The Free Market Environmental Law Clinic

APPEAL UNDER THE FREEDOM OF INFORMATION ACT

September 23, 2014

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

RE: **Appeal of TVA September 5, 2014 Partial Denial, FOIA #4474**

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) initial determination to our request of June 23, 2014, labeled #4474. TVA's determination amounted to a partial production and partial withholding, producing some records while withholding other documents in total and redacting certain information in responsive records pursuant to FOIA's "b4" "b5" and "b6" exemptions, including impermissible claims of "deliberative process", "attorney-client privilege", "confidential commercial privilege", "trade secrets and commercial or financial information", and "personal privacy". Thus, we appeal for the following reasons.

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 as set forth above, and detailed below. 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" of September 5, 2014 (18 C.F.R. §1301(b)), which is the date of TVA's response to our request.

II. PROCEEDINGS BELOW

This appeal involves one FOIA Request, sent by electronic mail to TVA's FOIA officer, at their FOIA email address FOIA@tva.gov, sent on June 19, 2014, seeking:

> **"copies of all emails, text messages and/or instant messages 1) sent to or from Marilyn Brown, Justin C. Maierhofer (Vice- President Government Relations), and/ or John Myers (Director of Environmental Policy), 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", "Gallatin", or "GAF" (which represents an abbreviation for Gallatin Fossil Plant), "retire", or "retirement" and b) "Sierra Club", or "Sierra" which are** c) dated from September 1, 2013 through March 31, 2014, inclusive."

After a series of delays and requests, TVA substantively responded to the request on September 5, 2014 stating it had found 278 pages of responsive emails and attachments. However, 7 pages of "copyrighted material" was withheld in their entirety pursuant to exemption 4, and an additional 35 pages were withheld in their entirety pursuant to "deliberative process, attorney-client, and government confidential commercial privileges under FOIA exemption 5." Additionally, there were substantial redactions to the documents produced, "pursuant to the deliberative process, attorney-client and government confidential commercial privileges under

FOIA exemption 5." Also "A small amount of information" was redacted pursuant to exemption 6. We believe most of these withholdings and redactions are improper under the law and hereby appeal for the following reasons.

III. STANDARD OF REVIEW: ALL DOUBTS MUST BE RESOLVED IN FAVOR OF DISCLOSURE

The legislative history of FOIA is replete with reference to the "'general philosophy of full agency disclosure' that animates the statute." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360(U.S.1976)(quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340,352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136,142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C.Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in the underlying request to TVA to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21,2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government."

Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA." Similarly, TVA's withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that **"The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today"** (President Barack Obama, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions**, including Exemptions 2, 5, 7, 8, and 9, **but they will be most applicable under Exemption 5**." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a'New Era of Open Government'").

TVA's withholding of 42 documents in full was in error, as were its redactions to various documents produced in part. These withholdings should thus be reversed, and all responsive documents be released subject to lawful redactions.

IV. WITHHOLDINGS ARE IMPROPER UNDER THE LAW AND DOCUMENTS PROPERLY SHOULD BE RELEASED SUBJECT TO LAWFUL REDACTIONS

A. Copyrighted material alone may not be withheld under exemption 4, as it is neither a trade secret, nor commercial or financial information that is privileged or confidential

In TVA's production letter, it withholds 7 pages of documents it refers to as "EEI EnviroWeek subscription newsletter, dated January 6, 2014," under exemption 4. Exemption 4

allows for the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Quite simply, a copyrighted magazine is neither a trade secret nor commercial or financial information that is privileged or confidential. Indeed, such copyrighted material (magazines) are explicitly for public consumption. To the extent a copyrighted work is part of an email attachment or embedded in TVA emails, there is simply no grounds to withhold the document. There is no precedent of which we are aware, or that we could find after a reasonable search, that holds that copyrighted material is exempt and properly withheld under exemption 4 of FOIA, nor has TVA cited to any and it is TVA's responsibility to support its withholdings.

To the extent TVA is concerned about possible copyright violations by copying such material, such copying would clearly fall under 17 U.S.C. § 107, the "fair use" section of the Copyright Act. Copyrighted articles and press coverage included and attached to emails are produced subsequent to FOIA requests as a matter of routine, including in the instant production which includes copies of various news articles sent as part of emails. Thus, exemption 4 is inapplicable and the documents ought to be released, subject to any lawful redactions.

