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Description of document: Records related to Freedom of Information Act Appeals for the Federal Transit Administration (FTA), 2009-2016

Requested date: 30-October-2016

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Source of document: FOIA Requester Service Center
Federal Transit Administration
1200 New Jersey Avenue, SE
4th Floor East Building
Washington, DC 20590
Email: FTA.FOIA@dot.gov
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U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

November 29, 2016

Our File No.: FY17-0027


This letter is in response to your e-mail of October 30, 2016, requesting information under the Freedom of Information Act (FOIA). Specifically, you requested copies of the "Freedom of Information Act APPEALS Log for the Federal Transit Administration for the time period since 2009." In a November 21, 2016, e-mail to you, Christopher Hall, an attorney in FTA's Office of Chief Counsel, clarified this request with you. He said that FTA doesn't maintain a "log" of appeals, but that we could provide the actual appeal decisions instead. In your response dated November 21, 2016, you agreed to receive the actual appeal documents.

A search of the FTA files has disclosed documents responsive to your request which are enclosed. Personal privacy information has been removed from the documents. We have based these deletions on Exemption 6 of the FOIA, USC § 552 (b)(6), as implemented by the Department of Transportation's regulations, 49 CFR § 7.13(c)(6), on the grounds that the release of this information would constitute a clearly unwarranted invasion of personal privacy. The persons responsible for this determination are the undersigned and Stephen Pereira, an attorney in FTA's Office of Chief Counsel.

To the extent that some of the material is being withheld, this is a partial denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within ninety calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and any information and

any arguments upon which you may wish to rely. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,


Nancy Sipes
Office of Management
Planning

Enclosure



U.S. Department
of Transportation
**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

MAR 04 2009

[REDACTED]
[REDACTED]
[REDACTED]

Re: FOIA Appeal
FTA File No. FY08-0210 & FY08-0211

Dear [REDACTED]:

This letter confirms receipt of your November 8, 2008, and November 11, 2008, letters appealing the Federal Transit Administration's (FTA) decision denying your request for FTA records.

FTA is currently reviewing your appeal. However, more time is needed to respond to your request due to the volume of documents requested. Department of Transportation regulations allow for extensions in unusual circumstances, such as "[t]he need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request."¹ Due to the nature of your requests, FTA needs additional time in order to adequately review and to appropriately make a determination of your request. We expect to have a final determination by March 13, 2009.

Please notify FTA in writing if you would like to modify your request.

Sincerely,

Matthew J. Welbes
Acting Deputy Administrator

¹ 49 C.F.R. §7.33(a).



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JUL 23 2010

Ramón Coto-Ojeda
Coto Malley & Tamargo, LLP
P.O. 71559
San Juan, PR 00936-8549

Re: *Acciona Infraestructuras, S.A.*
FOIA Appeal
File No. FY09-0145

Dear Mr. Coto-Ojeda:

I write in response to your letter dated April 19, 2010, appealing the Federal Transit Administration's ("FTA") partial denial of your March 16, 2010, request for FTA records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. After careful consideration, I must deny your appeal on the basis that all documents responsive to your request have been produced.

BACKGROUND

On June 18, 2009, you submitted an initial FOIA request by both email and Federal Express. You enclosed with your request a subpoena issued by the Superior Court of Fulton County in the State of Georgia. Through this correspondence you requested the following records:

- Any correspondence, photos, charts, reports, invoices, studies, daily register, registers, and any other document in FTA custody, control or possession pertaining in any way to the Tren Urbano Project, including electronic communications and electronic documents;
- Any correspondence, including emails, between FTA and any member of Puerto Rico Highway Safety Authority ("PRHTA");
- Any correspondence, including e-mails, between FTA and any member of the General Management and Architectural and Engineering Consultants ("GMAEC");
- Any document, including electronic documents, related to the close-out of the Hato Rey Contract including, but without limiting, studies, opinions, conclusions and reports;

- Any document, including electronic documents, related to the close-out of the contract with FTA;
- Any memorandum of meetings related to Tren Urbano;
- Any document, including electronic documents, related to estimates and/ or evaluations of the claims filed by the Contractor;
- Any document, including electronic documents, related to the claims argued by PRHTA against the Contractor;
- Resume and curriculum vitae of the deponent;
- Any document, including electronic documents, that establish any public policy or position of FTA regarding the close-out of the Hato Rey Contract;
- Any document, including electronic documents, regarding the transfer of the Tren Urbano to the operator of the railroad, Alternative Concepts, Inc. ("ACI"); and
- Any other document, including electronic documents, relating to the Hato Rey segment of the Tren Urbano.

By letter dated July 8, 2009, FTA disclosed documents pursuant to your request. In an objection letter dated February 10, 2010, you alleged that FTA limited the production of documents to monthly reports prepared by the Project Management Oversight Contractor ("PMOC"). The monthly reports covered the time period from January 1, 2005, through December 31, 2006. You alleged that the report for the month of May 2006 was not produced. In addition to the production of the monthly report for May 2006, you requested the monthly reports for August 2002 through December 2004. Furthermore, your objection contained a number of factual allegations pertaining to your knowledge of the existence of certain documents ("spot reports," meeting minutes, agreements and grants with the PHRTA) that were not produced.

By letter dated March 16, 2010, FTA provided you with a CD containing additional documents that were found. The letter stated that the May 2006 monthly report would be made available if found. In addition, you were put on notice to the partial denial of your request for documents that were not available, meaning that they either did not exist or were not in FTA's custody or control.

APPEAL

You have appealed FTA's March 16, 2010, determination. Specifically, you argue (1) that through discovery you became aware of the existence of the following documents which fall within the documents initially requested, and (2) that these documents were not, but should be produced:

- The Contract executed between the FTA and the PHRTA and any amendments to this Contract;
- Documents pertaining to an audit performed by the FTA to the PHRTA in 2004.
- All minutes or memorandums of meetings;
- All "spot reports" issued after August 1, 2002 to the present date which have not yet been produced;
- Electronic stored information related to the Tren Urbano;
- Documents relating to the public policy of the FTA as to the close-out of the project; and
- Monthly report for May 2006.

Moreover, you have asked FTA to confirm that documents which were not produced do not exist or are subject to a FOIA exemption or evidentiary privilege.

ESTIMATE OF NUMBER OF RECORDS WITHHELD

None. FTA has produced all relevant documents which are consistent with your request.

RESPONSE

After careful consideration, FTA hereby denies your request.

First, by letter dated June 16, 2009, FTA informed you that the U.S. Department of Transportation ("DOT") has promulgated regulations governing the production of documents in legal proceedings between private litigants. FOIA should not be used as a substitute for discovery in private litigation or to expand the scope of discovery beyond that provided by the Federal Rules of Civil Procedure.¹ Requests for documents in litigation between private persons are subject to 49 C.F.R. Part 9 (see specifically 49 C.F.R. 9.9-9.15).

Secondly, FTA has conducted a reasonable search to find documents responsive to your request.² After initially providing you with documents in the letter dated July 8, 2009, a second FTA search revealed documents responsive to your request which were provided to you on a disk accompanying the letter dated March 16, 2010. As FTA processed your appeal, we reviewed the original records provided on these two occasions, and a third diligent search for documents was made. Both electronic and hard copy files were searched. FTA did not find any additional

¹ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (FOIA was "not intended to function as a private discovery tool."). See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800 (1984); *NLRB v. Sears Roebuck Co.*, 421 U.S. 132, 143 n.10 (1975).

² *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (concluding that an agency has a duty to "conduct a reasonable search for responsive records").

documents in existence and within FTA's custody or control which would have been responsive to your request.³ Documents were not withheld because they were subject to an exemption. Some of the documents you requested may be pursuant to third party contracts between PRHTA and its contractors. As a matter of practice, PRHTA would not have been required to submit these documents to FTA.

CONCLUSION

The persons responsible for this decision are the undersigned and Jayme Blakesley, Attorney-Advisor. This decision constitutes the final administrative action on FOIA Request No. FY09-0145, and has been concurred in for the General Counsel for the Department of Transportation by an attorney on his staff. You may seek judicial review of this decision in the United States District Court in the district in which the requester resides or has its principal place of business, the district in which the records are kept, or the District of Columbia.

Sincerely,



Theresse W. McMillan

Enclosure

³ See *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (concluding that "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search").



U.S. Department
of Transportation
Federal Transit
Administration

Deputy Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

AUG 26 2010

R. Cooper Shattuck, Esq.
Rosen Harwood
2200 Jack Warner Parkway, Suite 200
Tuscaloosa, Alabama 35401

Re: *FOIA Appeal*
File No. FY09-0199

Dear Mr. Shattuck:

I write in response to your June 17, 2010, letter appealing from the May 19, 2010, decision by the Federal Transit Administration (FTA) denying, in part, your request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am denying your appeal for the reasons set forth below.

BACKGROUND

In your original FOIA request, submitted by letter dated September 22, 2009, you asked for all documents pertaining to contracts between the Puerto Rico Highway & Transportation Authority (PRHTA) and any of the six contractors you identified that performed services for PRHTA on the Tren Urbano Design Build Project (hereafter, "Tren Urbano" or the "Project"), the rapid transit system that serves metropolitan San Juan, Puerto Rico.

By letter dated December 16, 2009, FTA released a number of documents within the scope of your request but withheld certain other documents from release, invoking the FOIA exemptions codified at 5 U.S.C. §§ 552(b)(4) (privileged or confidential commercial or financial information), (b)(5) (deliberative process), and (b)(6) (privacy).

By letter dated March 18, 2010, you submitted a second FOIA request, stating that you did not receive some of the documents you requested in your original FOIA request: Specifically, documents relating not only to contracts between PHRTA and its contractors but documents pertinent to any surety bonds issued in connection with those contracts. By letter dated May, 19, 2010, FTA informed you that another search of the agency's records failed to produce any additional documents within the scope of your second FOIA request; thus, the May 19, 2010, letter was a denial of your second FOIA request to the extent that documents were not available. You have appealed FTA's May 19, 2010, decision.

ESTIMATE OF THE NUMBER OF RECORDS WITHHELD

FTA has withheld approximately 86 pages or portions thereof from the agency's responses to your two FOIA requests.

RESPONSE

I am denying your appeal on two grounds: (1) You seek certain documents pertaining to third party contracts between PRHTA and its contractors that are not within FTA's possession or control; thus, those documents are not "agency records" subject to FOIA; and (2) Insofar as the documents you seek are within FTA's possession or control—*ergo*, documents that are "agency records" subject to FOIA—FTA has released all documents responsive to your request, with the exception of those documents or portions of documents withheld pursuant to the FOIA exemptions invoked in FTA's decisional letter of December 16, 2009.

As defined by FOIA, a "record" is "any information that would be an agency record ... when *maintained* by an agency in any format ..." ¹ (emphasis added). In *Department of Justice v. Tax Analyst*, 492 U.S. 136, 144-45 (1989), the United States Supreme Court applied a two-part test to determine whether documents are agency records; the Court held that agency records are those records that are (1) created or obtained by an agency, and (2) are under agency control at the time that the FOIA request is made.

In this instance, I have no doubt there are any number of documents in existence, contemplated by your FOIA request, which neither were created by FTA nor have ever come into FTA's control or possession—documents that have been created or kept either by PRHTA (a state governmental entity, which is an FTA "grantee") ² or various private entities, such as the six contractors, which are not governed by FOIA. I will emphasize, moreover, that in the ordinary course of business, PRHTA is not required to submit these types of documents to FTA, nor do grantees typically provide the myriad of their third-party contracting documents to FTA. Only when FTA might need a grantee's third-party contracting documents for investigatory purposes will FTA request those documents of a grantee, ³ which was not the case here.

You are correct that the Secretary of Transportation's designee, FTA, must approve a grantee's project management plan for a project such as the Tren Urbano. ⁴ Please understand, however, that FTA's approval of a grantee's project management plan does not require the production of all contracts between a grantee and its contractors, ⁵ nor does it require FTA to obtain or maintain control of those documents. It is true, of course, that PRHTA was obliged to comply with document control and record keeping requirements; that FTA had rights of access to PRHTA's records on the project throughout the design and construction of Tren Urbano; that FTA grantees must follow certain record keeping and document retention policies; and that FTA can access a

¹ 5 U.S.C.A. § 552(f)(2)(A).

² See generally 49 C.F.R. § 18.42(f) ("... grantees and subgrantees are not required by Part 18 to permit the public to access their records.").

³ See 49 U.S.C.A. § 5325(g); 49 C.F.R. 18.42(e)(1); Federal Transit Administration, "Third Party Contracting Guidance," Circular 4220.1F at III-3(d); Federal Transit Administration, "Master Agreement," at 24 (2009).

⁴ See 49 U.S.C.A. § 5327(b).

⁵ See 49 U.S.C.A. § 5327(a)(1)-(13); 49 C.F.R. § 633.25.

grantee's records, even after the completion of a project, as "reasonably may be required."⁶ Nonetheless, the Freedom of Information Act does not require a Federal agency to request access to a grantee's records for the sole purpose of satisfying a third party's request for information from that grantee. *E.g., Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 649 F.Supp.2d 262, 275 (S.D.N.Y. 2009) ("... an agency's right to obtain another entity's documents and an agency's mere supervision over a federally funded entity is insufficient to satisfy the obtainment prong of the test"), citing *Forsham v. Harris*, 445 U.S. 169, 186 (1980).⁷ In short, FOIA is not a means for a third party, such as yourself, to oblige FTA to compel an FTA grantee to submit documents to FTA in which the third party may have an interest, albeit FTA retains authority to obtain those same documents on its own accord.

FTA has already released to you any and all records created pursuant to third party contracts between PRHTA and its contractors that were in FTA's possession or control and not protected by a FOIA exemption. The mere precept that FTA could acquire additional records from PRHTA is not sufficient to establish agency control or possession of those additional records.⁸ Inasmuch as FTA did not create or obtain any additional documents not already released to you, and does not have them in its possession, the documents are not "agency records" subject to FOIA.

And I note, again, that in the agency's letter of December 16, 2009, FTA explained its reasons for withholding certain documents pursuant to FOIA Exemptions 4, 5, and 6. FTA invoked Exemption 4 of FOIA⁹ to withhold information that is "...commercial or financial, obtained from a person and privileged or confidential." The exemption serves both the interests of government and the interests of those who submit information to the government.¹⁰ FTA invoked Exemption 5 of FOIA¹¹ to redact portions of documents that contain recommendations, conclusions, and draft budgetary information; we found these documents to be "pre-decisional" and integral to the agency's deliberative process. Finally, FTA invoked Exemption 6 of FOIA¹² to protect certain personal information, the release of which would have amounted to a clearly unwarranted invasion of personal privacy.

⁶ 49 U.S.C.A. § 5327(e); 49 C.F.R. § 633.15; see also Federal Transit Administration, "Grant Management Requirements," Circular 5010.D at III-2.

⁷ The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-495 (1998), has negated *Forsham* in part; the statute requires federal agencies that make grants to institutions of higher education, hospitals, and non-profit organizations to make available to the public all data produced under those grant award. The statute does not apply to state or local governments, however.

⁸ See *Forsham v. Harris*, 445 U.S. 169, 186 (1980) ("FOIA applies to records that have been *in fact* obtained, and not to records which merely *could have been* obtained") (emphasis in original; footnote omitted).

⁹ 5 U.S.C.A. § 552(b)(4) as implemented by 49 C.F.R. § 7.13(4).

¹⁰ See, e.g., *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974) (the legislative history "firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as agencies which collect it").

¹¹ 5 U.S.C.A. § 552(b)(5) as implemented by 49 C.F.R. § 7.13(5).

¹² 5 U.S.C.A. § 552(b)(6) as implemented by 49 C.F.R. § 7.13(6).

CONCLUSION

The persons responsible for this decision are the undersigned and Mr. Jayme Blakesley, an Attorney Advisor in FTA's Office of Chief Counsel. In accordance with Departmental rule, 49 C.F.R. § 7.21(g), this decision is subject to the concurrence of the General Counsel to the United States Department of Transportation; in this instance, Robert Ross, an Attorney on the General Counsel's staff, has concurred on his behalf. This decision constitutes the final administrative action on FOIA Request No. FY09-0199. You may seek judicial review of this decision in the United States District Court in the district in which the requester resides or has its principal place of business, the district in which the records are kept, or the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a long horizontal flourish extending to the right.

Therese W. McMillan



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JUL 23 2010

Jason M. Muncey, Esq.
Watt, Tieder, Hoffar, & Fitzgerald, L.L.P.
8405 Greensboro Drive, Suite 100
McLean, VA 22102-5104

Re: *FOIA Appeal*
File Number: FY10-0068

Dear Mr. Muncey:

I write in response to your April 19, 2010, letter appealing the Federal Transit Administration's ("FTA") March 24, 2010, decision denying in part your request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. After careful consideration, I must deny your appeal on the basis that FTA has produced all documents responsive to your request.

BACKGROUND

On March 1, 2010, you submitted a letter requesting records relating to "a contract (Contract No. 96CT001) dated October 28, 1996, between URS (then known as Raytheon Infrastructure, Inc. ("Raytheon")) and the New Jersey Transit Corporation ("NJ Transit") for construction of the Hudson Bergen Light Rail Transit System ("HBLRTS"). This request relates to the construction of the Minimum Operable Segment II ("MOS-II")¹ portion of the HBLRTS, which was the subject of change order No. 5, dated November 29, 2000, to Contract No. 96CT001." You specifically requested "documents related to the design and construction of the Weehawken Tunnel, which is also known as the N-30 portion of the project."

By letter dated March 24, 2010, FTA disclosed documents pursuant to your request and notified you that FTA did not and would not generally have documents involving a third party contract between NJ Transit and Raytheon. This letter served as a partial denial of your request to the

¹ "TFRC was the prime contractor and responsible for the "final design, construction, operations and maintenance" of MOS II, *Final Monitoring Report*- December 2007 pg. 61 by Interactive Elements-Delon Hampton Joint Venture. TFRC is a consortium of firms headed by the Washington Group (formerly Raytheon Infrastructure)." *Id.* URS acquired the Washington Group in 2007. http://www.urscorp.com/About_URS (6/17/2010).

extent that (1) documents were not available, meaning that they did not exist, and (2) any records made pursuant to a third party contract between NJ Transit and Raytheon, were not "agency records" within the meaning of FOIA.

You have appealed FTA's March 24, 2010, determination. By letter dated April 19, 2010, you argue that the number of documents produced (approximately 500) is neither consistent with the size of the project nor with FTA's involvement in the funding of the project. Although FTA produced some of the requested documents, you specifically noted the absence of Quarterly Progress Reports issued by NJ Transit from November 29, 2004 through October 1, 2004, and the Project Management Oversight Contractor's ("PMOC") monthly reports from June 2006 through September 2006. In addition, you asked FTA to identify its document retention policy and release any related documentation.

ESTIMATE OF NUMBER OF RECORDS WITHHELD

FTA has produced all relevant documents which are consistent with your request.

RESPONSE

After careful consideration, FTA hereby denies your appeal.

You argue that the "small number" of documents produced is neither consistent with the size of the project nor the amount of FTA involvement. However, you did not request documents pertaining to the entire HBLRTS project. Instead, you further narrowed your request by specifically asking for documents pertaining to the N-30 portion of MOS II. The MOS II portion of the project includes not only the design and construction of the Weehawken Tunnel (N-30), but the design and construction of 6.1 miles of double track, seven (7) passenger stations, two (2) Park & Ride lots with spaces for 949 cars, two (2) grade separation projects, and the purchase of twenty three (23) Low Floor Light Rail Transit ("LRT") vehicles.² Although you note the absence of the above mentioned reports, FTA does not have them and has provided you with all records responsive to your request. Despite your belief to the contrary, FTA does not possess additional documents.

