents discussing how the contract was sourced);
- Comments/complaints from private citizens regarding the CIN study;
- Publicly available articles/periodicals in relation to the Literature Review (e.g., law review articles, scholarly works, newspaper articles); and
- Records from the following offices:
 - o Office of Strategic Planning and Policy Analysis
 - o Office of Communications Business Opportunities
 - o Office of Managing Director
 - o Office of General Counsel

The offices of the Chairman and the Commissioners, the Media Bureau, the Consumer and Governmental Affairs Bureau, and the Office of Legislative Affairs searched for responsive records. We located approximately 5,400 pages of records potentially responsive to your request.

¹ E-mail from Chris Fedeli, Senior Attorney, Judicial Watch, to Rhonda Campbell, Assistant U.S. Attorney for the District of Columbia, U.S. Department of Justice (Dec. 4, 2014); E-mail from Chris Fedeli, Senior Attorney, Judicial Watch, to Rhonda Campbell, Assistant U.S. Attorney for the District of Columbia, U.S. Department of Justice (Jan. 9, 2015).

Of the approximately 5,400 pages of records located, approximately 1,600 pages were duplicative of other documents in the production. To improve efficiency, those pages were removed from the production.

Approximately 800 pages were not responsive to the request. Specifically, these documents were located during the search but were later excluded by agreement between the parties. These non-responsive records consist primarily of consumer comments/complaints regarding the CIN study and documents related to the procurement of the study. In addition, some documents fell outside the date range specified in your request.

After removing approximately 2,400 pages of duplicative or non-responsive documents, approximately 3,000 pages of records remained. Approximately 1,100 pages are produced here in full or in part pursuant to the FOIA exemptions discussed below. The remaining approximately 1,900 pages are withheld in full pursuant to the FOIA exemptions discussed below.

The vast majority of these approximately 1,900 pages were withheld under FOIA Exemption 5.² Additionally, some material on produced pages was redacted under Exemption 5. Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”³ To fall within the scope of this privilege the agency records must be both predecisional and deliberative.⁴ Predecisional records must have been “prepared in order to assist an agency decision maker in arriving at his decision.”⁵ Deliberative records must be such that their disclosure “would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”⁶

The withheld and redacted records consist of documents such as multiple drafts of talking points sent back and forth between Commission employees, briefing sheets prepared for Commissioners, and draft statements of Commissioners. Other withheld or redacted records include internal discussions among and between Commission staff and leadership on various internal topics, including considering how to respond to the press or other outside parties regarding the CIN study, reacting to draft documents, recommending edits to various press releases and statements, commenting on the internal review and revision process, planning the use of staff resources, and assessing press and public reaction to the CIN study.

² 5 U.S.C. § 552(b)(5).

³ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

⁴ *Id.* at 151-52.

⁵ *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents. . .”).

⁶ *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

Additionally, preliminary staff reactions and thoughts regarding the study are also withheld pursuant to the deliberative process privilege under Exemption 5.

Additionally, certain records responsive to your request that are being produced contain redactions under FOIA Exemption 6.⁷ Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Balancing the public’s right to disclosure against the individual’s right to privacy, we have determined that release of this information would constitute a clearly unwarranted invasion of personal privacy. The redactions include non-public e-mail addresses, phone numbers, and mailing addresses.

Lastly, one record responsive to your request was redacted under FOIA Exemption 4.⁸ Exemption 4 protects matters that are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” The record in question is a news article from a subscription news service that is only available to paying subscribers.

The FOIA requires that “any reasonably segregable portion of a record” must be released after appropriate application of the Act’s exemptions.⁹ The statutory standard requires the release of any portion of a record that is non-exempt and “reasonably segregable” from the exempt portion. However, when non-exempt information is “inextricably intertwined” with exempt information, reasonable segregation is not possible.¹⁰ The redactions and/or withholdings made are consistent with our responsibility to determine if any segregable portions can be released. To the extent non-exempt material is not released, it is inextricably intertwined with exempt material.

We also reviewed the withheld or redacted records to determine if discretionary release is appropriate.¹¹ Because of the reasonably foreseeable harm to agency decisionmaking processes, we decline to make a discretionary release for those materials withheld or redacted under Exemption 5. Furthermore, the materials that are protected from disclosure under Exemption 6 are not appropriate for discretionary release in light of the personal privacy interests involved.

⁷ 5 U.S.C. § 552(b)(6).

⁸ 5 U.S.C. § 552(b)(4).

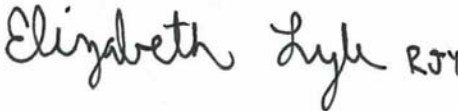
⁹ 5 U.S.C. § 552(b) (sentence immediately following exemptions).

¹⁰ *Mead Data Center Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹¹ See President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (2009).

In addition to the documents provided to Judicial Watch, you requested additional records related to the CIN study contracting process as well as records in the possession of the Office of Communications Business Opportunities. If, after reviewing the approximately 1,100 pages of CIN study documentation we provide here, you determine you are still interested in additional records, please contact us and inform us of your interest. If we do not receive a response by June 1, 2015, we will assume the records we have produced here satisfy your request and that you do not wish to receive further records. Thereafter, we will consider your FOIA request completed and will close out the request. If you do wish to receive additional documents, we will discuss with you the timeframe for producing such records.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth Lyle" followed by the initials "RJR". The signature is written in a cursive, flowing style.

Elizabeth Lyle
Assistant General Counsel

Enclosures
cc: FCC FOIA Office