The Free Market Environmental Law Clinic

APPEAL UNDER THE FREEDOM OF INFORMATION ACT

June 24, 2014

Tennessee Valley Authority
Vice President - Communications
Ms. Janet J. Brewer
400 West Summit Hill Dr. WT 7C
Knoxville, TN 37902-1401

BY ELECTRONIC MAIL: foia@tva.gov

RE: **Appeal of Partial Denial/Withholdings TVA FOIA Request #4426**

Dear Ms. Brewer:

On behalf of the Energy & Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FME Law) as co-requester and E&E Legal counsel, and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*., please consider this an appeal of the Tennessee Valley Authority's (TVA) partial production/partial denial redacting certain information in records responsive to our request of March 25, 2014, labeled #4426, incorrectly redacting information pursuant to FOIA's "b5" exemptions, including claims of "deliberative" and "attorney-client privilege" withholdings.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. Pursuant to 18 C.F.R. §1301.09(a), you have jurisdiction when a party is "dissatisfied with TVA's response to [its] request." TVA has partially denied our request by redacting certain information in

numerous documents. Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Appeal Under the Freedom of Information Act" and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed "within 30 days of the date of the letter denying your request" (while TVA dated its letter May 23, 2014 this appears to be a typographical error but regardless is not controlling as the correspondence transmitting this denial is date-stamped from foia@tva.gov at 9:15 am May 27, 2014, making that the date of the correspondence).

II. PROCEEDINGS BELOW

This appeal involves one FOIA Request, sent by facsimile to TVA's headquarters at the number listed on the website, 865-632-6901, sent on March 25, 2014, seeking:

> **copies of all emails, text messages and/or instant messages 1) sent to or from any employee within the office of the Executive Vice President and Chief Generation Officer, *or* Joe Hoagland (Designated Federal Officer for the Regional Resource Stewardship Council), 2) which emails, texts or IMs cite or use in either the To, From, cc:, bcc: or "Subject" fields, or their body, a) one or more of the words or terms "Climate Action Plan", "White House", or "Zichal", *and* b) coal, Gallatin, Paradis, Colbert, "Widows Creek", Sevier, and/or Johnsonville, which are** c) dated from June 1, 2013 through December 31, 2013, inclusive.

After a series of exchanges related to the fee waiver, leading to an ultimately successful appeal granting requesters' fee waiver, TVA produced responsive records including 60 pages of emails. However, eight of these emails were heavily redacted citing exemption (b)(5) "deliberative" and "attorney-client privilege" exemptions. We believe these redactions to be improper under the law and hereby appeal for the following reasons.

III. REDACTIONS ARE IMPROPER UNDER THE LAW AND DOCUMENTS SHOULD BE RELEASED UNREDACTED

A. Redactions 1, 1A, 7 and 8 are improper as they do not implicate deliberation of a final agency decision concerning agency legal or policy matters, but constituent relations communications made to outside organizations, individuals, corporate entities or other external groups

In TVA's production letter, it labels two redactions (the same portion, repeated in an email thread) as 1 and 1A and redacts them pursuant to (b)(5) "deliberative process." The stated rationale for these redactions is that the redacted text "reflects recommendations on the approach to be taken in a meeting with members of the Sierra Club who were opposed to keeping TVA's Gallatin Fossil Plant open." Likewise, two redactions, labeled 7 and 8, are withheld because "they reflect recommendations on the approach to be taken by TVA staff in a meeting with the Regional Energy Resource Counsel". This is an improper use of the "deliberative process" exemption, as it does not fall under the definition of deliberative as defined by the courts.

Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975) states that "Rather, to come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on *legal or policy matters*." (*emphasis added*) *Id*. at 1143-44. Other courts have found this as well. "(M)ost courts limit the scope of Exemption 5 to documents that reflect inter- or intra-agency "give and take" *during policy development*," *Lemaine v. IRS*, 1991 U.S. Dist. LEXIS 18651, 21 (D. Mass. 1991) *citing Crooker v. United States Parole Com*, 730 F.2d 1, 9 (1st Cir. 1984) (vacated on other grounds)(*emphasis added*). "The privilege attaches to inter- and intra-agency communications

that are part of the deliberative process preceding the adoption and promulgation *of an agency policy*." *Jordan v. United States DOJ*, 591 F.2d 753, 772 (D.C. Cir. 1978) (*emphasis added*).