The records you requested were created pursuant to a third party contract between NJ Transit and Raytheon and, hence, are not "agency records." FOIA defines "record" as including "any information that would be an agency record... when maintained by an agency in any format..."³ The Supreme Court has developed a two-prong test to determine whether records are agency records. Agency records are those records that are (1) created or obtained by an agency, and (2) are under agency control at the time that the request was made.⁴ Inasmuch as FTA did not create the documents you request and does not have them in its possession, the documents are not "agency records," and are not, therefore, subject to FOIA.

² *Final Monitoring Report-December 2007* pg. 1

³ 5 U.S.C. § 552(f)(2)(A) (2010).

⁴ *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

FTA neither created nor obtained any records relating to a third party contract between NJ Transit and Raytheon. Any records related to Contract No. 96CT001 would have been created by the parties to the contract, either NJ Transit or Raytheon.⁵ As a matter of practice, FTA would not have required NJ Transit to submit these documents to FTA. Such records of grantees or subgrantees are generally only obtained by FTA for investigatory purposes.⁶

Secondly, FTA is neither in control nor possession of any records pursuant to a third party contract between NJ Transit and Raytheon. The mere fact that FTA could acquire these records is not sufficient to show agency control or possession.⁷

Finally, per your request, the FTA Records Disposition schedule has been enclosed.

CONCLUSION

The persons responsible for this decision are the undersigned and Jayme Blakesley, Attorney-Advisor. This decision constitutes the final administrative action on FOIA Request No. FY10-0068, and has been concurred in for the General Counsel of the Department of Transportation by an attorney on his staff. You may seek judicial review of this decision in the United States District Court in the district in which the requester resides or has its principal place of business, the district in which the records are kept, or the District of Columbia.

Sincerely,



Therese W. McMillan

Enclosure: FTA Records Disposition Schedule

⁵ See generally 49 C.F.R. § 18.42(f)(2009) ("...grantees and subgrantees are not required to permit public access to their records.").

⁶ See 49 C.F.R. 18.42(e)(1) (2009); 49 U.S.C. § 5325(g); Federal Transit Administration, "Third Party Contracting Guidance," C 4220.1F at Vii(b) 2009; Federal Transit Administration, "Master Agreement," at 24 (2009).

⁷ See *Forsham v. Harris*, 445 U.S. 169, 186 (1980) ("the FOIA applies to records that have been *in fact* obtained, and not to records which merely *could have been* obtained.") (emphasis in original; footnote omitted).



U.S. Department
of Transportation
**Federal Transit
Administration**

The Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JUL 22 2011

[REDACTED]

Re: Denial of FOIA Appeal
FTA File No. FY 10-0159

Dear [REDACTED]:

This letter responds to your October 29, 2010 letter, appealing the Federal Transit Administration's (FTA) September 30, 2010 decision partially denying [REDACTED]' request for FTA documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. After careful consideration, I must deny your appeal on the basis that the documents you requested are exempt from disclosure pursuant to the attorney-client and deliberative process privileges of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as implemented by the U.S. Department of Transportation at 49 C.F.R. Section 7.13(c)(5). I explain the reasons for my decision below.

Background

On July 22, 2010, your client, [REDACTED], submitted a request for documents pursuant to FOIA. In it, he requested that FTA produce the following:

1. "Any all [sic] correspondence, emails, personal notes included in the '[REDACTED] file' but not limited to, Leslie Rogers, Edward Carranza, Renee Marler, Elizabeth Martineau, Nadeem Tahir, Raymond Sukys Susan Chu [sic], Jeff Jamieson and Pamela Payton and others"
2. "Any and all correspondence, emails, personal notes in reference to the incident 10/21/2008 include but not limited to, Leslie Rogers, Edward Carranza, Renee Marler, Elizabeth Martineau, Nadeem Tahir, Raymond Sukys, Jeff Jamieson and Pamela Payton and any others in FTA Human Resources involved and or participated in the 10/21/2008 issuance of the memo."

FTA partially denied the request on the basis that some documents were "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."¹

You have appealed FTA's partial denial of the requested documents; questioned FTA's failure to

¹ 49 C.F.R. § 7.13(c)(5)

provide a factual basis for the agency's determination that the attorney-client privilege protects the exempted documents; and demanded a privilege log, a list identifying all documents withheld due to the attorney-client privilege exemption, and a reasonable explanation for the unavailability of documents described as "not available" in FTA's initial determination. FTA's response to your appeal follows.

Estimate of all Documents Withheld

In its letter dated September 30, 2010, FTA provided the statutory basis for partially denying [REDACTED] request, but failed to provide an index of the withheld materials and an estimate of the volume of information withheld. Thirty-five electronic mail messages, and word attachments, totaling 110 pages were withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). The following is a list of the documents withheld due to attorney-client or deliberative process privilege:

Attorney Client Privilege

1. From: Raymond Sukys
Date: September 25, 2008
To: Renee Marler (Regional Counsel), Edward Carranza
Length: 2 pages
2. From: Raymond Sukys
Date: September 25, 2008
To: Renee Marler (Regional Counsel); Edward Carranza, Leslie Rogers
Length: 4 pages
3. From: Raymond Sukys
Date: September 25, 2008
To: Renee Marler (Regional Counsel), Edward Carranza, Leslie Rogers
Length: 7 pages
4. From: Raymond Sukys
Date: September 25, 2008
To: Renee Marler (Regional Counsel), Edward Carranza, Leslie Rogers
Length: 2 pages
5. From: Elizabeth Martineau (Sr. Attorney-Advisor)
Date: September 26, 2008
To: Renee Marler (Regional Counsel), Leslie Rogers, Raymond Sukys, Edward Carranza
Length: 5 pages
6. From: Renee Marler (Regional Counsel)
Date: November 04, 2008
To: Elizabeth Martineau (Sr. Attorney-Advisor), Leslie Rogers, Raymond Sukys, Edward Carranza
Length: 1 page

7. From: Edward Carranza
Date: May 11, 2010
To: Pamela Bell-Payton, Leslie Rogers, Raymond Sukys, Renee Marler (Regional Counsel)
Length: 4 pages
8. From: Renee Marler (Regional Counsel)
Date: May 17, 2010
To: Elizabeth Martineau (Sr. Attorney-Advisor), Pamela Bell-Payton, Raymond Sukys, Edward Carranza
Length: 5 pages
9. From: Edward Carranza
Date: May 20, 2010
To: Elizabeth Martineau (Sr. Attorney-Advisor), Renee Marler (Regional Counsel), Pamela Bell-Payton, Raymond Sukys
Length: 2 pages
10. From: Raymond Sukys
Date: May 20, 2010
To: Edward Carranza, Renee Marler (Regional Counsel), Elizabeth Martineau (Sr. Attorney-Advisor), Pamela Bell-Payton
Length: 2 pages
11. From: Pamela Bell-Payton
Date: May 21, 2010
To: Edward Carranza, Raymond Sukys, Elizabeth Martineau (Sr. Attorney-Advisor)
Length: 2 pages
12. From: Edward Carranza
Date: May 26, 2010
To: Elizabeth Martineau (Sr. Attorney-Advisor), Renee Marler (Regional Counsel)
Length: 4 pages
13. From: Raymond Sukys
Date: May 28, 2010
To: Edward Carranza, Renee Marler (Regional Counsel)
Length: 1 page
14. From: Edward Carranza
Date: June 8, 2010
To: Jeffrey Jamieson, Leslie Rogers, Renee Marler (Regional Counsel), Raymond Sukys
Length: 2 pages

Deliberative Process Privilege

15. From: Raymond Sukys
Date: August 25, 2009
To: Edward Carranza, Leslie Rogers
Length: 2 pages
16. From: Redacted
Date: May 06, 2010
To: Leslie Rogers, Raymond Sukys, Edward Carranza, Tahir Nadeem
Length: 1 page
17. From: Raymond Sukys
Date: May 11, 2010
To: Edward Carranza
Length: 2 pages
18. From: Susan Chu
Date: May 26, 2010
To: Edward Carranza
Length: 1 page
19. From: Edward Carranza
Date: May 26, 2010
To: Jeffrey Jamieson
Length: 5 pages
20. From: Susan Chu
Date: May 27, 2010
To: Edward Carranza
Length: 1 page
21. From: Edward Carranza
Date: May 27, 2010
To: Jeffrey Jamieson
Length: 2 pages
22. From: Jeffrey Jamieson
Date: May 27, 2010
To: Edward Carranza
Length: 2 pages
23. From: Jeffrey Jamieson
Date: May 28, 2010
To: Edward Carranza, Pamela Bell-Paton

Denial of FOIA Appeal – FTA File No. FY10-0159

Length: 3 pages

24. From: Edward Carranza

Date: June 2, 2010

To: Jeffrey Jamieson

Length: 4 pages

25. From: Jeffrey Jamieson

Date: June 4, 2010

To: Edward Carranza

Length: 4 pages

26. From: Edward Carranza

Date: June 4, 2010

To: Jeffrey Jamieson

Length: 4 pages

27. From: Edward Carranza

Date: June 8, 2010

To: Jeffrey Jamieson, Leslie Rogers

Length: 5 pages

28. From: Edward Carranza

Date: June 9, 2010

To: Jeffrey Jamieson, Leslie Rogers

Length: 5 pages

29. From: Jeffrey Jamieson

Date: June 9, 2010

To: Edward Carranza

Length: 2 pages

30. From: Raymond Sukys

Date: June 23, 2010

To: Edward Carranza, Jeffrey Jamieson

Length: 1 page

31. From: Raymond Sukys

Date: June 25, 2010

To: Edward Carranza, Jeffrey Jamieson

Length: 1 page

32. From: Raymond Sukys

Date: June 30, 2010

To: Edward Carranza, Jeffrey Jamieson

Length: 7 pages

33. From: Raymond Sukys
Date: July 12, 2010
To: Edward Carranza, Jeffrey Jamieson
Length: 6 pages
34. From: Jeffrey Jamieson
Date: July 13, 2010
To: Edward Carranza, Raymond Sukys
Length: 1 page
35. From: Raymond Sukys
Date: July 21, 2010
To: Jeffrey Jamieson, Edward Carranza
Length: 8 pages

Response

After careful consideration, and despite FTA's failure to index the withheld documents in the agency's initial determination, I must deny your appeal on two grounds pursuant to FOIA Exemption 5. First, I must affirm FTA's determination that the requested documents include "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Second, the documents you requested represent FTA's decision-making process, and fall under FOIA's deliberative process exemption. FTA may protect them to preserve the integrity of its deliberative processes. *See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988).

FOIA Exemption 5 protects "intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 49 C.F.R. § 7.13(c)(5). Exemption from disclosure under FOIA as intra-agency memorandum or letters requires a document to satisfy two conditions: "(1) its source must be a Government agency, and (2) it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds the document." *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 8 (2001). The privileges include the attorney-client privilege and the deliberative process privilege, which protects documents reflecting advisory opinions, recommendations, and deliberations by which Government decisions and policies are formulated. *Id.* (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

The documents at issue in this appeal satisfy both conditions articulated in *Klamath*. First, FTA, a Federal agency, is the source of the documents. Second, as documents reflecting advisory opinions and recommendations of FTA attorneys and employees they fall within the ambit of privileges against discovery under judicial standards that would govern litigation against FTA, namely the attorney-client and deliberative process privileges.

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." This privilege fundamentally applies to facts divulged by a client to his attorney, and "includes opinions from

attorney to client based on those facts.” *Brinton v. Dep’t of State*, 636 F.2d 600, 605 (D.C. Cir. 1980). On December 24, 2007, [REDACTED] initiated a formal Equal Employment Opportunity (EEO) complaint against FTA alleging that he encountered discrimination based on his race (African-American). This matter was dismissed, appealed, and the appeal was dismissed on July 31, 2008. Several of the withheld electronic mail messages described above were requests by Region IX employees and regional counsel for advice from FTA attorney-advisors in the Headquarters office on the appropriate handling of personnel matters involving [REDACTED]. This included, among other things, advice on taking appropriate actions in light of the past allegations of racial discrimination by [REDACTED]. The facts and opinions disclosed in these confidential communications, therefore, are protected by the attorney-client privilege. Accordingly, indexed documents 1-14 are withheld pursuant to the attorney-client privilege of FOIA Exemption 5.²

The deliberative process privilege preserves free and candid internal agency deliberations, preventing the disclosure of materials discouraging an uninhibited exchange of ideas and opinions among government employees and advisors. *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 706-07 (D.C. Cir. 1971). The privilege applies to documents that are pre-decisional and deliberative in nature. A pre-decisional document is “antecedent” to the adoption of an agency policy.” *Jordan v. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). A deliberative document is a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Factual information “inextricably intertwined” with deliberative material may be protected. *Env’tl. Prot. Agency v. Mink*, 410 U.S. at 93; *Tarullo v. U.S. Dep’t of Defense*, 170 F.Supp. 2d 271, 277-278 (D. Conn. 2001). The electronic mail exchanges indexed above contain recommendations and opinions on legal and policy questions concerning personnel matters involving [REDACTED]. The facts divulged in these communications are inextricably intertwined with the opinions and recommendations expressed by Region IX and Headquarters’ employees and attorneys. Accordingly, all thirty-five emails and corresponding attachments indexed above were appropriately withheld pursuant to FOIA Exemption 5.

The persons responsible for this determination are the undersigned and Erva Cockfield, FTA Attorney-Advisor in FTA’s Office of Chief Counsel. Title 49 CFR Section 7.18(g) requires that the General Counsel for DOT concur in this decision. In this instance, Claire McKenna, an attorney on the staff of the General Counsel, has concurred in this decision on behalf of the General Counsel.

² The agency is not required to produce a privilege log. Privilege logs are produced during discovery pursuant to the Federal Rules of Civil Procedure’s (FRCP) duty to disclose. See FRCP 26. A FOIA request is not a discovery mechanism; therefore, general provisions governing disclosure and discovery do not govern FOIA determinations. See *Gov’t Land Bank v. Gen. Serv. Admin.*, 671 F.2d 663 (1st Cir. 1982). While a determination of what may be withheld or disclosed under Exemption 5 requires references to the relevant statutory and case law in the pretrial context, as well as the FRCP, such references are analogies. See *Env’tl. Prot. Agency v. Mink*, 410 U.S. 73, 86 (1973). The fact that in civil litigation a party’s particularized showing of need may on occasion justify discovery of privileged material in order to avoid unfairness does not mean that such material is outside the scope of Exemption 5. See *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 12-14 (1988).

Denial of FOIA Appeal – FTA File No. FY10-0159

This letter constitutes the final administrative action on FTA FOIA Request No. FY10-0159. You may appeal this decision to the United States District Court for the Judicial District in which the requestor resides or has its principal place of business, the Judicial District in which the requested documents are located, or the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Rogoff', written in a cursive style.

Peter Rogoff

Legal Assistants
MICHEAL J. WAGNON
SANDRA GUERRERO
SHAUNA MARTIN

The Law Offices of
RICHARD W. SMITH
198 North Arrowhead Ave, Suite 1
San Bernardino, California

Mailing Address
POST OFFICE BOX 5039
SAN BERNARDINO CA 92412

Telephone: (909) 884-1247
Facsimile: (909) 888-0628

RICHARD W. SMITH
JENNIFER J. BENTLEY

July 6, 2011

Deputy Administrator of the Federal Transit Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

FOIA APPEAL

RE: [REDACTED] v. Ryder Transportation/Laidlaw/Parking Concepts
WCAB No: ADJ2628407
Claim No.: 950-23972-MC & CA4-005989-0
DOI: CT 11/97 - 9/10/01

Gentlepersons:

I am in receipt of the June 22, 2011 denial of our FOIA request, a copy of which is enclosed for your ready reference.

We believe, based on information found on the Omnitrans website, that Omnitrans receives Federal Transportation Funds in the operation of its transportation company in San Bernardino. We are seeking any and all documentation relating to Omnitrans' request for those Federal Funds for the period of 11/97 through 9/10/01.

It is inconceivable that a recipient of Federal Transportation Funds can obtain such funds without so much as an application. If there is more specific information you need in order to locate that documentation, please advise me immediately.

Very truly yours,

Law Offices of Richard W. Smith



By: JENNIFER J. BENTLEY
Attorney at Law

JJB:sam
cc:

Enclosure



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

JUN 22 2011

Ms. Jennifer J. Bentley
Attorney at Law
The Law Offices of
Richard W. Smith
198 North Arrowhead Avenue, Suite 1
San Bernardino, CA 92412

Our File No: FY11-0132

Dear Ms. Bentley:

This is in response to your letter of April 14, 2011, "seeking all documents relating to requests for Federal Funds from Omnitrans for the period of 11/97 through 9/10/01."

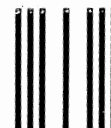
We have searched our records and find that we have no documents that are responsive to your request.

To the extent that this information is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590. An appeal must be submitted within thirty (30) days after you have received this determination. It should contain any information and arguments on which you may wish to rely, and the envelope in which the appeal is sent should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,

Tommy Carter, Director
Office of Management Planning

LAW OFFICE OF RICHARD W. SMITH
PO BOX 5039
SAN BERNARDINO, CA 92412



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Deputy Administrator of the Federal Transit Administration
Foia Appeal
1200 New Jersey Ave SE
Washington DC 20590-0001



ATTN: TCC



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JAN 17 2012

JAN 17 2012
Jennifer J. Bentley
The Law Offices of Richard W. Smith
198 North Arrowhead Avenue, Suite 1
San Bernardino, CA 92412

Re: FOIA Appeal – FTA File No. FY11-0132

Dear Ms. Bentley:

This letter responds to your July 6, 2011, letter appealing the Federal Transit Administration's (FTA) June 22, 2011, decision denying [REDACTED] request for FTA documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 522. As discussed below, your appeal is granted.

Background

In your original FOIA request, dated April 14, 2011, you requested "all documents relating to requests for Federal Funds from Omnitrans for the period of [November 1997] through [September 10, 2001]". After conducting a search of our records and finding no records responsive to your request, FTA sent a letter on June 22, 2011, denying your FOIA request to the extent that no responsive records were available.

Appeal

By letter dated July 6, 2011, you appealed FTA's decision. The administrative appeal process of the FOIA provides a responding agency with an opportunity to review its initial actions taken in response to a FOIA request, and to take corrective action where it is deemed necessary. In response to your appeal, FTA conducted a second, corrective search of our records that revealed a single responsive record of 31 pages titled Application, corresponding to Project ID CA-90-X929-00. The record was produced to you by email on August 2, 2011.

On December 6, 2011, you acknowledged receipt of the record and affirmed your desire to continue your appeal. To ensure that FTA had discovered and produced all responsive records, we conducted a third search for records related to Omnitrans from 1997 through 2001. This third search revealed only the Application corresponding to Project ID CA-90-X929-00.

Decision

Jennifer Bentley
Page 2 of 2

I am enclosing with this letter an updated version of the record produced to you in August. It reflects updates made during the intervening months related to Project ID CA-90-X929-00 and also includes a section titled "Part 4. Milestone/Progress Report" that was not produced to you in August. This additional section is not directly responsive to your request for "requests for Federal Funds from Omnitrans" and is overproduction; however, you may find it informative as part of the larger record.

To the extent that FTA found a record responsive to your request and has produced this record in full, your appeal is granted.

The persons responsible for this decision are the undersigned and Kerry Miller, FTA Assistant Chief Counsel. This letter constitutes the final administrative action on FTA FOIA Request Number FY11-0132. You may appeal this decision to the United States District Court for the Judicial District in which you reside or have a principal place of business, the Judicial District in which the requested documents are located, or the District of Columbia.


Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a long horizontal flourish extending to the right.

Therese W. McMillan

Enclosure (59 pages)


FOIA APPEAL
File No FY 11-0158

May 25, 2011


Deputy Administrator
US Department of Transportation
Federal Transit Administration
1200 New Jersey Ave. S.E.
5th Floor, East Building
Washington, D.C. 20590


Dear Deputy,

I write to Appeal the "partial denial" of my April 2, 2011 FOIA APPEAL – File No FY 11-0158 received from Tommy Carter, Director, of Office of Management Planning and dated May 17.