B. Email messages by their nature have factual material that is reasonably segregable and cannot be withheld in their entirety, and TVA owes a legally sufficient explanation concerning other withheld material

TVA's production letter states that it withheld 35 pages of records in their entirety pursuant to "deliberative process, attorney-client, and government confidential commercial privileges under FOIA exemption 5." TVA does not explicitly state this in its letter, since it discusses "emails and attachments," without making any distinctions between the two. However,

given the nature of our request it is all-but-certain that at least some of these documents are email messages themselves and not attachments. Given the very nature of email messages, withholding these documents in their entirety is presumptively unlawful.

Under 5 U.S.C. § 552(b), all factual information must be released unless it is simply impractical to segregate it, in other words, any "reasonably segregable" information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are "inextricably intertwined with exempt portions." *Trans–Pacific Policing v. U.S. Customs Serv.*, 177 F.3d1022, 1028 (D.C.Cir.1999) (court has "an affirmative duty to consider the segregability issue *suasponte*."); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C.Cir. 1977). Emails, by their very nature, include factual information that is clearly segregable, e.g., To, From, Date, and Subject information. This information cannot be deliberative and can clearly be segregable even if the rest of the document is properly withheld under FOIA.

The truth of this fact is furthermore demonstrated by the fact that TVA has demonstrated its ability to do this in the instant production. Several emails released as part of this production are redacted of everything but To, From, Date, and Subject information. TVA thereby acknowledges that such information also does not reveal the predecisional deliberations or "expose to public view an agency's decision-making process". TVA therefore must, at the very least, produce the documents without redacting such clearly segregable, factual information, as it has already done for several documents already released in response to the FOIA request at issue.

Moreover, an agency must provide a "detailed justification," not just "conclusory statements" to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. "The government must show with reasonable specificity why a document cannot be further segregated." *Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *see Quinon v. FBI*, 806F.3d 1222, 1227 (D.C. Cir. 1996) ("reasonable specificity" required). TVA has not even attempted to justify why such factual information is deliberative. Boilerplate is inherently insufficient to justify withholding public information. Thus, any withheld emails which include clearly segregable material should be released, pursuant to lawful redactions.

Additionally, TVA needs to further justify withholding the actual substance of the email messages being withheld, and any attachments. *See Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *Quinon v. FBI*, 806F.3d 1222, 1227 (D.C. Cir. 1996). The explanations given for other, non-inarguably factual portions the withheld documents explain why certain portions of the documents may be redacted, but do not sufficiently justify why all portions of the documents must be withheld. Particularly in light of the Obama Administration's promise to be "the most transparent administration, ever", and serial administration vows to err on the side of disclosure, and clear judicial precedent that FOIA should be interpreted as leaning toward disclosure, TVA must either sufficiently explain why no portions of the documents are redactable or release those portions as well.

V. CHALLENGED REDACTIONS ARE IMPROPER UNDER THE LAW AND DOCUMENTS PROPERLY SHOULD BE RELEASED UNREDACTED

A. Redactions 1-3, 6-20, 25-31, 34-35 are improper as they do not implicate deliberation of a final agency decision concerning agency legal or policy matters, but relate to communications made to outside organizations, individuals, corporate entities or other external groups, and otherwise discuss another agency's employee's circulation of an outside group's notice

In its production/withholding letter, TVA claims that the records containing the above-cited withholdings are being withheld pursuant to exemption (b)(5) as "deliberative" because, in the case of redactions 1-2, they discuss the "approach to be taken in a meeting with the Sierra Club, and meeting notes reflecting selective impressions of a TVA official"; in the case of redactions 3, 6-11, 14-18, 25-28, the basis for withholding is "internal and inter-agency discussions and recommendations regarding the EPA and a Sierra Club public meeting notice forwarded to TVA"; in the case of redactions 12-13, 19-20, and 34-35 the basis is that the withheld information represents "internal discussions and advice on the approach to be taken regarding a message sent by the Sierra Club on TVA's decision to retrofit the Gallatin Fossil Plant"; and in the case of redactions 29-31 the basis is that the withheld information includes "internal discussions and advice on the approach to be taken at a Tennessee Department of Environment and Conservation (TDEC) public hearing on a new landfill at the Gallatin Fossil Plant." The released information and context indicate that these are improper applications of the (b)(5) "deliberative process" exemption, and that the withheld discussions do 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*).

