Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

July 23, 2014 Sent by e-mail to: CHornerLaw@aol.com
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Craig E. Richardson, Esq.
Executive Director, Energy & Environment Legal Institute (EELI)
and
Christopher C. Horner, Esq.
Free Market Environmental Law Clinic (FMELC)
722 12th St., NW, Suite400
Washington, DC 20005

Dear Mr. Richardson and Mr. Horner:

This responds to your June 24, 2014, appeal of the Tennessee Valley Authority's disclosures to EELI and FMELC, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your FOIA request, received March 25, 2014, sought electronic records from certain TVA offices and containing keywords related to a Climate Action Plan. TVA's FOIA Officer sent you 60 pages of records at no charge by letter and email on May 27, 2014. On six of the pages produced, eight emails were partially redacted under FOIA exemption 5. The appeal specifically questions four redactions (Items 1, 1A, 7, and 8), and generally questions all of them.

The appeal questions the FOIA Officer's redactions of one email, in duplicate, on pages 16 and 17 of the disclosures (Items 1 and 1A). The email provided advice regarding a September 26, 2013, meeting that TVA personnel were preparing for with the Sierra Club, based on the author's impressions of prior meetings with that organization. The Sierra Club was then in litigation with TVA, and it is still challenging both TVA's decision to continue using coal at Gallatin Fossil Plant, and the permitting that TVA needs to operate that plant.

The appeal questions the FOIA Officer's redactions of two emails on page 52 (Items 7 and 8). The emails discussed TVA staff's plans for a presentation at a Regional Energy Resource Council (RERC) meeting. The RERC is a TVA Federal Advisory Committee. 78 Fed. Reg. 37,876 (June 24, 2013). TVA staff internally develops proposals for review by the RERC. The RERC then advises TVA on energy generation, conservation, management activities, and priorities. TVA considers RERC advice in its policy decisions (www.tva.gov/rerc/faq.htm), and TVA staff's two emails, partially redacted on page 52, were part of that policymaking process.

The appeal acknowledges (at 3), that the deliberative process privilege protects internal agency communications involving "'give and take'" on "'*legal or policy matters*.'" This allows staff discussions that are candid, without political calculation. The appeal incorrectly suggests (at 4-5) that the discussions in preparation for meetings with the Sierra Club and the RERC were "not related to *policy* or *legal* matters," but merely involved constituent or public relations. Internal agency discussions preparing for presentations on legal and policy issues are protected by the deliberative process privilege, as are records of a senior agency official in preparation for a presentation, or reflecting impressions of public meetings. Therefore, release of the redacted information would undermine TVA's efforts to foster frank staff

discussions, hamstring TVA's ability to support its positions in legal proceedings, and restrict development of policy proposals to advisory committees. There is clearly harm in revelation of negotiation preparations, and disclosure of staff communications regarding meeting plans would "have a chilling effect on . . . discussions." *Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F.Supp.2d 37, 44-46 (D.D.C. 2012). In addition, since no redacted email was adopted as a basis for rulemaking, later discussions of issues are not relevant to the deliberative process privilege.

The appeal generally argues (at 6-9) that deliberative records that contain "factual information," or involve matters discussed elsewhere, should be "segregable," and disclosed. Data in a privileged record does not lose its status because a topic is discussed, particularly where, as here, that record is not referenced. Accordingly, this does not support disclosure. Further, facts should be considered in agency policymaking, and can be protected by the deliberative process privilege when integral to that process. Indeed, the public interest in withholding data is heightened when facts are integrated early in the analytical process and disclosure of "nascent thoughts . . . would discourage the intellectual risktaking." *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984).

While, as a matter of discretion, several additional lines may be disclosed, the grounds for the redactions are compelling, and facts in the brief emails are not segregable since they were integrated in the policy analyses of agency staff. The redacted materials include (i) an email preparing for a meeting with an adverse party, in which an official's impressions from prior meetings combine facts with expectations and advice (Items 1 and 1A); (ii) estimates blended into initial evaluations of a policy (Items 2-4); (iii) evaluations of state proposals shared with TVA counsel to obtain legal assistance for TVA managers (Items 5, 6, and 6A); and (iv) emails planning for a TVA policy meeting, with those emails addressing, in prospective terms, the roles of possible participants and policy matters that might be presented (Items 7-8).

I have learned that FMELC and EELI staff may have used software tools to extract computer code from under document sections marked as redacted and privileged. Consequently, some marked code may be read if posted in other data forms. This was unintended by TVA, and may have occurred when a redaction tool did not successfully overwrite all underlying code. For reasons stated in TVA's June 27, 2014, letter to FMELC and EELI, there was no waiver of privilege with respect to the extracted code. We respectfully ask that the requests set forth in that letter be observed. Copies of TVA's updated disclosures, with code expunged, are enclosed.

This is TVA's final determination on your FOIA appeal received June 24, 2014. Under FOIA, you have the opportunity to seek judicial review of this final determination. The provisions of 5 U.S.C. § 552(a)(4)(B) provide the processes for seeking such review.

Sincerely,

Janet J. Brewer
Vice President, Communications

Enclosures