Among the record(s) denied is an e-mail from the Town of Sand Lake (see 2/15 correspondence to Ms Worden from  responding to the DOT's request for information. It is that record I believe would specify the Town's rationale for failing to comply with the ADA requirement to make its community van handicapped accessible, and acting instead to take the van off the road and shut down the van service. Although not a lawyer, I fail to see how this record qualifies for exemption 5 as cited in your correspondence. Neither is it an internal e-mai, but rather it is the Town's official response to the DOT, nor is it a document related to "proposed policy", either local or Federal. Do I assume correctly that all additional correspondence would have to be made available when the Town's actions are challenged in court proceedings?

It is indeed odd that no level of Federal or State government feels it has jurisdiction in assuring that a "handicapped accessible community van" is indeed made handicapped accessible under the definition of ADA law. Government seemingly has failed once again to act on behalf of its handicapped citizens.

Thank-you for your reconsideration of this FOIA Appeal.

Sincerely,


*Are you at
liberty to say
if there was any
response to
from either DOT
or DOT regarding
their correspondence
in handling removal
of the van from
service?*

cc Simeon Goldman – Attorney Disability Advocates
The Honorable Kirsten E Gillibrand, US Senator
✓ Linda Watkins Sorkin, Office of Chief Counsel
Ms Jeanine Worden, Acting Chief, Disability Rights Section

*Please forward
I have no
address*



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JAN 25 2012

[REDACTED]
[REDACTED]
[REDACTED]

Re: FOIA Appeal – FTA File No. FY11-0158

Dear [REDACTED]:

I write in response to your letter of May 25, 2011, appealing the Federal Transit Administration's ("FTA") May 17, 2011 decision denying, in part, your April 2, 2011 request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration, your appeal is granted in part and denied in part.

Background

In your original FOIA request, you requested all records created since September 24, 2010, related to FTA complaint number 10-0024, which concerned the operation of a demand-response transit van by the town of Sand Lake, New York (the "Town"). Your original FOIA request identified "particular interest" in correspondence between the Town and the FTA relating to FTA's letter of finding and request for information dated September 24, 2010, in which FTA asked the Town to respond to the complaint submitted against it.

By letter dated May 17, 2011, FTA released a number of records within the scope of your request, but withheld certain other documents from release. In withholding those documents, FTA invoked FOIA's Exemption 5, 5 U.S.C. § 552(b)(5), which encompasses the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege, among other privileges.

By letter dated May 25, 2011, you timely appealed FTA's May 17, 2011 decision. In your appeal, you specifically objected to the application of Exemption 5 to correspondence between the Town and FTA related to FTA's letter of finding.

Response

Your appeal is granted with regard to communications between FTA and the Town in response to FTA's letter of finding. Enclosed with this letter, FTA is providing you with redacted copies of communications between the Town and FTA responsive to your FOIA request. The

redactions to these documents protect internal advisory communications among FTA attorneys or between FTA attorneys and their agency clients. In addition to the redactions made to the enclosed records, FTA continues to withhold in full six pages of internal advisory communications to or from FTA attorneys. Neither the redacted portions of the enclosed records, nor the records being withheld in full, were shared with the Town.

FTA is withholding these records pursuant to FOIA Exemption 5. Exemption 5 protects “intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 49 C.F.R. § 7.13(c)(5). Exemption from disclosure under FOIA Exemption 5 requires a record to satisfy two conditions: “its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” Dep’t of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001). The relevant privileges include the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege that protects documents reflecting advisory opinions, recommendations, and deliberations by which Government decisions and policies are formulated. Id. (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)); Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

The withheld materials satisfy both conditions articulated in Klamath. First, FTA, a federal agency, is the source of the records. Second, as records reflecting advisory opinions and recommendations of FTA attorneys, they fall within the ambit of privileges against discovery under judicial standards that would govern litigation against FTA, namely the attorney-client privilege and deliberative process privileges. The attorney-client privilege protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” Mead Data at 252. This privilege fundamentally applies to facts divulged by a client to his or her attorney and “includes opinions from attorney to client based on those facts.” Brinton v. Dep’t of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

The deliberative process privilege preserves free and candid internal agency deliberations, preventing the disclosure of materials discouraging an uninhibited exchange of ideas and opinions among government employees and advisors. Sterling Drug, Inc. v. FTC, 450 F.2d 698, 706-07 (D.C. Cir. 1971). The privilege applies to documents that are pre-decisional and deliberative in nature. A deliberative document is a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

In the course of investigating FTA complaint number 10-0024, FTA staff relayed facts to, and sought the advice of, FTA attorney-advisors. The internal discussions among attorneys and between attorneys and FTA staff contained recommendations and opinions related to legal and policy questions. To ensure that such free and candid discussion can occur, these communications are appropriately protected by the deliberative process and attorney-client privileges, and thus are eligible for redaction under Exemption 5.

To the extent that FTA has redacted material from the records being provided to you and continues to withhold certain other records, your appeal is denied.

The persons responsible for this decision are the undersigned and Kerry Miller, FTA Assistant Chief Counsel. This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by John Allread, an attorney on his staff.

This letter constitutes the final administrative action on FTA FOIA Request No. FY11-0158. You may appeal this decision to the United States District Court for the Judicial District in which you reside or have a principal place of business, the Judicial District in which the requested documents are located, or the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan". The signature is fluid and cursive, with the first name "Therese" and last name "McMillan" clearly distinguishable.

Therese W. McMillan

Enclosures (2)

September 21, 2011

Via Email and U.S. Mail

Therese W. McMillan
Deputy Administrator
Federal Transit Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Dana C. Nifosi

T 202-344-4230
F 202-344-8300
dcnifosi@venable.com

Re: FOIA APPEAL – No. FY11-0166 (Westside Subway Extension Project)

Dear Ms. McMillan:

We represent the Beverly Hills Unified School District Board of Education (“Board of Education”) with regard to issues related to the Westside Subway Extension Project (“Project”) proposed by the Los Angeles County Metropolitan Transportation Authority (“MTA”). Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, we submitted a FOIA request to the Federal Transit Administration (“FTA”) on May 17, 2011. We did not receive responsive documents until August 22, 2011.

The FTA’s response stated, “To the extent that FTA does not have some of the information that you requested, this is a partial denial of your request.” The FTA failed, however, to provide several documents that are responsive to our FOIA request and are referenced in the documents that the agency did supply. Thus, FTA clearly has such documents and should have provided them pursuant to the FOIA request. Additionally, FTA failed to provide documents that typically are required to be submitted at the current stage of the Project in the New Starts process. Accordingly, this correspondence serves as an appeal of the FTA’s response and a request to provide all responsive documents within the next ten days.

The following is a list of categories of requested documents for which we contend that FTA provided an incomplete response, the FTA’s response, and our arguments supporting production of additional documents.

- A. **FOIA Request:** “All documents relating to FTA review and approval of the Project to enter into preliminary engineering, including, but not limited to, all submissions to FTA by MTA and FTA comments on MTA submissions. Such documents requested include (1) MTA’s letter of request for preliminary engineering initiation; (2) MTA’s formal request for approval to enter into preliminary engineering, and (3) FTA’s memorandum and letter admitting the Project into preliminary engineering.”

Therese W. McMillan
September 21, 2011
Page 2

FTA Response: “This folder contains MTA’s formal request for entering Preliminary Engineering (PE, FTA’s memorandum and letter approving the project into PE, and the final financial assessment that went into the project rating.”

Argument:

1. FTA provided a copy of a letter dated November 1, 2010 from MTA to FTA stating that “All of the items listed on FTA’s PE Approval Roadmap have been submitted by Metro, based on information available to date. Metro will continue to work with FTA to respond to comments and further refine Roadmap items as needed.” Pursuant to the FOIA request, however, FTA failed to provide all documents on the PE Approval Roadmap that MTA submitted to FTA, FTA’s comments, and MTA’s responses to comments.

This document also references the Financial Plan for the project, but FTA did not provide a copy of the document.

2. FTA provided a copy of a memorandum dated December 23, 2010, which recommended approval of the Project into Preliminary Engineering. In the second paragraph of that memorandum, FTA noted that in response to questions and comments from FTA on MTA’s formal request for entry into PE, MTA “provided additional information on November 8, 15, 16 and 17, 2010.” FTA, however, failed to provide a copy of the referenced FTA questions and comments, or MTA’s responses.

This document also referenced “FTA’s pre-PE risk assessment” on page 6, and listed as an attachment to the memorandum a “PMOC Pre-PE Readiness Report.” Again, FTA failed to provide these documents in response to the FOIA request, even though they are responsive to this category of requested documents as well as Category B, discussed below.

- B. **FOIA Request:** “All documents relating to the Project Management Oversight Consultant’s (“PMOC”) pre-Preliminary Engineering Cost, Scope, Schedule and Readiness Review and any risk assessments and risk registers for the Project.” (Emphasis added.)

FTA Response: “This folder contains the risk assessment the PMOC received for review. The risk assessment report contains information that is subjective in nature, resulting from a risk assessment exercise that could also be sensitive. See also Third Party Disclaimer within the report.”

Therese W. McMillan
September 21, 2011
Page 3

Argument: FTA provided the Risk Assessment Report prepared for MTA, but it did not provide any documents relating to the FTA's risk assessment. The FOIA request clearly requested documents relating to any risk assessments – not just those prepared by the project sponsor. As discussed in Paragraph A above, at a minimum there is a PMOC pre-PE Readiness Report that is responsive to this request but has not been provided.

- C. **FOIA Request:** “All documents relating to development of the Project Management Plan, including the Real Estate Acquisition Management Plan, Contingency Management Plan and required third party agreements and permits that have been identified and scheduled for the Project.”

FTA Response: “This folder contains the PMP, RAMP, and RCMP. The PMOC received multiple revisions. The RAMP contains a spreadsheet detailing proposed property acquisition with land value from high-level appraisals/estimates.”

Argument: The development of these plans is an iterative process. The PMOC receives draft plans, provides comments to the project sponsor and then receives revised versions of the plans. FTA, however, failed to produce copies of any PMOC comments on various drafts of these plans. Additionally, with the exception of the Real Estate Acquisition Management Plan, it only provided one version of the other plans.

Moreover, typically within 90 days of approval of entry into PE, a project sponsor develops and submits to FTA a third-party coordination plan relating to project stakeholders with respect to project permits. Such a plan would be responsive to this FOIA request. Given that PE approval was issued in January 2011 and this FOIA request was submitted in May 2011, such a plan is likely to have been submitted already to FTA but was not provided in response to this FOIA request.

- D. **FOIA Request:** “All documents relating to the investigation and analysis of soil gases in the vicinity of the Santa Monica Boulevard and Constellation Boulevard alternatives for the Century City station, and the Beverly Hills High School.”

FTA Response: “This folder includes a report related to soil gases: Draft Special Design Concepts for Tunnels and Stations in Gassy Ground.”

Argument: The documents produced by FTA is generic. It does not relate specifically to the investigation of soil gases for the Project, which is of particular concern in the vicinity of the Century City station given that there are numerous active and abandoned oil wells in the area. Accordingly, any documents that MTA has submitted to FTA that

Therese W. McMillan
September 21, 2011
Page 4

relate specifically to investigation and analysis with respect to soil gases for the Project should have been produced in response to this FOIA request.

If you have any questions regarding this appeal, please do not hesitate to call. I look forward to your reply.

Sincerely,



Dana C. Nifosi

cc: Lisa Korbatov, President, Board of Education



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

March 15, 2012

Margaret Strand, Esq.
Venable, LLP
8010 Towers Crescent Drive
Suite 300
Vienna, VA 22182

Re: FOIA APPEAL – No. FY11-0166 (Westside Subway Extension Project)

Dear Ms. Strand:

I write regarding to the Freedom of Information Act (FOIA) request Venable, LLP (Venable) filed with the Federal Transit Administration (FTA) on May 17, 2011, asking for documents related to the Westside Subway Extension Project (Westside Project), FTA's August 18, 2011 response, and the subsequent appeal your firm filed on September 21, 2011.

Thank you for taking time to discuss the matter over the phone Wednesday. As we discussed, FTA has identified additional documents responsive to your request, which I describe below and have enclosed with this letter. Due to the breadth of your request, I wanted to send you these documents in advance of a formal appeal decision. While this has no legal effect on the status of your appeal, my hope is that these documents will include the records you are seeking and will render the appeal moot. Please let me know as soon as possible if this is the case. If you choose to keep your appeal active, FTA will proceed with its review of the responsive records.

With some minor redactions, the following categories of documents are enclosed with this letter:

1. Records related to FTA approval of the Westside Project into Preliminary Engineering;
2. Records related to the Risk Assessment of the Westside Project; and
3. Records related to the Project Management Plan, Real Estate Acquisition Management Plan, and Cost Management Plan for the Westside Project;

FTA has withheld from the above records certain non-Federal staff resumes that are exempt from disclosure under FOIA Exemption 5 U.S.C. § 552(b)(6). Within the enclosed records, and as allowed by 5 U.S.C. § 552(b)(6), FTA has redacted certain personal contact information such as personal cell phone numbers and email addresses.

Letter to Margaret Strand

FTA has not redacted names, titles, affiliations, and work contact information. In addition, please note that several documents contain information on both the Westside Project and the Regional Connector Project. Inasmuch as your request is limited to the Westside Project, FTA has redacted information relating to the Regional Connector Project. FTA did not discover any additional documents regarding soil gasses.

Not included with the enclosed records are approximately 200 internal FTA communications about the Westside Project. In the interest of providing you some documents in advance of formally deciding your appeal, FTA has not reviewed the internal communications yet.

Please notify me at your earliest convenience if the enclosed information satisfies your request and obviates the need for FTA to continue its document review and to formally respond to your appeal. If not, FTA will process your appeal and respond appropriately.

Feel free to contact FTA Attorney Michelle Hershman at (202) 493-0197 or michelle.hershman@dot.gov with questions.

Sincerely,



Jayne L. Blakesley

Sipes, Nancy (FTA)

From: [REDACTED]
Sent: Friday, August 12, 2011 12:09 AM
To: Sipes, Nancy (FTA)
Subject: Re: FOIA FY11~0236

MS. SIPES:

I DEFINITELY WISH TO APPEAL THIS MATTER OF THIS FOIA/PA REQUEST.

I HAVE HAD MANY TRANSIT PROBLEMS FOR THE LAST 5-6 YEARS, ALL FOR THE FIRST TIME IN MY LIFE, WHERE I HAVE BEEN DENIED TRANSIT, HAD MY BAGS SUBJECTED TO SEARCH AND SEIZURE OF MY LEGAL DOCUMENTS AND OTHER ITEMS AND I HAVE AN ADVERSARIAL RELATIVE WHO WORKS FOR CALTRANS IN FRESNO, CA.

THERE ARE DOCUMENTS RELATING TO ME, BUT THEY ARE BEING INTENTIONALLY WITHHELD, AS THE FTA WISHES TO DENY ME ACCESS TO THEM. I HAVE VISITED YOUR OFFICES IN DC A FEW TIMES AND ALSO THE CA TRANSIT OFFICES, AND EACH TIME BEEN ORDERED TO LEAVE WHEN I HAVE REQUESTED DOCUMENTS RELATED TO ME, AND TOLD NOT TO COME BACK AND ASK AGAIN, WHICH IS ILLEGAL AND VIOLATED FOIA/PA STATUTES, AS THEY DID NOT SAY WHY I COULD NOT HAVE ACCESS AS THEY GAVE NO EXEMPTION OR EXCLUSION REASONS TO ME AT THOSE TIMES. MANY AGENCIES WHO HAVE LOTS OF DOCUMENTS ON ME STATE THEY DON'T HAVE ME IN THEIR SYSTEM OR THERE ARE NO DOCUMENTS WHEN IN FACT THE DOCUMENTS HAVE BEEN WITHHELD INTENTIONALLY FROM ME FOR LITIGATION REASONS OF LIABILITY. FOR LITIGATION REASONS, I APPEAL THIS DENIAL AND REQUEST PRODUCTION OF ANY DOCUMENTS RELATED TO ME IMMEDIATELY. PLEASE FORWARD THIS APPEAL TO THE APPEAL OFFICER STATED IN YOUR LETTER.

SINCERELY,

[REDACTED]

--- On Thu, 8/11/11, Nancy.Sipes@dot.gov <Nancy.Sipes@dot.gov> wrote:

From: Nancy.Sipes@dot.gov <Nancy.Sipes@dot.gov>
Subject: FOIA FY11~0236
To: [REDACTED]
Cc: Nancy.Sipes@dot.gov
Date: Thursday, August 11, 2011, 3:15 PM

Good Morning [REDACTED]

Attached you will find FTA's response to your FOIA request. Under FTA's policy, a hard copy of the response is being sent to your mailing address.

Nancy Sipes



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JAN 17 2012

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: FOIA Appeal – FTA File No. FY11-236

Dear [REDACTED]:

This letter responds to your August 12, 2011, appeal of the Federal Transit Administration's (FTA) August 3, 2011, decision denying your request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 522. I am denying your appeal for the reasons set forth below.

Background

In your original FOIA request, submitted by facsimile on July 18, 2011, you requested all records related to surveillance, involuntary medication, and other activities directed against you by FTA from the time you became a California resident in 1985.

FTA conducted a search of our records and found that we did not have any records responsive to your request. By letter dated August 3, 2011, FTA notified you that we did not have any responsive records and, to that extent, denied your request.

Appeal

By email dated August 12, 2011, you appealed FTA's August 3, 2011, decision. In your appeal, you also observe that previous denials of records by FTA and other agencies did not cite a specific "exemption or exclusion" under the FOIA.

Response

After careful consideration of your appeal and a review of the search for records conducted by FTA in response to your initial request, I hereby deny your appeal. FTA does not have records responsive to your request.

Your appeal states that no exemption or exclusion has been cited to you regarding your records requests. The exemptions and exclusions of the FOIA¹ permit an agency responding to a FOIA request to withhold responsive records under certain circumstances. I emphasize that FTA is not withholding records from you and is not claiming an exemption under the FOIA. Rather, no such records exist in FTA's possession.

Conclusion

The persons responsible for this decision are the undersigned and Kerry Miller, Assistant Chief Counsel. This decision constitutes the final administrative action on FOIA Request No. FY11-236. You may seek judicial review of this decision in the United States District Court for the Judicial District in which the requestor resides or has a principal place of business, the Judicial District in which the requested documents are located, or the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a stylized flourish at the end.

Therese W. McMillan

¹ 5 U.S.C. § 552(b)(1)-(9) (exemptions); § 552(c)(1)-(3) (exclusions).

November 30, 2011

Deputy Administrator of the Federal Transit Administration
1200 New Jersey Avenue, S.E., 5th Floor, East Building
Washington, DC 20590

RE: FREEDOM OF INFORMATION
ACT APPEAL
Your file number FY12-0013

Dear FOIA officer:

This is an appeal under the Freedom of Information Act.

This appeal stems from the Federal Transit Administration's ("FTA") failure to perform a diligent search of their records pursuant to 22 CFR §503.3(c) and removal of information from the documents pursuant to Exemption 6, as set forth in 5 U.S.C. §552(b)(6). The requested documents are largely made up of communications between Ray Tellis, FTA employee and my client, Access Services' former employee, [REDACTED].

On September 8, 2011, I requested documents under the Freedom of Information Act. My request was assigned file number FY12-0013. On November 3, 2011, my office received a response to my request in a letter signed by Nancy Siper on behalf of Tommy Carter. My response included several pages of documents but did not, I believe, contain all documents available that are responsive to my request.