In this case, all of these redactions concern discussions with outside groups, namely, Sierra Club and whatever individuals or groups attend a Tennessee Department of Environment and Conservation public hearing; they also possibly appear to reflect concern over a possible error made by *an employee of another agency entirely* — an EPA Region 4 employee who ambiguously circulated a notice of a Sierra Club call to action *to various private parties*.

TVA's own descriptions of the redacted portions state that they are discussions concerning the "approach" taken in discussions with these outside organizations and individuals. In other words, according to TVA these seem to be discussions of constituent relations in services of the agency's public image. This is not the kind of deliberation that is properly withheld under exemption (b)(5). Indeed, this question has been addressed in *Fox News Network, LLC v. United States Dep't of the Treasury,* 739 F. Supp. 2d 515 (S.D.N.Y. 2010), where the court held "The key

issue therefore is whether it is necessary that deliberations concerning 'massaging the agency's public image' be covered under the deliberative process privilege to further the goals of FOIA. *Communications regarding how to present agency policies to Congress, the press, or the public, while deliberative, typically do not relate to the type of substantive policy decisions Congress intended to enhance through frank discussion." Id*. at 544-45 (*emphasis added*).

The redactions in question do not appear to be not related to *policy* or *legal* matters, but more appropriately considered matters of constituent relations or agency image discussions. Constituent relations or discussions concerning communications to be made to outside organizations concerning the agency's image are neither legal matters nor policy matters, and thusly, "deliberative" exemptions do not protect such discussions as they are not part of policy or legal matters.

Allowing the "deliberative" exemption to apply to any discussion in a government agency, even 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 to these redactions and the information should be released.

B. Redactions 1-2, and 3, 6-11, 14-18, 25-28 and 12-13, 19-20, 34-35 and 29-31 are improper as they include information already released to the public

In the alternative, redactions 1-2, 3, 6-11, 14-18, 25-28,12-13, 19-20, 34-35 and 29-31 are, by TVA's descriptions of the information, improper as the information included has already been communicated to Sierra Club and whatever individuals or groups attend a Tennessee Department of Environment and Conservation public hearing (selective disclosure to outside organizations and individuals). To the degree that the redacted discussion included the information that actually was actually shared with Sierra Club or whatever individuals or groups attend a Tennessee Department of Environment and Conservation public hearing, 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 legally release information to some outside organizations and/or individuals but not to others.

Thus, any redacted portion that contain information that was shared with Sierra Club and/ or whatever individuals or groups attend a Tennessee Department of Environment and Conservation public hearing, was improperly redacted under (b)(5) deliberative and the agency should provide the information.

C. Redactions 21-23 are improper as they do not appear to meet the standard of the qualified confidential commercial privilege as defined by the courts

In its production/withholding letter, TVA claimed that redactions 21-23 are "made pursuant to the deliberative process and the government confidential commercial privileges since they involve discussions of strategies for TVA's environmental compliance and power purchase arrangements." However, these redactions are improper as they do not seem to be the type courts have granted a qualified privilege for under FOIA.

While it is true that courts have found that exemption (b)(5) "incorporates a *qualified* privilege for confidential commercial information," *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (U.S. 1979), that privilege is strictly limited and only applies when "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." *Id*. at 63. Indeed, the privilege is only "to the extent that this information is generated by the Government itself in the process leading up to awarding a contract." *Id*. at 60.

