



DARRELL STRAYHORN

06/03/2002 03:03 PM

To: DARRELL STRAYHORN/HQ/SOL/DOI@DOI
cc: BOB MOLL/HQ/SOL/DOI@DOI, EDWARD KEABLE/HQ/SOL/DOI@DOI, ERIC B EISENSTEIN/HQ/SOL/DOI@DOI, James Paxton/HQ/SOL/DOI@DOI, KAREN MOURITSEN/HQ/SOL/DOI@DOI, Lisa Lance/HQ/SOL/DOI@DOI, ROBIN FRIEDMAN/HQ/SOL/DOI@DOI, Timothy Murphy
Subject: Re: Withhold Draft Documents in Full

Here's the attachment.



2001-152.wpd

-drs-
Office of the Solicitor
Division of General Law
Branch of General Legal Services
(202) 208-5216

DARRELL STRAYHORN



DARRELL STRAYHORN

06/03/02 02:59 PM

To: BOB MOLL/HQ/SOL/DOI, James Paxton/HQ/SOL/DOI, Timothy Murphy, ERIC B EISENSTEIN/HQ/SOL/DOI, EDWARD KEABLE/HQ/SOL/DOI, Lisa Lance/HQ/SOL/DOI, KAREN MOURITSEN/HQ/SOL/DOI, ROBIN FRIEDMAN/HQ/SOL/DOI
cc:
Subject: Withhold Draft Documents in Full

Tom Hester, Office of Information and Privacy, Department of Justice, advised me that draft documents may be withheld in full. Under Attorney General Janet Reno's "foreseeable harm" policy, DGL often made determinations to segregate and release certain information from draft documents, e.g., information from the draft that appears in the final version or factual information that is not intertwined with deliberative material, based on the lack of foreseeable harm in the disclosure of such information. Tom stated that since we no longer have to make foreseeable harm determinations, such a review is not necessary and drafts are predecisional, deliberative documents that may be withheld in their entirety.

Bob Moll agreed that we should no longer make "foreseeable harm" determinations, and may withhold draft documents in their entirety under the deliberative process privilege of exemption (5). Please ensure that the legal opinions that you prepare pertaining to draft documents reflect this change.

Attached to this e-mail message is an opinion that deals with the withholding of draft documents in their entirety. Hopefully the analysis in this opinion will assist you all in quickly disposing of any appeals assigned to you that deal with this issue.

If you have any questions regarding this e-mail message, please feel free to e-mail or call me at (202) 208-5216.

-drs-
Office of the Solicitor
Division of General Law
Branch of General Legal Services

Memorandum

To: Assistant Secretary - Policy, Management and Budget
(Attn: Department FOIA Appeals Officer)

From: Edward T. Keable, Attorney-Advisor - Division of General Law

Subject: Freedom of Information Act Appeal of Rosalyn Fennel (No. 2001-152)

This memorandum provides the views of the Office of the Solicitor on the Freedom of Information Act (FOIA) appeal (Appeal) of Rosalyn Fennel (Appellant), on behalf of The Wilderness Society (TWS). For reasons discussed below, we recommend that this Appeal be granted in part and denied in part consistent with this memorandum.

BACKGROUND

On January 24, 2001, TWS submitted a request pursuant to the FOIA to the Superintendent, Fire Island National Seashore (Seashore), National Park Service (NPS), for information related to "the use, impacts or effects of personal water craft in Fire Island National Seashore." The Seashore responded on March 12, 2001, by releasing some documents while withholding eleven documents pursuant to exemption (5) (Response Letter). Appellant appealed the Seashore's decision to withhold these documents on April 4, 2001 (Appeal Letter).¹

DISCUSSION

FOIA exemption (5) allows an agency to withhold from public disclosure "inter-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption applies to memoranda that would not be disclosed routinely through the discovery process to private parties in litigation with the agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The exemption incorporates several of the government's common law privileges from discovery in litigation, including the deliberative process privilege. *Id.* at 149.

The deliberative process privilege protects the "decision making process of government agencies" in order to "prevent injury to the quality of agency decisions." *Id.* at 150-51. The courts have established a two part test to determine whether the deliberative process exemption applies in a case. *See Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing *Petroleum Info. Corp. v. United States Department of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)). Predecisional means "antecedent to the adoption of an agency policy." *Jordan v.*

United States Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

Five of the withheld documents are drafts (numbered 1-5 in the index of withheld documents); one draft issue paper and four separate iterations of draft regulations.² Drafts are one of the types of documents that are protected from release by the deliberative process privilege. *Town of Norfolk v. U.S. Corps of Engineers*, 968 F.2d 1438, 1458 (1st Cir. 1992). Release of these drafts could have an adverse effect on the Department's deliberative process by chilling the free flow of opinion that is necessary to develop policy and it could confuse the public by revealing opinions that may not have been adopted by the agency. Also, with regard to the four iterations of the draft regulation, the very process by which drafts evolves into a final document can itself constitute a deliberative process warranting protection. *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 114, 1122 (9th Cir. 1988).

Four of the six remaining documents (numbered 6-9 in the index of withheld documents) are electronic mail messages from NPS employees expressing their individual opinions about the draft regulations and the policy they address generally. For the reasons discussed above, these documents are protected from release by the deliberative process privilege. The last two items (numbered 10 and 11 on the index of withheld documents) are not privileged. Unlike the e-mail messages, the content of these two documents are factual. As such, they are not protected from release. Therefore, we recommend that documents 10 and 11 be released to Appellant.³

CONCLUSION

Based on the foregoing, we conclude that the instant Appeal should be granted in part and denied in part consistent with this memorandum.⁴

Questions concerning this memorandum may be directed to me at (202) 208-5216.

¹In her Appeal Letter, Appellant alleged an inadequate search and identified seven subject areas within which she expected the Seashore to have documents in its control. She also specifically requested a copy of the attachment referred to in the Response Letter in which the Seashore described the withheld documents. We understand that your office will address these issues.

²The index of withheld documents fails to properly identify the issue paper as a draft.

³We have discussed this matter with attorneys in the Office of the Solicitor - Division of Parks and Wildlife to ensure that we are not misreading these documents. They agree with our analysis that documents 10 and 11 should be released.

⁴A summary of the law pertaining to exemption (5) and documents 10 and 11 are attached to this memorandum.