By way of background, my client, Access Services, is a local public agency charged with administering the Los Angeles Coordinated Paratransit Plan on behalf of the 45 public fixed route transit entities in Los Angeles County, CA. Such plans are required under DOT regulations issued pursuant to 42 USC §12143 (ADA Title IIb). Pursuant to 49 C.F.R. §§ 37.139-147, this plan was approved by the FTA. By this means complementary ADA paratransit comparable to the service provided by the applicable fixed route operators in Los Angeles County, which are Access Services members, is furnished to persons with disabilities. Access Services is a direct grantee of funds by the FTA under the 5310 program through a master grant agreement.

Los Angeles Office
445 South Figueroa Street
Suite 2700
Los Angeles, California 90071

Phone: (213) 627-8149
Fax: (213) 627-0169

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Suite 1200
Oxnard, California 93036

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Toll Free: (866) 627-8471

JAMES G. JONES, ESQ.
PARTNER
jjones@joneslester.com

5769.59/169371.1

██████████, a former employee of Access Services, was terminated for insubordination and other causes in March of 2010. He later sued asserting for the first time that he was subjected to discrimination based upon his race and national origin, during the years of 2008, and before, until the date of his termination in March 2010. In addition to ██████████ claims for discrimination, he alleges that he was terminated not only because of his complaints of discrimination to employees of Access Services (which never occurred) but also as a result of his making "whistleblower" statements to outside governmental agencies about his discrimination as well as alleged Access Services' misuse of governmental (i.e., FTA) funds. ██████████ claims that he notified the FTA, through Mr. Tellis, that Access Services was engaging in race discrimination and misuse of FTA grant funding and it was because of that he was discharged. Based upon the foregoing, allegations, on September 8, 2011, we requested the deposition of Mr. Tellis pursuant to 49 C.F.R. §9.15. Concurrently, in accordance with 49 C.F.R. §9.13 we requested documents depicting all communications between the parties.

My September 8, 2011 FOIA request sought the following information:

- (1) All DOCUMENTS from January 1, 2001 to present pertaining to any complaints made by ██████████ to Ray Tellis regarding racial discrimination at Access Services.
- (2) All DOCUMENTS from January 1, 2007 to present pertaining to any alleged derogatory racial slurs by Access Services directed at ██████████ that are in the possession of Ray Tellis.
- (3) All DOCUMENTS from January 1, 2007 to present pertaining to an alleged hostile racial environment at Access Services as reported to Ray Tellis by ██████████.
- (4) All DOCUMENTS from January 1, 2007 to present pertaining to ██████████'s alleged complaints to anyone at Access Services which were forwarded to Ray Tellis or that Ray Tellis received a copy of.
- (5) All DOCUMENTS which describe Ray Tellis' duties as Team Leader (Community Planner) at the Federal Transit Administration, Los Angeles Office.
- (6) To the extent not provided pursuant to the above requests, All DOCUMENTS which reflect communication between Ray Tellis and ██████████ during the period of January 1, 2007 to present.

Unfortunately by letter dated October 25, 2011 (received by this office on November 3, 2011), we received only a small fraction of the documents requested. Of the materials received, many of the documents, specifically emails between [REDACTED] and Mr. Tellis were completely redacted pursuant to Exemption 6, USC §552(b)(6) on the grounds that the information would constitute an unwarranted invasion of personal privacy. We do not believe that there is any information contained in the emails that pose an unwarranted violation of personal privacy and point out that most if not all were sent and received using the email facilities of our client and the email facilities of the FTA while the sender and recipient were employees of those respective agencies.

Failure to Conduct Diligent Search

I do not believe that the FTA conducted an extensive search of the electronically stored documents. Our requests ask for numerous documents regarding communications between [REDACTED] and Mr. Tellis regarding complaints of discrimination by [REDACTED], some requests going back to 2001. Additionally, we also requested *"all documents which reflect communication between Ray Tellis and [REDACTED] during the period of January 1, 2007 to present."*

The response we received included only a handful of emails between [REDACTED] and Mr. Tellis yet we are aware of more than 200 such e-mails in the year 2008 alone, all of which were sent to and from Access Services and FTA email addresses. [REDACTED] and Mr. Tellis were more than merely work acquaintances, they were friends. The parties often met for lunch and had numerous email discussions throughout the workday. Based upon the relationship of the parties, it is reasonable to assume that not only would the FTA have those files my client can find, but also others of which we are unaware. Therefore, I do not believe that a diligent search of the FTA stored materials could yield such a low number of communications between the parties from 2007 to the present. By way of example, attached hereto as Exhibit "A" is an email received from your office from Ray Tellis of the FTA to my client's former employee, [REDACTED]. In the email, Mr. Tellis makes reference to an earlier email from [REDACTED] which was not included in your production. If a diligent search had been conducted the earlier email from [REDACTED] would have been included in the production. It was not. This is just one example of the many documents that are missing from your production.

Redaction of Information pursuant to 5 U.S.C. (b)(6)

Additionally, your letter indicates that you have removed personal privacy information from the limited documents produced. I do not agree that the requested materials contain information that constitutes an unwarranted invasion of personal privacy and ask that the Chief reverse the removal of this information, conduct a more extensive search of the files and waive all associated fees. I further request that if any

portions of the requested documents are withheld, the Chief should describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for your belief that the alleged statutory justification applies in this instance. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973, cert. denied., 415 U.S. 977 (1974)). Additionally, I ask that those portions of the documents which may indeed be properly exempted from disclosure by exemption 6, should be released pursuant to the Chief's powers of discretionary release. The Department of Transportation has a presumption of openness, I ask that this openness be utilized in this instance.

To qualify for exemption 6 under the "unwarranted disclosure of personnel, medical information or similar documents" the document must fall within the category of "personnel and medical files and similar files. See 5 USC §552(b)(6). None of the documents requested included personnel files or any FTA employee or any other employee nor did we request any documents that contained medical information of an FTA employee or anyone in the public at large. Therefore, I can only assume that the information was redacted under the "similar files" heading. The issue of what constitutes similar files has been defined by the US Supreme Court. The Court held that based upon a review of legislative history of the FOIA, Congress intended the term "similar files" to be interpreted broadly, rather than narrowly. See *United States Department of State v. Washington Post Co.*, 456 U.S. 595 (1982). The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." *Id.* Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. See *Associated Press v. DOD*, 554 F.3d 274, 291 (2d. Cir. 2009)(finding that records applying to detainees whose family members seek protection are "similar files" explaining that "[t]he phrase 'similar file' has a broad meaning and encompasses the government's records on an individual which can be identified as applying to that individual"). The information redacted from the files received does not contain information that pertains to specific individuals. It appears that the Agency has simply redacted names of people from the correspondence. The correspondence did not apply to a particular individual nor could it be identified as applying to a particular individual. In fact, some of the material was redacted from documents that were authored by my client, Access Services. It belies logic that an FTA production would redact information from the documents that were authored by the very organization seeking production of the documents.

Further, some of the emails produced appear to have been redacted in their entirety. We can see no reason why the entire message which was sent in an official capacity between two governmental agencies would be redacted in its entirety. Examples attached hereto as Exhibit "B". The redacted messages are the very types of documents we are seeking. A former employee (██████████) of a governmental agency (Access Services) has alleged that discrimination and misuse of public (FTA) funding is rampant throughout his former employer and that he reported these very issues to that government

agency (FTA). Because of these allegations the communications between these parties is vital and cannot possibly contain information which constitutes an unwarranted invasion of privacy. The emails were sent between two government employees using official government email accounts. It is evident that the FTA does not believe that Mr. Tellis' emails have a reasonable expectation of privacy in general as evidenced from the fact that various emails were produced from his account. Therefore, I struggle to understand why certain messages have been redacted in their entirety. As long time counsel and board member of a Federal Agency, I am aware that it is typical for an agency to inform employees, either in meetings or through an employee handbook that email systems were monitored or can be accessed at any time. As such, Mr. Telis does not have an expectation of privacy in any emails sent to or received to his work account. See *In re Asia Global Crossing, Ltd.* 322 B.R. 247, 256 (Bankr.S.D.N.Y.2005) (collecting authorities).

I request a description of the withheld material. I am entitled to the description of the withheld material that is "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Although we are not currently engaged in FOIA litigation, it would certainly be helpful if the FTA were to provide such an index if it were to decide to continue withholding any portions of the requested documents.

Public Policy Interest in Disclosure

Finally, because disclosure would be in the public interest in exposing racial discrimination occurring in a governmental agency, the Chief should release any materials which happen to be covered by exemption 6 by utilizing the discretionary release powers. Release of materials is considered to be in the public's interest if the benefit to the public outweighs any harm likely to result from disclosure. See *DOD v. FLRA*, 510 U.S. 487, 497 (1994) ("we must weight the privacy interest...in non disclosure...against the only relevant public interest in the FOIA balancing analysis- the extent to which the disclosure of the information sought would shed light on than agency's performance of its statutory duties or otherwise let citizens know what their government is up to") (quoting *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989); see also, *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (noting that if requested information falls within Exemption 6, the next step in the analysis is to determine whether 'disclosure would constitute a clearly warranted invasion of personal privacy...by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information').

The plaintiff in our case has alleged that he was exposed to systematic racial discrimination as well as witnessed misuse of government funding while employed by a governmental agency. As counsel of the public agency (Access Services) I am attempting to investigate the claims and seek to expose, or disprove those claims. The requested

documents, have the potential to expose racial discrimination occurring in within the confines of a governmental agency, namely, Access Services or to disprove its existence.

Further, the requested documents have the potential to provide the names and information of witnesses who may have information regarding whether alleged racial discrimination occurred. It is vital that all document be produced, without redaction, so that the discussion can be read as a whole. Not all complaints of discrimination utilize the actual word "discrimination" and not all forms of discrimination are illegal. Therefore, it is essential that we be able to evaluate the discussions between Mr. Tellis and [REDACTED] in their entirety to identify whether or not the discussions even hint that there was discrimination occurring within the government.

Finally, the documents may contain information that can expose collusion. We are aware that [REDACTED] and Mr. Tellis had discussions about the FTA's policy preventing employees from participating in the litigation process for private litigants and that subsequent to receiving that information, [REDACTED] amended the factual assertions of his complaint changing the agency he to which he claimed he blew the whistle from a an individual at a local California agency to Mr. Tellis at the FTA.. The requested documents could very well contain information that outlines these discussions or an agreement between the parties that Mr. Tellis would support [REDACTED] unsubstantiated claims. It is within the public's interest to have such information as Access Services is a publicly funded agency, all funding utilized by Access Services comes directly from the public and most of that from the FTA. It is hard to image materials falling more squarely within the goal of FOIA; the full illumination of the internal functions of a governmental agency, or the schemes of agency employees that have the potential to affect the public good. See *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 418 (D.D.C. 1976). (there is an "obvious public interest in a full and thorough airing of . . . serious abuses that did in fact occur, in the hope that such abuses will not occur in the future."). Compared to that important goal any balancing must tip in favor of complete disclosure.

CONCLUSION

It appears that the Agency has acted arbitrarily and capriciously by failing to conduct a diligent search of the records and improperly redacting information in requested materials.

Disclosure of the requested materials would not injure the goal of exemption 6; the protection of unwarranted disclosure of personnel, medical information or similar documents. Even if some aspects of the documents are within exemption 6, the Chief should use the discretionary release powers to disclose the materials because to do so would be in the public interest.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. 5 U.S.C. §552(a)(6)(ii). Time is of the essence in this matter. If this appeal is denied or the Agency's response is not forthcoming within 20 working days, my client reserves its rights under FOIA to seek judicial review, including the award of attorney's fees. I await your prompt reply.

Very truly yours,


James G. Jones, Esq.

JGJ:hl



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JAN 17 2012

James G. Jones, Esq.
300 E. Esplanade Drive
Suite 1200
Oxnard, CA 93036-1247

Re: FOIA Appeal – FTA File No. FY12-0014¹

Dear Mr. Jones:

This letter responds to your November 30, 2011 letter appealing the Federal Transit Administration's (FTA) October 25, 2011 decision partially denying Access Services' request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration, your appeal is denied for the reasons set forth below.

Background

On September 8, 2011, on behalf of your client, Access Services, you submitted a request for documents pursuant to FOIA. You requested that FTA produce the following:

1. "All DOCUMENTS ... from January 1, 2001 to present pertaining to any complaints made by [REDACTED] to Ray Tellis regarding racial discrimination at Access Services.
2. "All DOCUMENTS from January 1, 2007 to present pertaining to any alleged derogatory racial slurs by Access Services directed at [REDACTED] in the possession of Ray Tellis.
3. "All DOCUMENTS from January 1, 2007 to present pertaining to an alleged hostile racial environment at Access Services as reported to Ray Tellis by [REDACTED].
4. "All DOCUMENTS from January 1, 2007 to present pertaining to [REDACTED] alleged complaints to anyone at Access Services which were forwarded to Ray Tellis or that Ray Tellis received a copy of.
5. "All DOCUMENTS which describe Ray Tellis' duties as Team Leader (Community Planner) at the Federal Transit Administration, Los Angeles Office.

¹ In earlier communications, we informed you that your request was assigned file number FY12-0013. This was a typographical error. The correct file number of your request is FY12-0014.

6. “To the extent not provided pursuant to the above requests, All DOCUMENTS which reflect communication between Ray Tellis and [REDACTED] during the period of January 1, 2007 to present.”

By letter dated October 25, 2011, FTA responded to your request by producing several hundred pages of responsive records, a large part of which consisted of email communications between [REDACTED] and Tellis. By the same letter, FTA partially denied your request by redacting certain information from the produced records to protect personal privacy pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

Appeal

You are appealing FTA’s partial denial of the requested documents on two grounds: (1) that FTA did not conduct a sufficient search for records pursuant to the requirements of the FOIA, and (2) that information was improperly withheld under Exemption 6. You further request that FTA choose to release the redacted information, irrespective of its protection under Exemption 6, by applying whatever authority the agency has to make discretionary releases of records.

You also have requested an index of redacted material identifying the withheld information and the FOIA exemption under which it is withheld.

Response

After careful consideration of your appeal and after a review of FTA’s search for records and the redacted information, I must deny your appeal on both grounds. Furthermore, the records in question are contained in an agency system of records and are retrievable by an individual’s name or other personal identifier. As such, they are protected by the Privacy Act of 1974, 5 U.S.C. § 552a. To the extent that disclosure of the redacted portions of these records is not required by FOIA, 5 U.S.C. § 552a(b)(2), the FTA does not have discretion to release them.

I am granting, however, your request for an index of the redacted material, all portions of which were redacted pursuant to Exemption 6.

Failure to Conduct a Diligent Search

Your appeal argues that FTA failed to “conduct[] an extensive search of the electronically stored documents,” and that you are aware of communications between [REDACTED] and Tellis’ FTA email address that do not appear among FTA’s produced records. You also identify at least one “gap” in an email conversation, in which an email produced to you makes reference to another email that does not appear in the production. After reviewing the search that FTA conducted in response to your FOIA request, I have determined that FTA conducted a diligent and reasonable search for records.

FOIA requires an agency to conduct a search that is “reasonably calculated to uncover all relevant documents”. Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The standard is

one of reasonableness and is satisfied, in part, by an agency determining where responsive records are likely to be located and searching those locations in good faith. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990) (citing Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978)).

Your FOIA request, with the exception of item 5, focused on information that had been communicated to Ray Tellis either directly or indirectly. To discover responsive records, FTA searched locations where those records were likely to be located, particularly Tellis' hard drive files, Tellis' active email folders, and Tellis' archived email folders. The search resulted primarily in email communications spanning several years, relating to both work and personal matters.

I find that FTA searched diligently, reasonably, and in good faith, and thus deny that portion of your appeal.

Redaction of Information Pursuant to FOIA Exemption 6

You also appeal FTA's decision pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to redact certain personal information from its October 25, 2011 production. I affirm FTA's redactions of each document because the redactions are necessary to prevent an unwarranted invasion of personal privacy.

The following is a description of the material redacted from our production to you:

1. Document: Email conversation
Date: February 7, 2007
From: Ray Tellis
To: [REDACTED]
Redacted material: (1) Name of Access Services complainant whose complaint was unrelated to the subjects raised in your FOIA request items 1 through 4; (2) email address of a friend of the complainant which the complainant used to make his/her complaint.
2. Document: Formal letter
Date: June 19, 2009
From: [REDACTED]
To: Raymond Tellis
Redacted material: (1) Name of an Access Services complainant whose complaint was unrelated to the subjects raised in your FOIA request items 1 through 4; and (2) names of the complainant's relatives who assisted the complainant in making his/her complaint.
3. Document: Formal letter
Date: June 19, 2009
From: [REDACTED]
To: [Redacted]

Redacted material: (1) Name and home address complainant's relative who assisted complainant in making a complaint against Access Services; and (2) name and home address of complainant whose complaint was unrelated to the subjects raised in your FOIA request items 1 through 4.

4. Document: Email conversation

Date: June 22, 2009

From: [REDACTED]

To: Ray Tellis

CC: [REDACTED], [REDACTED]

Redacted material: (1) Name and residence of an Access Services complainant whose complaint was unrelated to the subjects raised in your FOIA request items 1 through 4; (2) names of the complainant's relatives who assisted the complainant in making his/her complaint; and (3) the last names of two Access Services employees specifically mentioned in the complaint.

5. Document: Email

Date: July 17, 2009

From: Ray Tellis

To: [REDACTED]

CC: [REDACTED]

Redacted material: Name, home address, and personal contact information of a complainant whose complaint against Access Services was unrelated to the subjects raised in your FOIA request items 1 through 4.

6. Document: Email

Date: August 31, 2009

From: Ray Tellis

To: [REDACTED]

CC: [REDACTED]

Redacted material: Name, home address, and personal contact information of a complainant whose complaint against Access Services was unrelated to the subjects raised in your FOIA request items 1 through 4.

7. Document: Email

Date: September 4, 2009

From: Ray Tellis

To: [REDACTED]

CC: [REDACTED]

Redacted material: Name and personal contact information of a rider, and the name of a complainant of the rider, whose complaint against Access Services was unrelated to the subjects raised in your FOIA request items 1 through 4.

8. Document: Email conversation

Date: September 10, 2009

From: Ray Tellis

To: [REDACTED]

CC: [REDACTED]

Redacted material: (1) Name, home address, and personal contact information of a complainant whose complaint against Access Services was unrelated to the subjects raised in your FOIA request items 1 through 4 and who believes that s/he was the subject of retaliation for complaining against Access Services; (2) first names of employees of Access Services who were specifically mentioned in the rider's complaint.

9. Document: Email

Date: September 10, 2009

From: Ray Tellis

To: [REDACTED]

Redacted material: (1) Names of attached files that contain personally identifiable information about Access Services complainants whose complaints were unrelated to the subjects raised in your FOIA request items 1 through 4; and (2) names of complainants.

10. Document: Email

Date: September 17, 2009

From: [REDACTED]

To: [REDACTED]

CC: Ray Tellis, [REDACTED]

Redacted material: Name of a person who had complained of mistreatment by Access Services unrelated to the subjects raised in your FOIA request items 1 through 4.

11. Document: Email

Date: April 10, 2011

From: [REDACTED]

To: Ray Tellis

Redacted material: Personal message on the occasion of a life event.

12. Document: Email conversation

Date: September 1, 2011

From: [REDACTED]

To: Ray Tellis

Redacted material: Personal message on the occasion of a life event.

Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(6). The application of Exemption 6 is therefore a two-part analysis: (1) the information in question must be part of a personnel, medical, or similar file; and (2) its disclosure would constitute a "clearly unwarranted invasion of personal privacy."

As you observe in your appeal, the U.S. Supreme Court instructed in Department of State v. Washington Post Co. that the category "similar files" should be interpreted broadly. 456 U.S.