The facts, so far as they are known by requesters, are insufficient to meet this standard. There appears to be no contract or similar arrangement being made; also, far from being sensitive commercial information as contemplated by *Fed. Open Market Comm.,* it seems that by TVA's own admission, the redacted information instead concerns compliance with environmental regulations. Far from being exempt as a commercial secret, information concerning the administration of the law is precisely the kind of information that FOIA was created for, to allow for public oversight of governmental administration and compliance with the law. In any event,

there is no evidence given by TVA why these redactions would generate any harm by disclosure, and as courts have repeatedly found, "(A)n agency bears the burden of justifying, in accord with a FOIA exemption, its refusal to disclose materials." *Campbell v. DOJ*, 334 U.S. App. D.C. 20, 164 F.3d 20, 30 (D. C. Cir. 1998); *See also Abbotts v. NRC*, 247 U.S. App. D.C. 114, 766 F.2d 604, 606 (D. C. Cir. 1985)." *Coldiron v. United States DOJ*, 310 F. Supp. 2d 44, 48 (D.D.C. 2004). Nor does it seem plausible that plans on how to implement environmental regulations would allow for a valid claim of confidential commercial privilege. To the extent complying with environmental regulations affects TVA's purchase agreements, it is the public's right to know how these regulations are affecting TVA. Thus, these withholdings are improper under exemption (b)(5) and the documents ought to be released in unredacted form.

D. Redactions 32-33, 36 and redactions 40-42 are improper as they do not appear to be deliberating agency policy

In TVA's production/withholding letter, it claims that redactions 32-33 and 36 are made in order to "protect internal evaluations of comments received in response to the draft environmental assessment which examined options for the Paradise Fossil Plant." These withholdings are improper as they do not appear to be deliberating agency policy.

There is insufficient information about redactions 32 and 36 to have much of an idea of what they contain, or if further information ought rightly to be segregated. However, the largest redaction, redaction 33, is made to an email which states "Following is an *overview* of the comments we have received" (emphasis added), proceeded by a substantial redaction. After the redaction, the author of the email explains "NEPA compliance staff is currently working through the comment submissions to identify and formulate the comment statements that require

responses. We anticipate starting to send out comment response assignments early next week." Public comments are just that, and an overview of them, prior to the analysis even of what requires a response, is not privileged.

Redactions 40-42 present similar circumstances. TVA claims this information is lawfully withheld to "protect a pre-decisional summary and evaluation of comments received on TVA's Integrated Resource Plan." However, oddly, the evaluation of said comments appear to be unredacted, even though they could plausibly be called deliberative, while the actual comments in every case appear to be what is redacted. For example, redaction 41 is preceded by the sentence "They and Patriot Coal also submitted an analysis of the closures by Energy Ventures Analysis, Inc. (attached)" and proceeded by "comment was submitted anonymously online; the only personal information entered is that the commenter is from Kentucky," clearly indicating the redacted information is an actual comment, not deliberation concerning a comment. Similarly, redaction 42 "is preceded by the sentence "The Tennessee Environmental Coalition's recent email newsletters have also been urging people to comment; see the attached email for an example," followed by a substantial redaction, again, indicating the comment itself has been redacted, not deliberation concerning agency policy.

A comment itself, or a summary or overview of a comment (or comments) received from outside groups, is neither privileged nor deliberative. Instead, it is merely information provided by outside actors, or a summary of information received by outside actors. While deliberating how to respond to these comments may be deliberative, such as unfinished drafts of response letters, it is clear from the context that the redacted portions instead are simply the comments

themselves, or an overview of the comments themselves. As we have previously noted, exemption (b)(5) only allows for redactions concerning deliberation of agency policy. *See, Jordan v. United States DOJ*, 591 F.2d 753 (D.C. Cir. 1978). Given that both redactions 32 and 36 are part of the same conversation as redaction 33, and redaction 40 part of the same conversation of redaction 41 and 42, it seems likely they are in a similar vein as redactions 33 and 41-42. Information provided by outside groups to TVA is already part of the public record, and neither the comments themselves nor a summary or overview of any such comments is rightfully considered privileged deliberation of agency policy. Thus, these redactions cannot be lawfully withheld under exemption (b)(5) and must be produced in unredacted form.

E. Redaction 43 is improper as it does not appear to be deliberating agency policy, but discussing the behavior of an outside actor

According to TVA, redaction 43 is proper because it is "made pursuant to the deliberative process and government confidential commercial privileges and protects an evaluation of possible actions by private utilities surrounding TVA and pre-decisional discussions of options for TVA." This is improper and the document should be released in unredacted form.

