



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 23, 2020

Erin Thomas
Center for Regulatory Reasonableness
1629 K Street NW
Suite 220
Washington, DC 20006

Re: Freedom of Information Act Appeal No. EPA-HQ-2020-003868 (Request No. EPA-R1-2020-002668)

Dear Ms. Thomas:

I am responding to your March 27, 2020 Freedom of Information Act (FOIA) appeal. You appealed the March 20, 2020 decision of Ken Moraff (“decision”), Water Division Director, Region 1, of the U.S. Environmental Protection Agency (EPA or Agency), to partially deny the request you submitted to EPA on January 31, 2020. Your request sought records related to the Draft NPDES Great Bay General Permit. The Center for Regulatory Reasonableness has had access to the administrative record for this draft permit. Specifically, the request sought:

1. Any records developed by DES or EPA identifying or evaluating the resulting ambient TN concentrations that would occur from establishing a 100 kg/ha-yr load limitation for Great Bay Estuary.
2. Records regarding EPA’s determination that 100 kg/ha-yr is a valid interpretation of the state narrative criteria for nutrients and/or that such watershed load is required to ensure narrative criteria compliance.

The decision stated that the Agency uploaded 10 non-privileged responsive records to FOIAonline and two records that were withheld in part. Your appeal states that: “[the Center for Regulatory Reasonableness] hereby appeals as arbitrary and capricious (1) EPA’s improper withholding of portions of responsive documents citing to 5 U.S.C. §552(b)(5), (2) EPA’s inadequate search for records, and (3) the excessive assessed fees to obtain the responsive records under FOIA.” Appeal at 1.

I have carefully considered your request, EPA’s decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, denied.

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The Agency Properly Applied Exemption 5.

Region 1 withheld portions of two records pursuant to Exemption 5, deliberative process privilege, 5 U.S.C. § 552(b)(5). Information subject to the deliberative process privilege must be both pre-decisional and deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The withheld portion of the two records fall within the deliberative process privilege. As explained in the decision, the withheld information, “includes internal, pre-decisional records concerning the development of the draft NPDES general permit for the Great Bay Estuary and communications and pre-decisional records exchanged between EPA and the New Hampshire Department of Environmental Services used to inform and improve the Agency’s decision-making and issuance of this draft permit.” Decision at 1.

Your appeal alleges that the withheld information is purely factual and scientific, and therefore that EPA may not withhold the information under the deliberative process privilege. Appeal at 2-3. To the extent the withheld information contains facts, they are inextricably intertwined with the deliberative discussions concerning the Agency's ongoing development of the Draft Great Bay General Permit. *See Mead Data Center, Inc. v. Department of the Air Force* 566 F.2d 242, 260 (D.C. Cir. 1977). Further, any factual or scientific information contained in the withheld portions of these documents reflects the author's selection of facts from a broad range of available information to advise Agency decision-makers during the deliberative process associated with drafting the NPDES permit. Therefore, the information was properly withheld pursuant to the deliberative process privilege, Exemption 5. Your appeal of the Agency’s partial withholding of two records is denied.

The Agency Conducted a Reasonable Search.

The appeal alleges that “EPA’s search was clearly inadequate as the sought records were clearly and specifically described. However, the records released by EPA do not provide the documents H&A requested.” Appeal at 3. I have confirmed the Agency conducted a search reasonably calculated to uncover all responsive records. *See Hall & Assocs. v. U.S. Env'tl. Prot. Agency*, 77 F. Supp. 3d 40, 48 (D.D.C. 2014) (frustration with the outcome of a search does not entitle a FOIA requester to relief). Your appeal of the adequacy of the Agency’s search is denied.

The Agency’s Fee Assessment Was Appropriate.

The appeal alleges that “the assessed fees of \$196.00 are excessive and arbitrary and capricious.” Appeal at 3. On February 24, 2020, the Agency provided you with a fee estimate of \$200 to process this request. On February 28, 2020, you provided an assurance of payment for that amount. The four hours of search time and three hours of review time billed in response to this request are reasonable. Your appeal of the Agency’s fee assessment is denied.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National

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Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 202-741-5770 or 1-877-684-6448; and fax, 202-741-5769.

Should you have any questions concerning this matter, please contact Peter Bermes of my staff at bermes.peter@epa.gov.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Ken Moraff, Director, Water Division, EPA Region 1
Cris Schena, EPA Region 1 FOIA Officer