595 (1982). In that case, the Court reiterated that “nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its ‘personnel’ files,” id. at 601 (quoting Dep’t of Air Force v. Rose, 425 U.S. 352, 372 (1976)), and reasoned that “information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than ‘personnel’ or ‘medical’ files.” Id. Rather, “[Exemption 6 is] intended to cover detailed Government records on an individual which can be identified as applying to that individual. When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person’s privacy.” Id. at 602 (internal citations and quotations omitted).

The information withheld consists of names, contact information, and places of residence, and in two instances contains messages relating to a personal life event. All of the redacted information can clearly be identified as applying to particular individuals who have privacy interests in this information. Information need not be intimate for a privacy interest to exist, see Washington Post Co., 456 U.S. at 600, yet, where the information identifies complainants, it does happen to be intimate. Making a complaint against a paratransit provider can be an emotional experience, and can relate to such intensely personal matters as disability, social equality, mobility, and independence.

Even where a privacy interest exists in an agency record, production may be appropriate if the public’s interest in the information outweighs that privacy interest. In this matter, I find that the public interest will be served very little, if at all, by disclosure of the redacted information. The public interest invested in a FOIA request is not a general one. “[T]he basic purpose of the Freedom of Information Act [is] to open agency action to the light of public scrutiny.” Rose, 425 U.S. at 372 (internal quotations omitted). “Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens ... that reveals little or nothing about an agency’s own conduct.” DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 773 (1989).

Having already produced the substance of the records in question, the additional release of the identities and contact information of the non-agency persons concerned in those records would “reveal little or nothing” about the agency’s conduct. At the same time, it would represent an intrusion upon the privacy interests of those individuals. The same is true of the two redactions of personal messages between Tellis and [REDACTED]. FTA’s redactions under Exemption 6 were proper, and I deny the balance of your appeal.

The persons responsible for this determination are the undersigned and Kerry Miller, FTA Assistant Chief Counsel. This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by John Allread, an attorney on his staff.

This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0014. You may appeal this decision to the U.S. District Court for the Judicial District in which the

James G. Jones
FOIA Appeal – FTA File No. FY12-0014
Page 7 of 7

requestor resides or has its principal place of business, the Judicial District in which the requested documents are located, or the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a stylized flourish at the end.

Therese W. McMillan



U.S. Department
of Transportation
**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

JUL 05 2012

Mr. Simmie Graves, Jr.
President
Computer Design Solutions
855 Folsom Street, Unit 142
San Francisco, CA 94107

Re: Hotline Protest – Case No. H11E007CC and FOIA Appeal – FTA No. FY12-0128

Dear Mr. Graves:

This letter responds to your March 26, 2012 letter to the Federal Transit Administration (FTA) in which you: (1) lodge a protest of FTA's response to the U.S. Department of Transportation Office of Inspector General (OIG) Hotline Case No. H11E007CC; and (2) appeal FTA's response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7.

On the first issue, the appropriate party with whom to lodge an appeal of the process or decision to close the complaint is the OIG. FTA prepared and provided its response to OIG as part of the Department of Transportation's hotline complaint process, which is conducted by the OIG. As indicated in the OIG closure letter addressed to you and dated June 13, 2011 which you shared with FTA as an attachment to your FOIA request dated February 6, 2012, OIG reviewed FTA's response and closed Hotline Case No. H11E007CC. Any further questions related to this Case should be directed to the OIG.

On the second issue, after careful consideration, your FOIA appeal is granted in part and denied in part for the reasons set forth below.

Background

By letter dated February 6, 2012, you submitted a FOIA request seeking certain documents related to FTA's investigation of DOT Hotline Case No. H11E007CC, specifically:

- All documents obtained and reviewed by the FTA during the investigation.
- Name(s) of persons from the FTA who conducted the investigation and a copy of the written determination(s) made (include any handwritten notes).
- Name(s) of Transbay Joint Powers Board employees interviewed or contacted. Please include any handwritten notes and responses to FTA's request.
- A copy of the FTA Compliance Review Report for California DOT and any local MUNI and TJPA transit reports.

On March 8, 2012, FTA produced documents responsive to your request. At the same time, FTA partially denied your request by withholding certain internal agency email communications pursuant to FOIA Exemption 5.

Appeal

By letter dated March 26, 2012, you appealed FTA's response to your FOIA request in two ways:

- (1) You stated that "[t]he grounds for exemption 5 of the FOIA, 5 U.S.C. Section 552(b)(5) to not produce emails does not excuse FTA from producing those documents in some portion. ... Even redacted correspondence should be forwarded."
- (2) You also stated, "I hereby request that any withheld email correspondence and any other records be released and made available to me."

Response

Your appeal is granted in part and denied in part. Enclosed with this decision are redacted versions of the emails that FTA withheld from its March 8, 2012 production. Each redaction has been made pursuant to FOIA Exemption 5.

Exemption 5 protects "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption from disclosure under FOIA Exemption 5 requires a record to satisfy two conditions: "its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Ass'n, 532 U.S. 1, 8 (2001). The most common privileges include the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege that protects documents reflecting advisory opinions, recommendations, and deliberations by which government decisions and policies are formulated. Id. (citing NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150 (1975)); Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

The withheld emails are all internal to FTA. No communication between FTA and Parsons Transportation Group (a company that was the focus of your appeal letter) or TJPA was withheld from you. The enclosed emails were created in response to a hotline complaint referred by the DOT Office of the Inspector General, and the substance of the emails concerns the strategy and procedures of FTA personnel for investigating and responding to the OIG referral. The emails touch on the needs of the OIG, the involvement of the FTA regional office, examining information from TJPA, and other subjects requiring employees' candid discussion.

The emails fall within the deliberative process privilege, which preserves free and candid internal agency discussions, preventing the disclosure of materials discouraging an uninhibited exchange of ideas and opinions among government employees and advisors. Sterling Drug, Inc. v. Fed. Trade Comm'n, 450 F.2d 698, 706-07 (D.C. Cir. 1971). The privilege applies to documents that

Simmie Graves

Hotline Protest – Case No. H11E007CC and FOIA Appeal – FTA No. FY12-0128

Page 3 of 3

are pre-decisional and deliberative in nature. A deliberative document is a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

FTA is producing the headers of the emails to you. FOIA requires the disclosure of any reasonably segregable nonexempt portion of a record. 5 U.S.C. § 552(b). Even if an agency determines that a record is properly exempted from disclosure, “the agency must still release ‘any reasonably segregable portion’ after deletion of the nondisclosable portions.” Oglesby v. U.S. Dep’t. of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (quoting 5 U.S.C. § 552(b)).

In this case, the headings of the emails contain factual, rather than deliberative, information. They can be easily separated from the exempt portions of the emails, and the information they contain is not so inextricably intertwined with the exempt information that they are reduced to being of “minimal or no information content” in their isolation. Mead Data Cent., 566 F.2d at 260.

Therefore, your appeal for “any withheld email correspondence” is denied. Your appeal for redacted copies of the withheld correspondence is granted.

The persons responsible for this determination are the undersigned and Christopher Hall, FTA Attorney. This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by John E. Allread, an attorney on his staff.

This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0128. You may appeal this decision to the U.S. District Court for the judicial district in which you reside or have your principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Therese W. McMillan', with a stylized flourish at the end.

Therese W. McMillan

Enclosure (4 pages)

From: [Griffo, Paul \(FTA\)](#)
To: [Hall, Christopher \(FTA\)](#)
Subject: AM New York Withdrawal of appeal
Date: Monday, April 16, 2012 6:32:03 PM

Here you go.

Paul Griffo

Senior Public Affairs Officer
Federal Transit Administration
Washington, DC 20590
202-366-4064

From: Marc Beja [mailto:Marc.Beja@am-ny.com]
Sent: Monday, April 16, 2012 6:27 PM
To: Griffo, Paul (FTA)
Subject: Re: FW: January PMOC Report For ESA

Hi Paul,
I'm withdrawing my FOIA appeal, since they have been re-posted with the missing information.

Thanks,
Marc

Please note new office phone number

Marc Beja
Reporter
amNewYork
office: (646) 293-9413
mobile: (646) 584-8221 >>> <Paul.Griffo@dot.gov> 4/16/2012 12:45 PM >>>
Marc,

Would you please shoot me an email that I can pass along to notify our legal team that you're withdrawing your FOIA appeal?

Thanks!

Paul Griffo

Senior Public Affairs Officer
Federal Transit Administration
Washington, DC 20590
202-366-4064

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Fax (860)667-3635

May 14, 2012

Deputy Administrator
Federal Transit Administration
Washington DC 20590

ATTN: FOIA APPEAL

RE: FY 12-0175

VIA E-MAIL AND POSTAL MAIL

To the Deputy Administrator:

This is an appeal of certain redactions in records received in FY12-0175.

FTA's response to this FOIA request was dated May 9, 2012, the envelope was metered as of May 10, 2012, and the package was received on May 12, 2012. The appeal is timely under the regulations.

The cover letter in the response cites both Exemption 6 of the FOIA and Exemption 5 of the FOIA for certain redactions in the enclosed records.

I am limiting this appeal to the following record or records (the "subject records"):

- E-mail dated March 7, 2012, 11:09 a.m., from Katherine M. Killebrew of Government Accountability Office (GAO) to Angela Dluger of FTA.
- E-mail dated March 7, 2012, 10:48 a.m., from Angela Dluger of FTA to Katherine M. Killebrew of GAO.
- E-mail dated March 7, 2012, 11:19 a.m., from Katherine M. Killebrew of GAO to Jonathan Klein of FTA and Derrin Jourdan of FTA.

(I reserve the right also to appeal redactions in other records in this same FOIA request.)

Although the handwriting pertaining to the redactions of the subject records is unclear to me, it appears that there may be claims of both Exemption 6 and Exemption 5.

If Exemption 6 is in fact being invoked, that would appear to be a misapplication of this exemption. My inference from the redacted records, considering, among other factors, their widespread dissemination to other officials, is that the content is not personal. Accordingly, please withdraw Exemption 6 as a bar to the release of the subject records.

That leaves Exemption 5, which appears to be claimed for all of the subject records. I submit that this is a misapplication of Exemption 5.

Exemption 5 pertains to "inter-agency" or "intra-agency" records. I call your attention to the *Department of Justice Guide to the Freedom of Information Act* ("DOJ Guide"), which states, at page 359, that as an "initial consideration" under Exemption 5 it must be determined whether the records are either "inter-agency" or "intra-agency" records. They are neither in this case, and thus the Exemption 5 privilege cannot be invoked.

The FTA is an "agency" under the FOIA. The subject records are not "intra-agency" records, because they represent communications between the FTA and another party.

GAO is *not* an "agency" under the FOIA, because it is an arm of Congress, not the Executive Branch. Accordingly, the subject records are not "inter-agency" records.

There is a case on point. See FOIA Guide, at page 364, as follows:

"[T]he D.C. Circuit held that documents conveying advice from an agency to Congress for purposes of congressional decisionmaking are not 'inter-agency' records under Exemption 5 because Congress is not itself an 'agency' under the FOIA...."

(Citing to *Dow Jones & Co., v. DOJ*, 917 F.2d 571 (D.C. Cir. 1990).)

In summation, the Exemption 5 claim fails to meet the threshold test of application only to "inter-agency" or "intra-agency" records. Further, the D.C. Circuit U.S. Court of Appeals has explicitly ruled against Exemption 5 privilege in a case involving documents conveying advice from an agency to Congress for purposes of Congressional decisionmaking, as is the situation with the subject records.

Accordingly, all claims to privilege in the subject records are inappropriate.

Please undelete the redactions and forward a complete version of the subject records within the time limit required by FOIA regulations.

Sincerely,

/s/

Sid Goldstein, Editor
TRANSIT ACCESS REPORT

LETTER PUBLICATIONS

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West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

May 29, 2012

Deputy Administrator
Federal Transit Administration
Washington DC 20590

ATTN: FOIA APPEAL

RE: FY 12-0175 – AMENDMENT TO APPEAL

(AMENDMENT IN THE NATURE OF A SUPPLEMENT)

VIA E-MAIL AND POSTAL MAIL

To the Deputy Administrator:

I currently have an appeal pending concerning redactions in FY12-0175. This is an amendment in the nature of a supplement to the original appeal. This amendment does not make any changes in the original appeal, filed May 14, 2012; this amendment is strictly supplemental to the original appeal; this amendment pertains to different records in FY12-0175.

FTA's response to FY 12-0175 was received on May 12, 2012. Accordingly, this amendment is still timely under appeal time limits in the regulations.

This amendment pertains to redactions of e-mails the hard copies of which have been scanned and attached as three PDF files (the "additional records").

I am contesting the assertion of privilege under Exemption 5 in the redactions of the additional records.

With one exception, all of the additional records appear to be "intra-agency" e-mails between or among FTA personnel or "inter-agency" e-mails between FTA and FHWA personnel.

The one exception is an e-mail from Katherine Killebrew of GAO to "Angela," apparently referring to Angela Dluger of the FTA. Due to redactions, I do not have the date of this e-mail. I submit that this e-mail is not privileged under Exemption 5 of the FOIA because it does not pass the threshold test of being either an "intra-agency" or an "inter-agency" communication.

(See the argument on that point in my original appeal letter of May 14, 2012.)

The remainder of this supplementary appeal letter deals with the e-mails between or among FTA personnel and e-mails between FTA and FHWA personnel. These are not privileged because they do not pass the test of being “predecisional.” In fact, as I will demonstrate, they are “postdecisional” and therefore not protected.

The response letter issued by the FTA with FY12-0175, dated May 9, 2012 (the “response letter”), suggests that the “deliberative process privilege” is the privilege that FTA relies on in invoking Exemption 5 privilege in the additional records.

I quote from the response letter as follows:

“Exemption 5 incorporates the deliberative process privilege. The basis for the privilege is to protect these working documents and to encourage open, frank exchange of opinions and recommendations between government personnel, and to protect against public confusion that might result from disclosure of reasons and rationale that are not in fact ultimately the grounds for an agency’s action.”

In this case, however, there is no implication of “an agency’s action.” The “action” that is pending, according to the subject line of various e-mails contained in the additional records, is “GAO’s Review of Paratransit Services.” I stress that this is GAO’s review, not FTA’s review. And GAO is not an “agency,” as defined by the FOIA, because it is an arm of Congress, not of the Executive Branch. Hence, no “agency action.” If no agency action, there is no “deliberative process.” If no deliberative process, no privilege in the records.

I call your attention to the *Department of Justice Guide to the Freedom of Information Act* (“*DOJ FOIA Guide*”), regarding Exemption 5, concerning the deliberative process privilege, at page 368:

“Traditionally, courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. First, the communication must be predecisional, i.e., ‘antecedent to the adoption of an agency policy.’ Second, the communication must be deliberative, i.e., ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. The burden is upon the agency to show that the information in question satisfies both requirements....’”

I further call your attention to the following guidance at page 372:

“In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law, that implement an established policy of an agency, or that explain actions that an agency has already taken. Exemption 5 ordinarily does not apply to postdecisional documents....”

The “agency” in this appeal is the FTA. The FTA was involved in some form of interaction with GAO, which is not an “agency” for FOIA purposes. Inferentially, FTA shared with GAO the FTA’s or the DOT’s policies pertaining to paratransit service under the Americans With Disabilities Act. Inferentially, such policy or policies are based on “decisions” that were finalized previously. As a matter of public policy, the dissemination of information about existing policies is not subject to Exemption 5 privilege.

In this regard, one court has noted that the “deliberative process privilege does not protect documents that merely state or explain agency decisions.”

(*Judicial Watch v. HHS*, as cited in *DOJ FOIA Guide*, at page 372 (in footnote 89).)

I submit that by extension, documents pertaining to a meeting by FTA personnel with GAO personnel at which agency decisions (i.e., FTA decisions) will be or have been discussed are also, logically, postdecisional, and thus cannot be protected under Exemption 5.

Even predecisional information is not universally protected under Exemption 5, which “does not authorize an agency to throw a protective blanket over all information.”

(*ARRL v. FCC*, as cited in *DOJ FOIA Guide*, at page 384 (in footnote 151).)

Surely, a principle that applies in the predecisional context cannot be more restrictive in the postdecisional context, and, logically, must be broader in the postdecisional context. I submit that records that are informational in the postdecisional context are not entitled to Exemption 5 privilege. Accordingly, please release the full content of the e-mails in the additional records.

There does not appear to be any court ruling that supports protection of records associated with collaboration of an agency with Congress in the service of decisionmaking by Congress. To the contrary (as stated in my original appeal letter), there is authority for the *absence* of privilege in records that an agency has shared with Congress. Therefore, there is no privilege either in such shared records themselves or in records memorializing an agency’s collaboration with Congress. The e-mails in the additional records are thus not privileged.

In summary, the additional records are not protected under Exemption 5, because they are postdecisional documents that played no part in the deliberative process of the agency.

Accordingly, all claims to privilege in the additional records, as well as the subject records identified in the original appeal letter of May 14, 2012, are inappropriate.

I also call your attention to the admonishment stated as follows in the *DOJ FOIA Guide*, at page 23:

“In administering the Act's procedural requirements, agencies should remember President Obama's pronouncement that ‘[a] democracy requires accountability, and accountability requires transparency.’ Accordingly, agencies should administer the FOIA ‘with a clear presumption: [i]n the face of doubt, openness prevails.’”

In closing, please undelete the redactions and forward a complete version of the additional records, as well as the subject records identified in the original appeal letter of May 14, 2012, within the time limit required by FOIA regulations.

Sincerely,

/s/

Sid Goldstein, Editor

TRANSIT ACCESS REPORT



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

SEP 17 2012

Mr. Sid Goldstein
Letter Publications
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Appeal – FTA No. FY12-0175

Dear Mr. Goldstein:

This letter responds to your May 14, 2012 appeal and May 29, 2012 amended appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration, your appeal is granted in part and denied in part as set forth below.

Background

By e-mail dated April 1, 2012, you requested "all correspondence, including e-mails, including attachments, issued over the name or title of the Director or the Acting Director of the FTA Office of Civil Rights and concerning or referencing the Americans with Disabilities Act and/or the Department of Transportation's ADA regulations, from March 1, 2012, to March 31, 2012."

On May 9, 2012, FTA produced documents responsive to your request. By this response, FTA partially denied your request by withholding or redacting certain records pursuant to FOIA Exemptions 5 and 6.

Appeals

By letter dated May 14, 2012, you appealed FTA's response to your FOIA request. You stated: "I am limiting this appeal to the following record or records (the 'subject records'):

- "E-mail dated March 7, 2012, 11:09 a.m., from Katherine M. Killebrew of Government Accountability Office (GAO) to Angela Dluger of FTA.
- "E-mail dated March 7, 2012, 10:48 a.m., from Angela Dluger of FTA to Katherine M. Killebrew of GAO.
- "E-mail dated March 7, 2012, 11:19 a.m., from Katherine M. Killebrew of GAO to Jonathan Klein of FTA and Derrin Jourdan of FTA."

On May 29, 2012, you submitted an amendment to your appeal. The amendment appealed "redactions of e-mails the hard copies of which have been scanned and attached" to the appeal

amendment. Eight pages of e-mails were attached to the amendment, covering conversations of March 7, 2012, March 13, 2012, and March 29, 2012.

In all cases, FTA produced the e-mail's header and withheld the body of the e-mail.

Response

Your appeal is granted in part and denied in part. In FTA's May 9, 2012 production, the agency redacted the e-mails in question pursuant to FOIA Exemption 5. Exemption 5 protects "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption from disclosure under FOIA Exemption 5 requires a record to satisfy two conditions: "its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

FTA-GAO E-Mails

Certain of the e-mails were communications between FTA personnel and GAO personnel. As stated above, the threshold determination in applying Exemption 5 is whether the records in question are the records of an "agency" within the meaning of FOIA.