First, we believe that upon review TVA will agree that the withheld text is not properly withheld as deliberative, and request that *de novo* review on administrative appeal.

Second, contrary to that which the courts describe in *e.g., Vaughn* and *Jordan*, these redactions concern public discussions with outside groups, namely, Sierra Club and whatever "private sector (entities) and individuals interested in the development and management of energy resources in the Tennessee Valley" constitute the Regional Energy Resource Council.[1] TVA's own descriptions of the redacted portions state that they are discussions concerning the "approach" taken in *discussions with outside organizations*, which discussions themselves of course cannot be privileged, as that would constitute selective disclosure to pressure groups or special interests who are the public. In other words, the redactions in question are not related to *policy* or *legal* matters, but more appropriately considered matters of constituent relations or fielding arguments from such groups.

Constituent relations or discussions concerning communications to be made to outside organizations are neither legal matters nor policy matters, and thusly, "deliberative" exemptions

[1] *See* https://tva.com/rerc/index.htm

do not protect such discussions as they are not part of policy or legal matters.[2] Allowing the "deliberative" exemption to apply to any discussion, even to matters unrelated to policy or legal matters, would be to allow the exception to swallow the rule. The courts have recognized this, noting that excessively stretching exemption 5 to other sorts of internal discussions, "would go a long way toward undercutting the entire Freedom of Information Act*," Lemaine v. IRS*, 1991 U.S. Dist. LEXIS 18651, 22 (D. Mass. 1991) *citing Vaughn* at 1144. This is doubly true since "the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure." *Vaughn* at 1142. Thus, (b)(5) deliberative is inapplicable and the information should be released.

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[2] It is worth noting that, while the issue of "public relations" communications has never been litigated in the 6th Circuit, nor the 4th Circuit, nor ever upheld by any appeals court, the redacted information in question appears to be of a different type than the development of public relations plans, since it is not something that is intended to be broadly disseminated and does not "impact the "massaging" the agency's public image." *ICM Registry, LLC v. United States DOC*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008). Instead, the information appears to be how to discuss plans, which have already been decided upon by TVA, to certain outside groups, not the public at large concerning the agencies "messaging" or "image." Thus, even if DC District Court opinions regarding the withholding of public relations documents would be found to be correct by 6th Circuit or 4th Circuit, it would not impact the redactions in question here. Discussions of disclosures to particular individuals or groups, not the public at large, are categorically different than information intended for disclosure to the public at large.

In the event that TVA takes the stance that these are public relations documents in the same sense as the documents discussed in the D.C. Circuit, we note again that there has been no similar finding in the 6th District, nor the 4th Circuit, nor any other district, nor in any appellate court, D.C. Circuit included, and we reserve our right to challenge this distinction in court, if TVA takes the position that these redactions concern public relations, as discussions concerning public relations are not discussions of policy or law as required by most courts.

B. Redactions 1, 1A, 7 and 8 are improper because they contain information already released to other members of the public, thus leaving the agency with no control over further disclosures to other parties

In the alternative, Sierra Club and the private entities and individuals that make up the Regional Energy Resource Council are outside organizations and individuals that took part in communications with TVA. To the degree that the redacted discussion included the approach/ position/information shared with Sierra Club or members of the Regional Energy Resource Council, it would not be "inter-agency or intra-agency" information covered by (b)(5), but instead would be information that has already been released to the public. Once information has "already been fully disclosed to at least one party outside the Department …. the Department has no control over further disclosure." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). In other words, TVA cannot selectively release information to some outside organizations and/or individuals but not to others.

Thus, any portions that contain information that was shared with Sierra Club and the Regional Energy Resource Council, was improperly redacted under (b)(5) deliberative and the agency should provide the information.

C. All redactions are at least partially improper because the descriptions are incomplete, and they are total or near total redactions of the substance of records and would seem to contain factual information that rightly is segregable and ought to be released under FOIA

These redactions withhold every substantive section of several emails, leaving only information such as the identity of the sender and the greeting.