As discussed in Section C of this appeal, the government confidential commercial privilege is sharply limited to certain circumstances,[1] none of which appear to be present here. The context of this redaction concerns an email of which the subject is "Duke announces

[1] The government confidential commercial privilege "incorporates a *qualified* privilege for confidential commercial information," *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (U.S. 1979), that privilege is strictly limited and only applies when "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." *Id*. at 63. Indeed, the privilege is only "to the extent that this information is generated by the Government itself in the process leading up to awarding a contract." *Id*. at 60.

significant coal plant retirements," and an earlier email in the chain merely references an article discussing this topic. As we have discussed previously, exemption (b)(5) only protects that which concerns "the adoption and promulgation *of an agency policy*." *Jordan v. United States DOJ*, 591 F.2d 753, 772 (D.C. Cir. 1978) (*emphasis added)*. TVA discussions of what other private utilities are doing is quite simply not deliberating agency policy.[2] Thus, any portions concerning evaluations of outside actors withheld under redaction 43 is improper and ought to be released in unredacted form.

F. Redactions 38-39 are insufficiently described and as such are unlawful; the material also is not privileged if it does not include actual contract negotiations with labor unions

TVA claims that redactions 38-39 are protected under exemption (b)(5) deliberative and commercial confidential privilege "as they protect selective impressions of a TVA official on a meeting with labor unions." This is insufficient information by which to judge if these redactions are lawful, and TVA should either further explain these redactions, as required by law, or produce unredacted documents. Barring sufficient justification, the redaction is unlawful.

Petitioners concede that if these redactions are discussing actual contract negotiations between TVA and unions, they would be exempt from disclosure under exemption (b)(5) commercial confidential privilege. However, the description does not establish that it was a contract negotiation meeting or some other kind of meeting. TVA must attest that it was a contract negotiation meeting being discussed, which would indeed involve "(sensitive)

[2] At the very least, if there is actual deliberation of agency policy, TVA needs to explain with reasonable specificity what policy is being deliberated, if in fact any agency policy is being deliberated, and further justify why portions that are discussions of what private utilities are also redacted. *See Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *Quinon v. FBI*, 806F.3d 1222, 1227 (D.C. Cir. 1996).

commercial secrets" and be "in the process leading up to awarding a contract." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (U.S. 1979) if this is indeed the case. The evidence suggests that it is not the case, however.

While there is little context in the documents themselves, they do mention "Chris Foster" of "PG&E," who apparently is the same Chris Foster who until very recently was a lobbyist for Pacific Gas and Electric,[3] and mention a "Blue Green Coalition", which apparently refers to the Blue Green Alliance, a special interest group that promotes labor unions and environmental groups and shared political agenda items. The record does not appear to be discussion of a union contract that would rightfully be redactable under exemption (b)(5) confidential commercial privilege. Instead, it seems to be discussing agency communications to outside individuals and organizations interested in lobbying TVA. If so, it does not meet the criteria for confidential commercial privilege, *See Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (U.S. 1979) (as discussed in greater detail in subsection C of this appeal). Additionally, any such information provided that had "already been fully disclosed to at least one party outside the Department" would mean that "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) and would need to provide documents with all portions discussing what was told to outside parties unredacted.

However, such little context and vague explanations make the propriety of any further action unknowable to petitioners. What can be clearly demonstrated is that TVA has failed to

[3] *See* http://www.linkedin.com/pub/chris-foster/27/332/a15

"sufficiently justify" redactions 38-39 as required by the courts, *See Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *Quinon v. FBI*, 806F.3d 1222, 1227 (D.C. Cir. 1996). Thus, TVA must either provide a more sufficient justification or produce the document in an unredacted form.

G. Redaction 5 is improper as the withheld information does not seem to present the threat of unwarranted invasions of personal privacy contemplated by the statute, which possible threat is outweighed by public interest even if it would fall under that threshold

In its production/withholding letter, TVA claims that redaction 5 is "made pursuant to FOIA exemption 6 which protects against clearly unwarranted invasions of personal privacy." Redaction 5 does not appear to be the type of withholding contemplated by the statute or clear court precedent. Thus, the document must be released in unredacted form.