FOIA defines an agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1). Furthermore, FOIA is construed according to the definitions of 5 U.S.C. § 551, which expressly exclude Congress from the definition of agency. 5 U.S.C. § 551(1)(A). Congress in this sense refers not just to the two houses of Congress, but to the entire legislative branch of government. See Mayo v. U.S. Government Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1993) (holding the Government Printing Office, a unit of Congress, not subject to FOIA). GAO, as an arm of Congress, is therefore not an agency for the purposes of FOIA and FOIA's Exemptions.

Because Congress is a non-agency, communications from an agency to Congress ordinarily fail the threshold inquiry of Exemption 5 and are outside of its protection. See Dow Jones & Co. v. Dep't of Justice, 917 F.2d 571, 573-74 (D.C. Cir. 1990). Exemption 5 may nevertheless "protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency's deliberative process." Id. at 575 (emphasis original). In this matter, however, the FTA-GAO e-mails were not generated as part of a deliberative process of FTA, but rather to assist GAO's review of paratransit services. Accordingly, I have determined that Exemption 5 does not apply to those e-mails that were sent between FTA and GAO.

FTA-FTA E-Mails

Certain other e-mails were intra-agency e-mails among FTA employees. These agency records are protected from disclosure under FOIA if they “would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 is commonly interpreted to incorporate three privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.

The deliberative process privilege preserves free and candid internal agency discussions and prevents the disclosure of materials that would discourage an uninhibited exchange of ideas and opinions among government employees and advisors. Sterling Drug, Inc. v. Fed. Trade Comm’n, 450 F.2d 698, 706-07 (D.C. Cir. 1971). The privilege applies to documents that are pre-decisional and deliberative in nature. A deliberative document is a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

Eight e-mails remain redacted according to the deliberative process privilege of Exemption 5. These e-mails contain advice and opinions exchanged among FTA employees in preparation for GAO’s site visit, including FTA’s responses to likely GAO questions, and subsequent to GAO’s site visit. With regard to these e-mails, your appeal is denied:

- March 7, 2012, from Linda Ford to Edward Carranza and Ray Tellis, re: “GAO’s Review of Paratransit Services – 542195 – Los Angeles meeting”
- March 7, 2012, from Edward Carranza to Ray Tellis, re: “GAO’s Review of Paratransit Services – 542195 – Los Angeles meeting”
- March 13, 2012, from Linda Ford to Angela Dluger, re: “GAO’s Review of Paratransit Services – 542195 – Los Angeles meeting”
- March 13, 2012, from Angela Dluger to Linda Ford, re: “GAO’s Review of Paratransit Services – 542195 – Los Angeles meeting”
- March 29, 2012, re: “Request for Meeting Summary: GAO’s Review of Paratransit Services - 542195 - Los Angeles meeting.” All four e-mails in this conversation remain redacted as originally produced.

With regard to all remaining e-mails, your appeal is granted. They are enclosed with this letter. Also enclosed is an additional page of e-mails that was not part of your appeal but which completes an e-mail conversation that you did request.

The persons responsible for this determination are the undersigned and Mr. Jayme L. Blakesley, FTA Acting Assistant Chief Counsel for General Law. This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by John E. Allread, an attorney on his staff.

This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0175. You may appeal this decision to the U.S. District Court for the judicial district in which the

Sid Goldstein

FOIA Appeal – FTA No. FY12-0175

Page 4 of 4

requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Therese W. McMillan".

Therese W. McMillan

Enclosures (8 pages)



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

JUN 19 2012



Re: FOIA Appeal—FTA File No. FY11-0183

Dear [REDACTED]:

This letter responds to your March 29, 2012 letter appealing the Federal Transit Administration's (FTA) February 24, 2012 response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. After careful consideration, your appeal is denied for the reasons set forth below.

I. BACKGROUND

By letter dated June 3, 2011, American Federation of Government Employees (AFGE) Local 3313 president Antonyio Johnson submitted a FOIA request on your behalf. The request sought FTA records of:

1. The amount of travel funds that have lapsed for Fiscal Years 2005 to the present;
2. The amount of training funds that have lapsed for Fiscal Years 2005 to the present;
3. A list of FTA employees by name and the dollar amount of training funds and the dollar amount of travel funds that have been utilized by each employee, by name and by Fiscal Year for Fiscal Years 2005 to the present.

FTA initially responded to the request on July 22, 2011. FTA provided the information requested in items 1 and 2 but stated that it did not possess records that would satisfy item 3. FTA explained that it would have had to compile various data into a new record in order to produce a record responsive to item 3, that to do so would necessitate hiring a contractor, and that in any case FOIA does not require a responding agency to create records where no responsive records exist. To the extent that FTA's search found no records responsive to item 3, FTA partially denied your request.

A. Travel Records

Although the requested travel records were not directly within FTA's control, FTA subsequently worked with you to obtain the sought-after records from other sources. Through a request FTA made to the Office of the Secretary of Transportation, FTA obtained travel records responsive to item 3 from the contractor responsible for the Department's travel management system.

On September 16, 2011, FTA produced these records for you. Travel records from fiscal year 2005 were not available because the 2005 annual fund had met its record retention period and expired with the U.S. Treasury. Also, travel records for fiscal year 2011 were incomplete because fiscal year 2011 had not yet ended when the record was produced.

On October 14, 2011, after fiscal year 2011 had ended, you asked FTA to update its production with the balance of travel records for fiscal year 2011. FTA obliged by submitting a second request to the Office of the Secretary of Transportation to obtain additional fiscal year 2011 travel records and produced these records to you on January 10, 2012.

B. Training Records

With regard to training records, FTA's July 22, 2011 response was mistaken. FTA later identified two possible sources that could satisfy your request for a list of employees and the training funds spent by each: the Office of Human Resource's Centralized Training Record and the Administrative Management Expense System (AMES). The Centralized Training Record is a manually updated list of training that is organized by employee name and cost of training. However, the Centralized Training Record has only been maintained since 2010. FTA produced 2010 and 2011 Centralized Training Record data to you on January 10, 2012.

You replied by email on January 16, 2012, requesting records that would cover the balance of your request. FTA determined that its production could be supplemented using AMES. AMES is an internal budgeting tool that allows offices to record their spending and later reconcile office records with records of actual expenditures. Like the Centralized Training Record, AMES is maintained manually and, for training related expenses, contains fields where a user can enter an employee's name and the budgeted cost of the training. By an email dated February 8, 2012, FTA explained that although AMES was expected to provide accurate information, it was only as good as what was originally entered. Because AMES is used as a budgeting tool and not a training tool, there was a possibility, for example, that offices may not have filled out all of the information fields you requested or may not have updated or deleted entries if employees changed training plans suddenly.

With that caveat, on February 24, 2012, FTA produced AMES records of training from fiscal years 2006 through 2009.

II. APPEAL

In your appeal, referring to the AMES records, you stated:

We believe that other training records exist for this time period and that the training was paid from a centralized account. We are therefore requesting these additional records for fiscal years 2006-2009.

We have already received centralized training records for fiscal years 2011 and 2010. We would like to receive the “AMES” training records for fiscal years 2011 and 2010.

III. RESPONSE

After considering your appeal and after reviewing FTA’s searches and productions of records, I must deny your appeal; FTA completed its response to your request with its February 24, 2012 production, and your appeal now seeks records that are beyond the scope of your original request.

An agency responding to a FOIA request must give a reasonable interpretation to the request’s terms and overall content, see LaCedra v. EOUSA, 317 F.3d 345 (D.C. Cir. 2003), but agencies must read and interpret a FOIA request as it was drafted, “not as either [an] agency official or [requester] might wish it was drafted”. Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984). The agency is not required to conduct additional searches based on subsequent additions to or clarifications of the request. See Kowalczyk v. Dep’t of Justice, 73 F.3d 386, 388-89 (D.C. Cir. 1996).

In this matter, your FOIA request sought, in relevant part, “[a] list of FTA employees by name and the dollar amount of training funds ... that have been utilized by each employee, by name and by Fiscal Year for Fiscal Years 2005 to the present.” Although FTA’s initial search did not reveal that it possessed responsive records, a subsequent search revealed the Human Resources’ Centralized Training Record. This record was responsive to your request, but it only covered two of the years for which you sought records. FTA consequently supplemented this list with records from AMES. In all, FTA produced such a list as you requested.

Your appeal for additional data from specific agency systems and your broad appeal for “other training records” go quite beyond the original request for “a list.” FTA is not required to produce records on administrative appeal that were outside the scope of the original FOIA request. See, e.g., Wilson v. Department of Transportation, 730 F.Supp.2d 140, 155 (D.D.C. 2010). If you seek such records, you may submit new FOIA requests for them. Because your FOIA request was satisfied as it was written and because your present appeal goes beyond the scope of that request, I must deny your appeal.

The persons responsible for this decision are the undersigned and Jayme L. Blakesley, FTA Acting Assistant Chief Counsel. This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by Claire McKenna, an attorney on his staff.

FOIA Appeal—FTA File No. FY11-0183
Page 4 of 4

This letter constitutes the final administrative action on FTA FOIA Request No. FY11-0183. You may appeal this decision to the U.S. District Court for the Judicial District in which the requestor resides or has its principal place of business, the Judicial District in which the requested records are located, or the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a long horizontal flourish extending to the right.

Therese W. McMillan



U.S. Department
of Transportation
**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

DEC - 3 2012

Sid Goldstein
Transit Access Report
Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Appeal – FTA No. FY2012-0207

Dear Mr. Goldstein:

This letter responds to your August 29, 2012, appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. Your appeal is granted as described below.

Initial FOIA Request and Appeal

Pursuant to a June 15, 2011, request from the Senate Committee on Banking, Housing, and Urban Affairs, the U.S. Government Accountability Office (GAO) is presently performing a study that includes a review of the provision of public transportation paratransit services within the United States. FTA has assisted the GAO research team by providing information and subject matter expertise as requested.

In your FOIA request, dated May 14, 2012, you requested "all written communications and materials, including e-mails, including all attachments, sent or otherwise provided between the FTA . . . and the Government Accountability Office (GAO) concerning a GAO review of paratransit services under the Americans with Disabilities Act". You also identified specific records your request was intended to include: "the GAO's draft survey instrument, the GAO's final survey instrument, copies of any GAO PowerPoints or other presentation materials that are in FTA possession, GAO memoranda or materials provided to the FTA, and FTA memoranda or materials provided to the GAO in connection with this project."

On July 24, 2012, FTA denied your request. FTA's search discovered records that were responsive to your request, however, FTA withheld the documents under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), citing GAO's still pending review. FTA's denial also noted that the GAO's investigation and report were estimated to be completed in November 2012.

On August 29, 2012, you appealed FTA's decision, arguing that GAO's review was not an "investigation" within the meaning of FOIA, and that Exemption 7 could not apply.

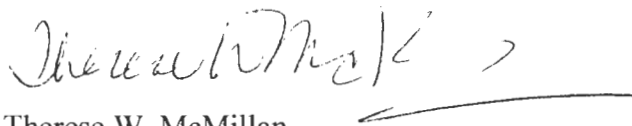
Decision

Except as provided for by certain statutory exemptions and exclusions, FOIA requires Federal agencies to make agency records available to the public upon reasonable request. 5 U.S.C. § 522(a)(3). FOIA Exemption 7(A) exempts “records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

Without examining the appropriateness of the Exemption 7(A) claim below, FTA is no longer claiming any exemption for the requested records. Your appeal is granted, and the requested records are being produced to you as an enclosure with this letter. As you will notice, most of the requested records are e-mail communications between FTA and GAO staff members. Of the kinds of records you identified with specificity in your request, only the GAO draft survey instrument was found in FTA’s possession; it is included in this letter’s enclosure.

The persons responsible for this determination are the undersigned and Mr. Jayme L. Blakesley, FTA Acting Assistant Chief Counsel for General Law. This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0207. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Therese W. McMillan", with a horizontal line extending to the right.

Therese W. McMillan

Enclosures

Sipes, Nancy (FTA)

From: Sid Goldstein <editasst17@cs.com>
Sent: Thursday, July 05, 2012 1:09 PM
To: FOIA, FTA (FTA)
Subject: FOIA Appeal - FY12-0223
Attachments: FOIA_Appeal_-_FY_12-0223.doc

07/05/12

Please route attached FOIA Appeal (FY12-0223) to appropriate office. Thank you,

Sid Goldstein, Editor
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616

Phone (860)667-7250
Fax (860)667-3635

"Accessibility and Mobility Issues
... in Public Transportation"

LETTER PUBLICATIONS

PO Box 271616
West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

July 5, 2012

Deputy Administrator
Federal Transit Administration
Washington DC 20590

ATTN: FOIA APPEAL

RE: FY 12-0223

VIA E-MAIL AND POSTAL MAIL

To the Deputy Administrator:

This is an appeal of the partial denial of my request under your file number FY12-0223.

FTA's response to this FOIA request was dated June 28, 2012, the envelope was metered as of June 29, 2012, and the package was received on July 3, 2012. The appeal is timely under the regulations.

The cover letter responding to the request invoked Exemption 5 of the FOIA as the basis for redaction of a certain document or documents and Exemption 6 of the FOIA as the basis for redaction of a certain other document or documents. This appeal is limited to the redactions for which Exemption 5 was invoked.

Specifically, I appeal the redactions in an e-mail from Dawn Sweet of FTA to John Starling of the Florida Department of Transportation (FDOT) dated May 11, 2012, at 10:33 a.m., with the subject line: "FW: Bus Stops." (A copy of my redacted copy is enclosed with the version of this appeal sent by postal mail).

My argument on appeal is as follows:

Exemption 5 pertains to "inter-agency" or "intra-agency" records. I call your attention to the *Department of Justice Guide to the Freedom of Information Act* ("DOJ Guide"), which states, at page 359, that as an "initial consideration" under Exemption 5 it must be determined whether the records are either "inter-agency" or "intra-agency" records. They are neither in this case, and thus the Exemption 5 privilege cannot be invoked.

The FTA is an "agency" under the FOIA. (5 USC 551, 5 USC 552(f)(1).)

The redacted records are not "intra-agency" records, because they represent communications between the FTA and another party.

FDOT is *not* an "agency" under the FOIA. (See 5 USC 551.)

Therefore, the withheld records, in addition to not being "intra-agency" records, cannot be "inter-agency" records either.

Therefore, the Exemption 5 claim fails to meet the threshold test of application only to "inter-agency" or "intra-agency" records.

Accordingly, all claims to privilege in the subject records are inappropriate.

Please undelete the redactions and forward an unredacted copy of the above-referenced e-mail within the time limit required by FOIA regulations.

Sincerely,

/s/

Sid Goldstein, Editor

TRANSIT ACCESS REPORT



U.S. Department
of Transportation
**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Ave. S.E.
Washington, DC 20590

SEP 17 2012

Mr. Sid Goldstein
Transit Access Report
Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Appeal – FTA No. FY12-0223

Dear Mr. Goldstein:

This letter responds to your July 5, 2012 appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. Your appeal is granted as set forth below.

Background

By e-mail dated June 4, 2012, you requested, in part, "All written responses from the FTA Office of Civil Rights, including e-mails, including attachments, to requests for technical assistance from FTA grantees under the Department of Transportation's Americans with Disabilities Act regulations, from May 1, 2012, to May 31, 2012."

On June 28, 2012, FTA produced documents responsive to your request. By this response, FTA partially denied your request by withholding or redacting certain records pursuant to FOIA Exemptions 5 and 6.

Appeal

By letter dated July 5, 2012, you appealed FTA's response to your FOIA request. You specifically appealed the redaction of an e-mail dated May 11, 2012, sent from Dawn Sweet, an employee in FTA's Office of Civil Rights, to an employee of the Florida Department of Transportation.

Decision

Your appeal is granted, and an unredacted copy of the requested e-mail is enclosed with this letter.

FTA had initially claimed that the e-mail was protected by FOIA Exemption 5. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). A threshold inquiry in applying Exemption 5, therefore, is whether the record in question is an

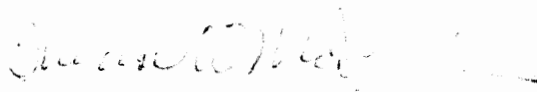
inter-agency or intra-agency record. For purposes of FOIA, the term “agency” “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency” of the United States. 5 U.S.C. § 552(f)(1).

As you observe in your appeal, the e-mail in question was sent to the Florida Department of Transportation, a State entity that is not an “agency” for the purpose of Exemption 5. Your appeal is therefore granted and the e-mail is produced with this letter.

The e-mail contains advice offered by an FTA employee in response to a request for technical assistance. The advice is informal in nature and does not represent an official FTA policy or determination.

The persons responsible for this determination are the undersigned and Mr. Jayme L. Blakesley, FTA Acting Assistant Chief Counsel for General Law. This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0223. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Therese W. McMillan", written over a horizontal line.

Therese W. McMillan

Enclosure (2 pages)

LETTER PUBLICATIONS
PO Box 271616
West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

July 5, 2012

Deputy Administrator
Federal Transit Administration
Washington DC 20590

ATTN: FOIA APPEAL

RE: FY 12-0230

VIA E-MAIL AND POSTAL MAIL

To the Deputy Administrator:

This is an appeal of the partial denial of my request under your file number FY12-0230.

FTA's response to this FOIA request was dated June 28, 2012, the envelope was metered as of June 29, 2012, and the package was received on July 3, 2012. The appeal is timely under the regulations.

The cover letter in the response states that although documents were found responsive to my request, FTA "withheld documents based on exemption 5 of the FOIA." (Such documents are hereinafter referred to as "the Withheld Records.") The cover letter also states that Exemption 5 "incorporates the deliberative process privilege," apparently implying that the deliberative process privilege is the basis upon which FTA partially denied the request.

The description of the records requested follows, interspersed with the status of each element of the request:

A letter from Justin Augustine III, general manager of RTA [Regional Transit Authority, New Orleans], to Robert C. Patrick, FTA Regional Administrator, of unknown date (referenced in April 4, 2012, response from Linda Ford of TCR to Mr. Augustine)

... RECEIVED

"Draft memorandum" attached to the letter from Mr. Augustine to Mr. Patrick (also referenced in April 4, 2012, response)

... NOT RECEIVED, PRESUMABLY WITHHELD

All other communications, including e-mails, including all attachments, between FTA and

RTA on this matter from April 4, 2012, to the present (excluding the April 4, 2012, letter from Ms. Ford to Mr. Augustine itself, which I already have).

... NOT RECEIVED, PRESUMABLY WITHHELD

My argument on appeal is as follows:

Exemption 5 pertains to "inter-agency" or "intra-agency" records. I call your attention to the *Department of Justice Guide to the Freedom of Information Act* ("DOJ Guide"), which states, at page 359, that as an "initial consideration" under Exemption 5 it must be determined whether the records are either "inter-agency" or "intra-agency" records. They are neither in this case, and thus the Exemption 5 privilege cannot be invoked.

The FTA is an "agency" under the FOIA. (5 USC 551, 5 USC 552(f)(1).)

The Withheld Records are not "intra-agency" records, because they represent communications between the FTA and another party.

The RTA is *not* an "agency" under the FOIA. (See 5 USC 551.)

Therefore, the withheld records, in addition to not being "intra-agency" records, cannot be "inter-agency" records either.

Therefore, the Exemption 5 claim fails to meet the threshold test of application only to "inter-agency" or "intra-agency" records.

Accordingly, all claims to privilege in the subject records are inappropriate.

Please undelete the redactions and forward the Withheld Records within the time limit required by FOIA regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Sid Goldstein".

Sid Goldstein, Editor
TRANSIT ACCESS REPORT



U.S. Department
of Transportation
**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

SEP 17 2012

Mr. Sid Goldstein
Transit Access Report
Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Appeal – FTA No. FY12-0230

Dear Mr. Goldstein:

This letter responds to your July 5, 2012 appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration, your appeal is granted in part and denied in part as described below.