As TVA undoubtedly knows:

> "FOIA requires disclosure of 'any reasonably segregable' portion of a record that falls within one of the statute's exceptions.....The agency has the burden to show that portions withheld are not segregable from the disclosed material.....Under this principle of segregability, an agency cannot justify withholding an entire document simply because it contains some material exempt from disclosure. Krikorian v. Department of State, 299 U.S. App. D.C. 331, 984 F.2d 461, 467 (D.C. Cir. 1993) (quotations omitted). Rather, an agency must supply a relatively detailed justification and explain why materials withheld are not segregable." *Rugiero v. United States DOJ*, 257 F.3d 534, 553 (6th Cir. Mich. 2001).

TVA's descriptions of records redacted as 1, 1A, 7 & 8 are insufficient, and we further believe a review of the withheld information will affirm that it includes information that is rightly segregable. The descriptions given, namely, that the withheld information "reflects recommendations on the approach to be taken in a meeting with members of the Sierra Club who were opposed to keeping TVA's Gallatin Fossil Plant open," and that others "reflect recommendations on the approach to be taken by TVA staff in a meeting with the Regional Energy Resource Counsel," are overly broad and suggest that the agency may have redacted certain factual information that is not rightly labeled as "deliberative." Given these vague descriptions, potential factual information improperly redacted might include items such as:

- The names of people and/or organizations involved in the discussions, from either TVA, Sierra Club, or the Regional Energy Resource Council;

- What issues were slated to be discussed with Sierra Club? Merely saying it was related to Sierra Club's opposition the Gallatin Power Plant is overly broad and insufficiently descriptive. Thus, information concerning specific actions Sierra Club had decided to oppose, or ones that Sierra and TVA had chosen to cooperate on that were slated for discussion, should be unredacted;

- What issues were slated to be discussed with the Regional Energy Resource Council, *i.e.*, regulations coming out of Washington, the cost of energy, or other such issues slated to be discussed?

TVA's description of records redacted as 2, 3 and 4 are insufficient and likely include information that is rightly segregable. The descriptions TVA provides, namely that they "reflect recommendations on TVA's response to the social cost of carbon proposed by the Administration," are overly broad and suggest that the agency may have redacted certain factual information that is not rightly labeled as "deliberative." Given these vague descriptions, potential factual information improperly redacted might include items such as:

- Any data provided by TVA officials concerning what compliance with such a plan would cost TVA and its customers; and

- Any calculations made by TVA officials aggregating those numbers to conclude what the costs to TVA would be in relation to such a plan.

TVA's description of records redacted as 5, 6 and 6A are insufficient and likely include information that is rightly segregable. The descriptions given by TVA are too broad and suggest that certain factual information may have been included that is not rightly labeled "deliberative"; for example, TVA states that they "offer analysis for recommendations on TVA's response to a presentation by a Clean Air Act regulator from Kentucky. The emails are also subject to attorney client privilege because they share client views on that matter with TVA attorneys". Given this description, potential factual information improperly redacted might include items such as:

- What laws, regulations or plans are discussed concerning in relation to the presentation;
- What officials and/or organizations were involved in the meeting, and what issues were slated for a discussion; and
- The identity of any individuals who put forth a presentation to TVA or otherwise were involved in communicating to the TVA concerning these issues.

Likewise, as with the emails concerning the meetings with Sierra Club and the Regional Energy Resource Council, any information/approach/positions shared with the outside entity, such as the Kentucky regulator in question, is also not properly redacted. Thus, all information described above is not rightly subject to (b)(5) deliberative or (b)(5) attorney client privilege withholdings and should be released.

IV. Conclusion

In a memo to the heads of federal government agencies, President Obama clearly laid out his policy with regards to FOIA by saying "in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." What's more, even Attorney General Holder has readily admitted that withholdings, particularly the (b)(5) "deliberative" exemption, has been overused and abused by agencies. In that spirit, particularly since these redactions clearly appear to be not in accordance with the law and clear court precedent, we respectfully ask that you provide the unredacted versions of these documents promptly.

If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,

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