



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

June 9, 2014

IN REPLY REFER TO
FOIA Appeal No. 2013-169

Cheryl A. Schmit
Stand Up For California!
P.O. Box 355
Penryn, CA 95663

Dear Ms. Schmit:

This responds to the September 18, 2013, Freedom of Information Act (“FOIA”) appeal (“appeal”) (No. 2013-169) that you filed with the Department of the Interior (“Department”). Your appeal concerns your August 20, 2013, FOIA request to the Bureau of Indian Affairs (“BIA”) that sought certain documents concerning the Santa Ynez Band of Chumash Indians’ “Proposed Land Consolidation and Acquisition Plan of 11,500 ac. in Santa Ynez, Santa Barbara County.” In response to the FOIA request, the BIA released some documents and withheld, pursuant to the deliberative process privilege of FOIA exemption (5),¹ one document totaling two pages. You filed this appeal to challenge the BIA’s withholding decision.

After fully reviewing the issues presented in the appeal, the withheld document, and current case law, the Department concludes that the BIA properly invoked the deliberative process privilege² of exemption (5) as a basis to withhold the document at issue in the appeal.

The withheld document is a memorandum from the Pacific Southwest Assistant Regional Solicitor, a Departmental attorney, to the BIA’s Pacific Regional Director, which she prepared in response to the BIA’s request for legal advice. The attorney prepared the document prior to the BIA reaching a final decision on the issue under discussion and did so to assist the BIA’s decisionmaker in determining how to resolve the matter. The attorney’s opinions, recommendations, and advice to the BIA decisionmaker reflects

¹ FOIA exemption (5) protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency.” 5 U.S.C. § 552(b)(5).

² The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. To qualify for protection under the deliberative process privilege of exemption (5), a document must be both predecisional and deliberative. A document is predecisional if it was “generated before the adoption of an agency policy.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004). A document is deliberative if it reflects the “give-and-take of the consultative process.” *Id.*

precisely the type of internal deliberations that the deliberative process privilege of exemption (5) was designed to protect.³

The Department is also invoking the attorney-client privilege of exemption (5)⁴ as a basis to withhold the document at issue in the appeal, as there is nothing that precludes the Department from invoking additional exemption (5) privileges. The withheld document reflects confidential communications from a Departmental attorney related to a legal matter for which a client, i.e., the BIA, sought professional legal assistance and services and it encompasses opinions given by an attorney to her client based on client-supplied facts. Moreover, the BIA employee who sought the legal advice was in fact a client of the attorney at the time the memorandum was generated and the attorney was acting in her capacity as a lawyer at the time she communicated the legal advice to the BIA. Further, the BIA has not waived the attorney-client privilege.

Additionally, on the issue of waiver,⁵ the Department notes that you have not presented any evidence that the BIA shared the withheld document with any individual or entity outside of the federal government⁶ and thereby waived its ability to invoke exemption (5), as you imply in the appeal is an action that may have occurred. There is also no other evidence on the record before the Department to support any such claim. Accordingly, the Department finds no basis to diverge from its determination that the document is protected from disclosure by the deliberative process and attorney-client privileges of exemption (5).

Finally, please be aware that the Department's review of the withheld document reveals that there is no reasonably segregable non-exempt information that can be released to

³ *Id.*

⁴ The attorney-client privilege of exemption (5) protects confidential communications made by a client to his/her attorney and also protects from disclosure certain communications provided by an attorney to his/her client. *See Maine v. United States Dep't of the Interior*, 298 F.3d 60 (1st Cir. 2002).

⁵ When a requester produces evidence that specific information has officially entered the public domain, the courts have concluded that the government may not rely on an otherwise valid exemption to justify withholding that identified information. *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (emphasizing that for a waiver to occur, the specific information sought must have already been "disclosed and preserved in a permanent public record" (citing *Cottone v. Reno*, 193 F.3d 550, 554-55 (D.C. Cir. 1999))).

⁶ The courts have consistently held that the burden is on the FOIA requester to demonstrate that a waiver has occurred. *See James Madison Project v. NARA*, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (holding that a FOIA plaintiff "bears the burden of showing that the specific information at issue has been officially disclosed"); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester to establish that a waiver has occurred (citing *Afshar v. Department of State*, 702 F.2d 1125, 1132 (D.C. Cir. 1983))).

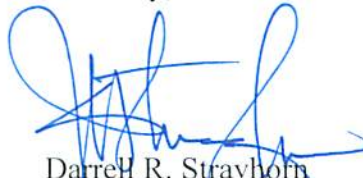
you. Therefore, the Department will continue to withhold the document in full under exemption (5).

Based on the foregoing, your appeal is **DENIED**.

This completes the Department's response to your appeal. Pursuant to 5 *U.S.C.* § 552(a)(4)(B), you have a right to seek judicial review of this decision.

If you have any questions regarding your appeal, please call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Daphne Berwald, FOIA Officer, BIA
Douglas Garcia, BIA-Pacific Regional Office
Kevin Mack, Attorney-Advisor, SOL-Pacific Southwest Regional Office
Cindy Cafaro, Departmental FOIA Officer