Background

By e-mail dated June 7, 2012, you requested "access to and copies of certain documents pertaining to accessibility of St. Charles Streetcar line in New Orleans, as follows:

1. A letter from Justin Augustine III, general manager of [New Orleans Regional Transit Authority], to Robert C. Patrick, FTA Regional Administrator, of unknown date (referenced in April 4, 2012, response from Linda Ford of TCR to Mr. Augustine)
2. Draft memorandum' attached to the letter from Mr. Augustine to Mr. Patrick (also referenced in April 4, 2012, response)
3. All other communications, including e-mails, including all attachments, between FTA and RTA on this matter from April 4, 2012, to the present (excluding the April 4, 2012, letter from Ms. Ford to Mr. Augustine itself, which I already have)."

On June 28, 2012, FTA produced documents responsive to your request. FTA partially denied your request by withholding certain records pursuant to FOIA Exemption 5 and because certain other requested records did not exist.

Appeal

By letter dated July 5, 2012, you appealed FTA's response to the second and third items of your FOIA request, that is, RTA's draft memorandum and related communication between FTA and RTA subsequent to FTA's April 4, 2012 letter to RTA. FTA did not produce either RTA's draft

memorandum or any FTA-RTA communications, stating only that “FTA withheld documents based on Exemption 5 of the FOIA.”

Decision

Communication between FTA and RTA

FTA’s response did not specifically address the requested records of communication, implying that such records had been withheld according to FOIA Exemption 5. In fact, no such records existed. FTA searched where such records could reasonably be expected to be found, specifically FTA’s Office of Civil Rights and FTA’s regional office for Region VI (the region in which RTA is located). Additionally, the absence of any responsive records of communication was confirmed in preparing this reply to your appeal.

Because FTA’s search found no records of communication responsive to your request, your appeal must be denied as to this part.

RTA’s Draft Memorandum

RTA’s letter to FTA requested guidance on implementing provisions of the Americans with Disabilities Act and enclosed with it, for FTA’s consideration, a draft memorandum prepared by RTA personnel concerning accessibility on the St. Charles streetcar line. FTA’s reply letter to RTA of April 4, 2012, provided requested guidance and specifically referred to the draft memorandum.

FTA initially claimed that RTA’s draft memorandum was protected by FOIA Exemption 5, which protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). For purposes of FOIA, the term “agency” “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [U.S.] Government (including the Executive Office of the President), or any independent regulatory agency” of the United States. 5 U.S.C. § 552(f)(1). RTA is a creation of the state of Louisiana, not the United States. Thus, as you observe in your appeal, RTA is not an “agency” under FOIA, and the memorandum in question cannot come within FOIA Exemption 5.

FTA no longer claims Exemption 5 protection for this record and is producing it as an enclosure with this letter. As to RTA’s draft memorandum, your appeal is granted.

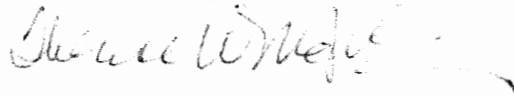
Conclusion

The persons responsible for this determination are the undersigned and Mr. Jayme L. Blakesley, FTA Acting Assistant Chief Counsel for General Law. This letter constitutes the final administrative action on FTA FOIA Request No. FY12-0230. You may appeal this decision to

Sid Goldstein
FOIA Appeal – FTA No. FY12-0230
Page 3 of 3

the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Therese W. McMillan", with a stylized flourish at the end.

Therese W. McMillan

Enclosure (2 pages)



SHORE, McKINLEY, CONGER & SCOTT LLP
ATTORNEYS AT LAW

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July 10, 2013

U.S. Department Of Transportation
 Federal Transit Administration
Attn: Therese W. McMillan, Deputy Administrator
FOIA APPEAL
 1200 New Jersey Ave., S.E.
 East Building, 5th Floor
 Washington, D.C. 20590

Re: File No. FY13-0160

Dear Deputy McMillan,

This letter is in response to a partial denial of my request made under FOIA. The denial letter from Mr. Tommy Carter of June 17, 2013 (*copy enclosed*) states:

"Also, FTA does not have any documents responsive to the American Recovery and Reinvestment Act program part of your request. To the extent that some of the material is unavailable, this is a partial denial of your request."

I am not satisfied with this response and hereby appeal pursuant to 49 C.F.R. §7.21. I previously submitted a separate FOIA request dated July 25, 2012 (*copy enclosed*) requesting similar documents. In response to that request, Mr. Carter replied:

"A search of the FTA files has disclosed documents responsive to your request which are enclosed."

Mr. Carter proceeded to provide the Application and Grant Agreement for Project No. CA-96-X045-00 to San Joaquin Regional Transit District, for the amount of Six Million Nine Hundred Forty-One Thousand One Hundred Eighty-One Dollars (\$6,941,181), under the American Recovery and Reinvestment Act program (*copy enclosed*). As such, the June 17, 2013 denial of my request is clearly in error, as the FTA has previously provided similar documents for past years.

Therese W. McMillan, Deputy Administrator
July 10, 2013
Page 2

As my request for records reasonably described the records I sought and was made in accordance with published rules, the FTA should make the records promptly available to me as mandated by 5 USC §552(3).

I look forward to your response within twenty (20) days of your receipt of this appeal, as required by 5 USC §552(6).

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

SHORE, McKINLEY, CONGER & SCOTT, LLP

JOHN H. McKINLEY



JMcK/mg
Enclosures



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

June 17, 2013

John H. McKinley
Shore, McKinley, Conger & Scott, LLP
3031 West March Lane, Suite 230
Stockton, CA 95219-6500

Our File No. FY13-0160

Dear Mr. McKinley:


This letter is in response to your letter of May 10, 2013, requesting information under the Freedom of Information Act (FOIA). Specifically, you requested a copy of "All documents San Joaquin Regional Transit District submitted to FTA in regard to the One Voice program, the State of Good repair program, the TIGER Grant program, and the American recovery and Reinvestment Act program, in April 2013."

A search of the FTA files has disclosed documents responsive to the State of Good Repair program part of your request which are enclosed. FTA does not have the One Voice program nor do they administer the TIGER grant program. The TIGER grant program is administered by the Office of the Secretary and FTA has forwarded your request to them for a response. Also, FTA does not have any documents responsive to the American Recovery and Reinvestment Act program part of your request. To the extent that some of the material is not available, this is a partial denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. An appeal must be submitted within thirty (30) days after you have received this determination. It should contain any information and any arguments you may wish to rely on, and the envelope in which the appeal is sent should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

JUN 22 2013

The duplication fee is negligible and is waived pursuant to the FOIA and the Department of Transportation regulations, 49 C.F.R. § 7.44 (c). I hope this information meets your needs.

Sincerely,



Tommy Carter
Director, Office of Management
Planning

Enclosure



SHORE, MCKINLEY, CONGER & SCOTT LLP
ATTORNEYS AT LAW

100-612081-V13

Dennis Shore
John H. McKinley
John R. Conger
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Megan E. Galarneau

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Facsimile 925-225-1027

July 25, 2012

VIA FIRST CLASS MAIL, E-MAIL at FTA.FOIA@dot.gov and FACSIMILE (202) 366-7164

Office of Chief Counsel
Federal Transit Administration
1200 New Jersey Avenue, SE
4th Floor East Building
Washington, DC 20590

Re: *FOIA Request*

Dear Sir or Madam:

Pursuant to my legal rights under the The Freedom of Information Act (FOIA), I ask to obtain copies of the following, which I understand to be held by your agency:

All documents pertaining to FTA's funding of San Joaquin Regional Transit District's "Regional Transportation Project", and any related projects, through any FTA Program, including, but not limited to, the One Voice program, the State of Good Repair program, the TIGER Grant program, and the American Recovery and Reinvestment Act program.

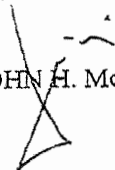
I ask for a determination on this request within ten (10) days of your receipt of it, and an even prompter reply if you can make that determination without having to review the records in question.

If I can provide any clarification that will help expedite your attention to my request, please contact me at 209-477-8171.

I am sending a copy of this letter to your FOIA requester service center to help encourage a speedy determination, and I would likewise be happy to discuss my request with them at any time.

Thank you for your time and attention to this matter.

Sincerely,


JOHN H. MCKINLEY

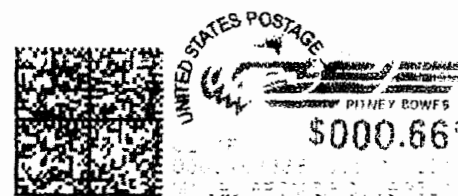
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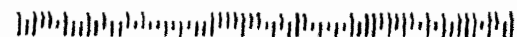
SHORE, MCKINLEY, CONGER & SCOTT, LLP

ATTORNEYS AT LAW

3031 West March Lane, Suite 230
Stockton, California 95219-6500



U.S. Department of Transportation
Federal Transit Administration
Attn: Therese W. McMillan, Deputy Administrator
FOIA APPEAL
1200 New Jersey Ave., S.E. TOA-JL
East Building, 5th Floor
Washington, D.C. 20590





U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

OCT 31 2013

John H. McKinley, Esq.
Shore, McKinley, Conger & Scott LLP
3031 West March Lane, Suite 230
Stockton, CA 95219-6500

Re: FOIA request FY13-0160 decision on appeal

Dear Mr. McKinley:

This letter responds to your July 10, 2013, appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration, FTA's decision is affirmed for the reasons below.

Background

On July 25, 2012, you submitted a FOIA request seeking "[a]ll documents pertaining to FTA's funding of San Joaquin Regional Transit District's 'Regional Transportation Project', and any related projects, through any FTA Program, including, but not limited to ... the American Recovery and Reinvestment Act program [ARRA]." FTA granted this request and provided you with certain documents related to San Joaquin Regional Transit District's ARRA grant, project number CA-96-X045-00.

You submitted a second FOIA request, which is the subject of this appeal, by letter dated May 10, 2013. Your 2013 request sought copies of "[a]ll documents San Joaquin Regional Transit District submitted to FTA in regard to the One Voice program, the State of Good Repair program, the TIGER Grant program, and [ARRA], in April 2013."

On June 17, 2013, FTA granted your request in part and denied it in part. FTA found records related to the State of Good Repair program and forwarded copies of those documents to you, although, upon review, some of these documents appear to have been beyond the scope of your request for April 2013 documents. FTA denied your request as to the One Voice program because FTA does not administer any such program. FTA also denied your request as to the TIGER program because that program is administered by the U.S. Department of Transportation's Office of the Secretary; FTA forwarded your request to that office. Finally, FTA denied your request as to ARRA and stated that it did "not have any documents responsive to the [ARRA] part of your request."

In light of the positive response you had received in 2012, which included documents related to ARRA project number CA-96-X045-00, you disputed FTA's statement that it had no documents responsive to your request and appealed FTA's decision.

John McKinley
FOIA appeal FY13-0160
Page 2 of 2

In light of the positive response you had received in 2012, which included documents related to ARRA project number CA-96-X045-00, you disputed FTA's statement that it had no documents responsive to your request and appealed FTA's decision.

Decision

An agency responding to a FOIA request has a duty to conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). In this matter, FTA referred the ARRA part of your request for documents "San Joaquin Regional Transit District submitted to FTA ... in April 2013" to the FTA regional office for Region IX, in which the San Joaquin Regional Transit District is located.

Region IX staff consulted agency records and confirmed that San Joaquin Regional Transit District's ARRA grant, project number CA-96-X045-00, was closed in February 2012. Accordingly, staff did not locate any documents related to your request for submissions received in 2013. This search was reasonable and satisfied the requirements of FOIA. Therefore, FTA's June 17, 2013, decision is affirmed.

Although it is not responsive to your request, enclosed with this decision is a copy of the February 2012 close-out amendment to project number CA-96-X045-00 for your reference.

This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY13-0160. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,



Therese W. McMillan

Enclosure

Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

Aug. 13, 2013

Deputy Administrator
Federal Transit Administration
1200 New Jersey Ave SE
Washington DC 20590

Re: FOIA APPEAL

This is an appeal of denial of Freedom of Information Act request, your file number FY13-0199.

The request was for certain documents including a letter from City of Tucson to FTA Office of Civil Rights dated March 26, 2013, including all attachments.

The request was also for all responses, including e-mails, including all attachments, including correspondence to or from City of Tucson, subsequent to May 1, 2013, letter from Linda Ford to City of Tucson regarding this matter.

In response to the request, I received a letter from FTA dated August 7, 2013 (the "Denial Letter"), stating, "We have searched our records and find that we do not have any records responsive to your request." A copy of the Denial Letter is enclosed.

The grounds for this appeal are as follows: INADEQUATE SEARCH.

Enclosed please find copy of May 1, 2013, letter from Linda Ford to City of Tucson (the "Linda Ford Letter"), in which she refers to "your letter dated March 26, 2013." I submit that the Linda Ford letter constitutes evidence of the existence of letter from City of Tucson to FTA Office of Civil Rights dated March 26, 2013, as requested in my request. Accordingly, I now ask that FTA resume the search for records responsive to the original request in order to find the March 26, 2013, letter from City of Tucson to FTA Office of Civil Rights as well as any other records that may be responsive to the original request.

Respectfully submitted,

Sid Goldstein, Editor
TRANSIT ACCESS REPORT
Editasst17@cs.com



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

August 7, 2013

Sid Goldstein
Letter Publications, Inc.
PO Box 271616
West Hartford, CT 06127-1616

Our File No: FY13-0199

Dear Mr. Goldstein:

This is in response to your email of June 27, 2013, requesting copies of the following:

- “- Letter from City of Tucson to FTA Office of Civil Rights dated March 26, 2013, including all attachments.
- All responses, including e-mails, including all attachments, including correspondence to or from City of Tucson, subsequent to May 1, 2013, letter from Linda Ford to City of Tucson regarding this matter.”

We have searched our records and find that we do not have any records responsive to your request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. An appeal must be submitted within thirty (30) days after you have received this determination. It should contain any information and arguments you may wish to rely on, and the envelope in which the appeal is sent should be prominently marked “FOIA APPEAL.” The Deputy Administrator’s determination will be administratively final.

Tommy , Director
Office o Planning



U.S. Department
of Transportation

**Federal Transit
Administration**

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

OCT 31 2013

Mr. Sid Goldstein
Editor, Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Request No. FY13-0199 Decision on Appeal

Dear Mr. Goldstein:

This letter responds to your appeal of the Federal Transit Administration's (FTA) decision denying your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. FTA's decision in this matter is affirmed in part and reversed in part for the reasons stated below, and a record responsive to your request is produced to you as an enclosure with this decision.

Background

On June 27, 2013, you submitted a FOIA request seeking records related to two requests for determinations of equivalent facilitation for the Tucson, Arizona, Modern Streetcar Project. In particular, you requested a "[l]etter from City of Tucson to FTA Office of Civil Rights dated March 26, 2013, including all attachments," and "[a]ll responses, including e-mails, including all attachments, including correspondence to or from City of Tucson, subsequent to May 1, 2013, letter from Linda Ford to City of Tucson regarding this matter."

On August 7, 2013, FTA denied your request and stated that it did "not have any records responsive to your request."

On August 13, 2013, you appealed FTA's initial decision based on the inadequacy of FTA's search for records. To assist with any supplementary search conducted by FTA, you enclosed with your appeal a copy of an FTA letter dated May 1, 2013, signed by Acting Director of the Office of Civil Rights Linda Ford, that specifically referred to FTA's receipt of a letter from the City of Tucson dated March 26, 2013, regarding the Modern Streetcar Project.

Decision

An agency responding to a FOIA request has a duty to conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). In preparing a response to your appeal, FTA conducted a second search for records responsive to your request. FTA's second search was conducted by FTA Office of

Sid Goldstein
FOIA No. FY13-0199 Appeal
Page 2 of 2

Civil Rights staff familiar with the City of Tucson's request. This second search produced the March 26, 2013, letter you requested. A copy of that letter is enclosed with this decision.

Without addressing the details or adequacy of FTA's initial search, FTA's decision is reversed as to this part of your request because a responsive record did exist.

During FTA's second search for records, FTA staff confirmed that there has not been correspondence between FTA and the City of Tucson regarding the City's equivalent facilitation requests since Ford's May 1, 2013, letter. Because no records responsive to the second part of your request exist, FTA's decision is affirmed as to that part of your request.

This decision has been concurred in for the General Counsel of the U.S. Department of Transportation by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY13-0199. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a long horizontal flourish extending to the right.

Therese W. McMillan

Enclosure

Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

Sept. 24, 2013

Deputy Administrator
Federal Transit Administration
1200 New Jersey Ave SE
Washington DC 20590

Re: FOIA APPEAL

This is an appeal of the Federal Transit Administration's denial of a request made under the Freedom of Information Act, with your file number 13-0220. Because the FTA's response to the request does not report that a search was conducted, or, if conducted, whether records responsive to the request were located in such search, as required by statute, I am treating the FTA's response as a *constructive denial* of the request.

Grounds for this appeal are as follows:

FAILURE TO CONDUCT SEARCH and/or FAILURE TO REPORT RESULTS OF SEARCH.

By e-mail on July 14, 2003 (the "Request"), I asked for "all available records pertaining to employment discrimination complaint against FTA by the late [REDACTED]."

In a letter on Aug. 22, 2013 (the "Denial Letter"), FTA responded as follows:

"All employment discrimination complaints are filed against the Secretary of Transportation. Therefore, we have forwarded your request to the Office of the Secretary for a response. You should receive a FOIA acknowledgement letter shortly from that office."

I received the Denial Letter in the U.S. Mail on Aug. 26, 2013.

Copies of the Request and the Denial Letter are enclosed or attached.

The FOIA, at 5 USC Section 552(a)(3)(A)(ii), requires that upon receiving an appropriately styled request for reasonably described records, the "agency" (in this case, FTA) "shall make the records promptly available ..."; subject, however, to certain exemptions in categories enumerated in 5 USC Section 552(b); the agency is required within a certain time limit to "determine ... whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor" (5 USC Section 552(a)(6)(A)(i); but the agency is not authorized to withhold information or limit the availability of records "except as

specifically stated in this section” (5 USC Section 552(d)).

The statutory section does not provide authority to withhold information or limit availability of records for which no search has been conducted. Accordingly, failing to conduct a search with the explanation “All employment discrimination complaints are filed against the Secretary of Transportation” – as if such an assertion, if true, would preclude the existence of records responsive to the Request in FTA’s own files – does not meet the mandate of the FOIA. The statute requires a search; the statute requires that results of the search be reported to the requester; and that the records be provided to the requester, or, then (and only then) a valid exemption be cited that justifies withholding the records.

Only then it may be permissible for FTA to consult with “another agency” or an “agency component” that may have “interest” in the records that have been located pursuant to the FOIA request.

(See: Department of Justice, OIP Guidance, *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*. This entire guidance document refers only to handling of records that have been located after a search has been conducted; no authority is indicated for referring or forwarding a request in lieu of searching for the records.)

In sum, FTA is obligated to conduct a search and report to the requester the results of the search, and either provide the records to the requester or cite a valid applicable exemption for withholding the records.

“As a general rule, courts require agencies to undertake a search that is ‘reasonably calculated to uncover all relevant documents.’” (Department of Justice, *Guide to the Freedom of Information Act, Procedural Requirements*, 2013 edition, at page 39, citing Weisberg v. DOJ, 705 F.2d 1344.)

Accordingly, I ask that FTA respond to this appeal by conducting a search for records responsive to the Request and reporting to me on the results. If there is a question about where to find the records, I would suggest looking in [REDACTED] personnel file.

Respectfully submitted,



Sid Goldstein, Editor
TRANSIT ACCESS REPORT
editasst17@cs.com

From: Sid Goldstein <editasst17@cs.com>
To: fta.foia <fta.foia@dot.gov>
Subject: Transit Access Report request (re: [REDACTED])
Date: Sun, Jul 14, 2013 6:45 pm

07/15/13

To the FOIA Officer:

Pursuant to Freedom of Information Act, I request access to and copies of all available records pertaining to employment discrimination complaint against FTA by the late [REDACTED].