Exemption (b)(6) provides that covered information can be withheld if "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." That is, according to the Department of Justice Guide to FOIA, "To warrant protection under Exemption 6, information must first meet its threshold requirement; in other words, it must fall within the category of 'personnel and medical files and similar files.'"[4]

Redaction 5 does not appear, given the context, to meet this threshold. The redaction comes at the end of a long paragraph contemplating "Neil's Nomination" which concludes by saying "We are a little hamstrung on going directly to the White House on this so we have to rely on information from folks like you on nominations. We can help once they're nominated, but

[4] Available at: http://www.justice.gov/oip/doj-guide-freedom-information-act-0

you probably understand why its difficult before…" Far from being a personnel or medical file that would contain details on their physical health or things like their social security number or detailed employment history, this appears to concern a political discussion concerning a nomination of interest to TVA. Moreover, *TVA is acknowledging that it relies on obtaining this information when given to outside special interest groups, which simply cannot be privileged*.

Far from being properly withheld under (b)(6), this is precisely the kind of information that FOIA was created to make public, upon request, namely, to see how governmental agencies work, how they are administered, and how they interact with or elected officials. A nomination to a federal post is not a private matter. It is a very public one, particularly when the information at issue is provided to special interest groups, and FOIA does not exempt information on matters of public concern merely because someone would prefer it be private.

Even if, for whatever reason, this could be held to be information found in a personnel or similar file or would constitute an invasion of privacy — again, despite the glaring problem that this involves information of the sort TVA acknowledges it expects to receive from a special interest group — courts have consistently held that the privacy or interests must be balanced against the public interest in disclosure. *See Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994) ("We must weigh the privacy interest . . . in nondisclosure . . .against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens 'know what their government is up to.'" (quoting DOJ v.Reporters Committee for Freedom of the Press , 489 U.S. 749, 773 (1989)); *Multi Ag Media LLCv. USDA*, 515 F.3d 1224,

1228 (D.C. Cir. 2008)(noting that if requested information falls withinExemption 6, the next step in the analysis is to determine whether "disclosure would constitute a clearly unwarranted invasion of personal privacy . . . [by] balanc[ing] the privacy interest that would be compromised by disclosure against any public interest in the requested information").

Whether TVA has even attempted such a balancing test is unclear. If TVA has performed such a test, it has clearly not explained that fact, nor has it explained why it found in favor of nondisclosure, as is required by law. Given that the redacted portions apparently includes discussing the nomination of someone to a federal post, it is highly unlikely that such a redaction would survive a balancing test against the public interest, as courts have repeatedly held that public figures, such as public officials and candidates for public offices, whether elected or appointed, have diminished privacy interests *See, e.g. Iowa Citizens for Cmty. Improvement v. USDA, 256 F.Supp.2d 946 (S.D. Iowa 2002), Nation Magazine v. United States Customs Service, 71 F.3d 885, 894, n.9 (D.C. Cir. 1995).* Thus, the redaction is unlawful and the document must be released in unredacted form.

H. Unchallenged Redactions

We do not challenge redactions 24 or 4 and 37 as they appear to be valid claims of exemption (b)(5) attorney/client privilege and (b)(6), respectively.

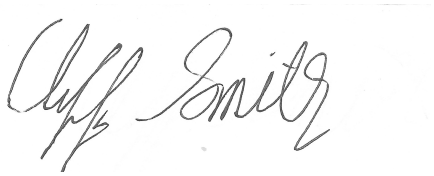
VI. Conclusion

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. Similarly, concerning exemption (b)(6) should be read to make available information on public figures, given the high public interest in public officials. Finally (b)(4) was not intended to withhold copyrighted material, but only trade secrets and other material not intended to be disclosed to the public. 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 withheld documents, and unredacted versions of the documents redacted under exemptions (b)(4), (b)(5) and (b)(6) promptly.

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

Respectfully submitted,



Clifford V. Smith on behalf of
The Free Market Environmental Law Clinic
Energy & Environment Legal Institute
1235 Newton St. NE
Washington DC 20017
(571) 249-2755
csmith@fmelawclinic.org