Format requested: hard copy.

This is a news media request.

Sid Goldstein, Editor
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616

Phone (860)667-7250
Fax (860)667-3635

"Accessibility and Mobility Issues
... in Public Transportation



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

August 22, 2013

Sid Goldstein
Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Our File No. FY13-0220

Dear Mr. Goldstein:

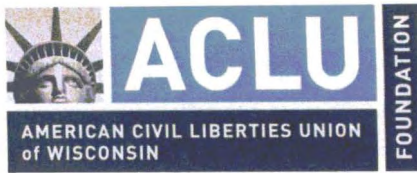
This letter is in response to your e-mail of July 14, 2013, requesting information under the Freedom of Information Act (FOIA). Specifically, you requested a copy of "all available records pertaining to employment discrimination complaint against FTA by the late [REDACTED]." ."

All employment discrimination complaints are filed against the Secretary of Transportation. Therefore, we have forwarded your request to the Office of the Secretary for a response. You should receive a FOIA acknowledgement letter shortly from that office.

Sincerely,

Tommy Carter
Director, Office of Management
Planning

Enclosure



October 25, 2013

Deputy Administrator
FTA
1200 New Jersey Ave SE
5th Floor, East Building
Washington DC 20590

RE: FY13-0231

American Civil
Liberties Union
of Wisconsin Foundation
State Headquarters
207 E. Buffalo St.,
Suite 325
Milwaukee, WI 53202-5774
T/ 414-272-4032
F/ 414-272-0182

American Civil
Liberties Union
of Wisconsin Foundation
Madison Area Office
P.O. Box 687
Madison, WI 53701-0687
T/ 608-469-5540

www.ACLU-WI.org

Dear FTA Deputy Administrator:

I am submitting this response regarding the denial of portions of the July 31, 2013 Freedom of Information Act (FOIA) request for records regarding the recertification of the Southeastern Wisconsin Regional Planning Commission (SEWRPC). The response/denial was mailed on September 26, 2013 and was received several days later. This appeal is being sent 30 days from the date of mailing, and thus within 30 days of receipt.

“‘[D]isclosure, not secrecy, is the dominant objective’ of the FOIA. Because of this, our obligation is ‘to construe FOIA exemptions narrowly in favor of disclosure.’” *Patterson v. Internal Revenue Service*, 56 F.3d 832, 835 (7th Cir. 1995) (internal citations omitted). “The government agency bears the burden of justifying its decision to withhold the requested information.” *Id.* at 836. A categorical description of materials being withheld is inadequate. *Id.*

You claim as a categorical description that that you are withholding “some documents” regarding SEWRPC’s recertification. I object to this broad categorical description and request that you provide specificity as to the nature of those documents.

Further, you claim that the drafts fall within the “(b)(5)” exception to the FOIA. As the 7th Circuit recently held, “subsection (b)(5) protects ‘inter-agency and 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). This exemption covers work product, which prevents ‘a party [from] discover[ing] documents and tangible things *that are prepared in anticipation of litigation or for trial* by or for another party or its ... agent.’” *Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1022 (7th Cir. 2012) (emphasis added, internal citations omitted). “Relevant” material that does not constitute work product is routinely disclosed in litigation. *Id.*; Fed. R. Civ. P. 26(b)(1). If the “drafts” were not prepared in anticipation of litigation or for trial, then under 7th Circuit precedent they should not have been withheld.



FTA-131030-005

Moreover, to the extent that these documents related to materials related to the “Zoo Interchange” litigation, *MICAH v. Gottlieb*, No. 12–C–0556 (E.D. Wis. filed Aug. 6, 2012), then we request that you provide, with specificity, information on how they constitute agency work product prepared in anticipation of litigation or for trial that would be exempt from disclosure and not relevant to that litigation. If those materials were prepared in anticipation of some other litigation or for trial in some other case, please identify the same with specificity.

I anticipate your prompt response.

Sincerely,



Karyn L. Rotker
Senior Staff Attorney



U.S. Department
of Transportation

Federal Transit
Administration

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

MAR 05 2014

Karyn L. Rotker, Esq.
American Civil Liberties Union of
Wisconsin
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202-5774

Re: FOIA request FY13-0231 decision on appeal

Dear Ms. Rotker:

This letter responds to your October 25, 2013, appeal of the Federal Transit Administration's (FTA) partial denial of your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration of your appeal, FTA's decision is affirmed in part and reversed in part.

Background

On July 31, 2013, you submitted a FOIA request to both FTA and the Federal Highway Administration, seeking

any records evidencing or discussing any aspect of [the Southeastern Wisconsin Regional Planning Commission's (SEWRPC)] 2012 recertification review, created from July 1, 2011, to [July 31, 2013,] and prepared, received, transmitted, collected, and/or maintained by the U.S. Department of Transportation, the Federal Highway Administration, the Federal Transit Administration, and/or any of their employees, agents, officials, or contractors.

On September 26, 2013, FTA produced records responsive to your request but withheld certain other responsive records pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Your appeal challenges FTA's decision that Exemption 5 applies to the withheld records and requests that FTA provide specific descriptions of the withheld records.

Decision

Upon review, a reasonably segregable portion of a withheld record was discovered that appears not to have been included in FTA's September production and for which FTA does not claim an exemption from FOIA. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. 552(b). FTA's decision is reversed as to this portion of a withheld record, and the portion is enclosed with this decision.

FTA is withholding approximately 38 pages of intra-agency email communications pursuant to Exemption 5, which protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption incorporates such common civil discovery privileges as the attorney work-product privilege and the deliberative process privilege. Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). The deliberative process privilege protects the "decision making processes of government agencies," NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975), by (1) encouraging open, frank discussions on matters of policy; (2) protecting against premature disclosure of proposed policies before they are actually adopted; and (3) protecting against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See, e.g., Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980). Records that are predecisional and deliberative are commonly exempt from disclosure under this privilege. See, e.g., Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

All of the withheld records contain predecisional and deliberative exchanges among agency employees concerning meetings with SEWRPC, drafts of reports and other agency documents, opinions, and other deliberation concerning SEWRPC's certification, and are therefore protected by the deliberative process privilege of Exemption 5.

Exemption 5 also incorporates the attorney-client privilege. See, e.g., Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Of the withheld records, approximately nine pages contain confidential communications between agency staff and agency counsel and the legal opinions and advice of agency counsel concerning SEWRPC's certification review, the attendant public comment process, and related litigation. These records are protected by the attorney-client privilege of Exemption 5 in addition to the deliberative process privilege.

The Exemption 5 privileges were appropriately applied to the withheld records, and the balance of FTA's decision is therefore affirmed.

This decision has been concurred in for Kathryn Thomson, the Acting General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY13-0231. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, reading "Therese W. McMillan". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Therese W. McMillan

Enclosure

[REDACTED]

November 8, 2013

Ms. Therese McMillan, Deputy Administrator
Federal Transportation Administration
1200 New Jersey Ave, S.E. 5th Floor
East Building
Washington, D.C. 20590

Attn: FOIA APPEAL

Dear Ms. McMillan:

In his letter of October 30, 2013 (File No. FY14-0006), Director Tommy Carter of the Office of Management and Planning with legal counsel Scheryl Portee denied in part our Freedom of Information Act request (Oct. 8, 2013), citing Exemption 5 of FOIA, USC §552 (b) (5), which concerns “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” We write in appeal of that decision.

In considering our request, we ask you to call to mind the intent of President Obama’s 2009 “Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act,” urging departments to “adopt a presumption in favor of disclosure.”

The grounds in brief:

We write to appeal this decision, on the grounds that: 1) the client has not been identified in this attorney-client privilege; 2) application of the attorney-client privilege requires the maintenance of confidentiality, and the burden to prove sustained confidentiality falls upon the federal agency invoking the privilege; 3) communications with parties pursuing their own interests, such as MassDOT or MBTA, are not protected under the attorney-client privilege; and 4) the privilege does not protect communications enumerating or interpreting agency policy, and this request seeks to discover how FTA applies its internal rules and policy in relation to OMB Circular A-16, internalized by its own Section 35 of the Master Agreement.

Each argument is meant to stand independently, so that any one should suffice to justify the appeal.

The grounds in detail:

We ask for a waiver without cause in the spirit of the President's memorandum. In the event further cause is needed, we ask you to consider the following:

1. Mr. Carter's letter does not indicate the individual or body claiming the attorney-client privilege, as required by *Elec. Privacy Info. Ctr. v. DOJ*. This leaves open the question of whether confidentiality is invoked on behalf of a legitimate agency interest or on behalf of officials of Region I, including its administrators and General Counsel, who may have short-circuited established procedures for vetting geospatial conformity.
2. We request that you conduct an inquiry to ascertain whether actions on the part of the FTA have caused or will cause the attorney-client privilege to be waived ipso facto. Such actions include, but are not limited to a breach of confidentiality, and sharing information with non-federal parties. The Supreme Court places the burden on the federal agency to prove that information was kept confidential and only disseminated on a "need to know basis." (e.g. in *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d at 866) Any communication to MEPA, MBTA, MassDOT, or any other state agency or affiliates thereof that divulge the contents of the documents now withheld would annul FTA's right to invoke Exemption 5. These limitations would also apply to communications to FHA, among other federal agencies, at present or in the future.
3. Per *Department of the Interior v. Klamath Water Users Protective Ass'n*, communication between a federal agency and non-federal parties that are pursuing "their own, albeit entirely legitimate, interests in mind," or are "seeking a Government benefit at the expense of other applicants," does not qualify for Exemption 5 protection. As applicants in the competitive New Starts program, the MBTA and MassDOT seek such a "Government benefit at the expense of other applicants," and thus cannot meet the intra-agency threshold test.
4. *Nat'l Council of La Raza v. DOJ* establishes that attorney-client privilege's rationale of protection for confidential communications is inoperative for documents which reflect actual agency policy, or which are authoritative interpretations of agency law. The very nature of our FOIA request is to discover a) whether or not FTA Region I followed in good faith the directive of OMB Circular A-16 and its own internal Master Agreement, Section 35; b) whether it informed state agencies that conformity with federal geospatial standards was a condition for release of federal funds; and c) whether it used or intends to use established risk-assessment procedures to vet geospatial claims. Any communication that provides advice on whether these directives had been appropriately followed, referenced, or enforced would, under *La Raza*, fall outside the protections of the attorney-client privilege. Any communications seeking to establish how OMB Circular A-16 applies to FTA operations, and in the present situation to the Green Line Extension Project, or to MTBA, or to MassDOT would likewise not be protected.

Finally, there is an open question on which we could find no precedent: namely, that by withholding information pertaining to geospatial conformity, is the FTA providing an unfair advantage to the GLX project over other projects that have conformed in good faith to OMB Circular A-16 and Section 35 of the Master Agreement? And further, does the participation of the GLX in such a competition for federal funds necessitate a greater degree of transparency?

With thanks for your careful consideration.

Sincerely,

A black rectangular redaction box covering the signature area. There are some faint, handwritten marks above the box, possibly initials or a date.



U.S. Department
of Transportation

Federal Transit
Administration

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

MAR 05 2014

[REDACTED]

Re: Appeal of FOIA decision FY14-0006

Dear [REDACTED]:

This letter responds to your November 8, 2013, appeal of the Federal Transit Administration's (FTA) partial denial of your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. After careful consideration of your appeal, FTA's decision is reversed in part and affirmed in part.

Background

On October 8, 2013, you submitted a FOIA request for correspondence, documents, or memoranda generated by or for FTA related to geospatial requirements of the Massachusetts Bay Transportation Authority's Green Line Extension project.

On October 30, 2013, FTA produced records responsive to your request, but withheld other responsive records. FTA stated that it withheld the records pursuant to the attorney-client privilege incorporated into FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

Your appeal challenges FTA's privilege claim on the grounds that the substance of the records may not qualify for privilege, or, if it does, that privilege may have been waived by previously releasing the records outside of FTA.

FTA withheld approximately 11 pages of email exchanges. Of these, approximately four pages consist of emails that were exchanged between you and FTA personnel, and carbon copied to various third parties, between December 20, 2011, and January 20, 2012. The remainder of the withheld records are emails that were exchanged only among FTA Region I personnel, with no outside parties addressed or copied.

The substance of approximately six pages of the withheld records is FTA personnel seeking or receiving legal advice from FTA counsel concerning draft versions of documents. The substance of approximately one page of the withheld records is a deliberative exchange between FTA personnel concerning draft documents, without the participation of legal counsel.

Discussion

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. 552(b). The approximately four pages of emails exchanged between you and FTA and carbon copied to third parties are not privileged and are reasonably segregable from the remainder of the document in which they are found. Therefore, FTA’s decision as to this portion of the withheld records is reversed, and the reasonably segregable portion is enclosed with this decision.

FOIA Exemption 5 protects from disclosure those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption incorporates common civil discovery privileges such as the attorney-client privilege. See, e.g., Mead Data Central, Inc. v. U.S. Dep’t of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). The attorney-client privilege protects the “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” Id. at 252. It serves public ends by enabling the free exchange of information, advice, and opinion between an attorney and the client-agency. The approximately six pages of attorney-client communication reflect just such an exchange within FTA, and are therefore privileged under Exemption 5. FTA’s decision is affirmed as to these records.

Exemption 5 also incorporates the deliberative process privilege, which protects “ ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’ ” Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001) (quoting N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The deliberative process privilege protects the decision making processes of government agencies by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s decision. See N.L.R.B., 421 U.S. at 151-53; Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir.1980). To this end, records that are predecisional and deliberative are exempt from disclosure under the privilege. Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

The approximately one page of withheld records that does not contain an attorney-client communication is not protected by the attorney-client privilege as stated in FTA’s decision. It does, however, contain a predecisional and deliberative exchange between agency employees and is protected by the deliberative process privilege. Therefore, although the applicable privilege is different from the one identified to you previously, FTA’s decision to withhold the record is affirmed.

This decision has been concurred in for Kathryn Thomson, the Acting General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY14-0006.

You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a long horizontal flourish extending to the right.

Therese W. McMillan

Enclosure



U.S. Department
of Transportation

Federal Transit
Administration

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

MAR 27 2014

[REDACTED]

Re: FOIA request FY14-0026 decision on appeal

Dear [REDACTED]:

This letter responds to your January 22 appeal of the Federal Transit Administration's (FTA) partial denial of your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. For the reasons described below, FTA's decision is affirmed.

Background

You submitted a FOIA request dated November 11, 2012, seeking "records for all JP Morgan Chase Bank travel credit card transactions (FTA, Region V) under Rhonda Reed's travel authority from FY2006—FY2012".

On January 13, 2014, FTA partially granted your request for records and produced a record of Region V employees' charges to JPMorgan Chase Bank-issued travel credit cards from fiscal years 2009 through 2012. The earliest transactions in FTA's record were from December 2008. FTA's records did not contain transactions from earlier than December 2008 because FTA's contract with the bank that preceded JPMorgan Chase Bank had expired and FTA no longer had access to those transactions. To the extent that FTA's production did not include transactions from earlier than December 2008, FTA partially denied your request.

You appealed FTA's decision on January 22, 2014, based on the adequacy of FTA's search for records. Your appeal stated, in pertinent part:

[T]here is an FTA, Region V employee whose JP Morgan Chase bank travel credit card transactions were not provided in the report.

Attached are several FTA, Region V, Organizational Charts which list the employee whose name was not provided in the report.

I am requesting to be provided a revised JP Morgan credit card transactions report which includes the employee whose name was not provided in the report I received on January 13, 2014.

Your appeal enclosed three Region V organization trees from different dates, but did not specify the employee to which you were referring. Comparing the Region V organization trees enclosed with your appeal to the record that FTA produced to you, there are at least seven names that appear on the organization trees that do not appear in the record of credit card transactions.

To ensure the adequacy of FTA's initial search for records, FTA performed a second search on February 19, 2014, for records responsive to your FOIA request. The FTA employee who conducted the second search described the second search as follows: "I ran a query in [the JPMorgan Federal customers payment website] - JP Morgan travel card transactions for the dates 9/1/2005-9/30/2012 for Region V cardholders. I sorted the query by cardholders last name. Information is not available for transactions prior to using JP Morgan Chase." The names in this second record were the same names as in the record produced to you on January 13, 2014.

Decision

FOIA requires an agency to conduct a search that is "reasonably calculated to uncover all relevant documents". *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The standard is one of reasonableness and is satisfied, in part, by an agency determining where responsive records are likely to be located and searching those locations in good faith. *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 67-68 (D.C. Cir. 1990) (citing *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986).

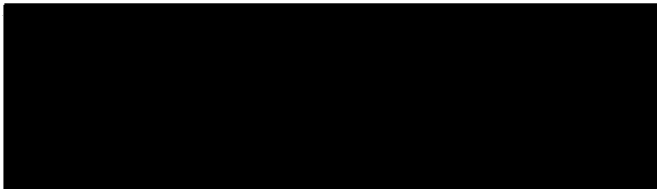
FTA's search for records, as described above, appears to have been diligent, reasonable, and in good faith and satisfies the standards of FOIA. FTA's decision of January 13, 2014, is therefore affirmed.

This decision has been concurred in for Kathryn Thomson, the Acting General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY14-0026. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Yours truly,

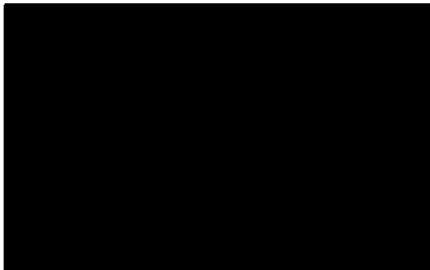


Therese W. McMillan




April 17, 2014

Federal Transit Administration
Department of Federal Transportation
1200 New Jersey Avenue S.E. 5th Floor
East Building
Washington D.C. 20590
Attn: Deputy Administrator




Re: File no. FY14-0090
Denial of a FOIA Request

Dear Deputy Administrator,

This letter constitutes a timely request for an Appeal of a partial denial of FOIA request No.FY14-0090 made by my client, Mr. . The attached decision by Ms. Scheryl Portee(?) and Ms. Nancy Sipes (?) for Mr. Tommy Carter Director Office of Management Planning redacted the names of public officials from public documents which documents are required by law to be filed. The cited basis for the partial denial is **5 USC 552 (b) (6) as implemented by 49 CFR 7.13(c) (6).**

Background of this Appeal

On or about February 3, 2014 pursuant to the Federal Freedom of Information Act, my client, , a former Director of Transportation for the City of Long Beach in New York requested copies of numerous federally required public transportation documents which are specifically delineated in the attached decision, the subject of this Appeal.(Ex. A) The requested documents required to be filed with the Department of Transportation, indicate the use and allocation of public dollars by local transportation departments through federally funded grants as well as the statistical results of drug testing.(ie.without names).

These documents are required to be signed by specific public employees responsible for the requests and the allocations of the funds at the local and federal level.

On or about March 30, 2014 my client received the attached letter dated March 28, 2014 denying in part his request in that in all of the documents that were provided the names of the public officials involved in generating the documents and responsible for the request for and allocation of federal transportation funds were redacted and several documents, specifically the Transportation Department's Echo Payment Request Form, the Echo Web Authorization and Certification form V 2, and the Echo User Access form filed by the City of Long Beach, Long Beach New York were not provided.

Position Statement

I respectfully submit that simple disclosure of the names of the public employees and or officials indicated within the public documents requested, as well as the production of the documents themselves, *clearly* does not constitute an "unwarranted invasion of personal privacy." The documents are required by statutory rules and regulations to be filed and indicate the allocation of public transportation tax dollars; the names of the individuals located within the documents requested are simply those of the persons charged with the public trust and responsibility for filing these forms and allocating federal transportation dollars on behalf of the general tax paying public.

The disclosure of the documents requested in un-redacted form here is clearly in the public's interest of understanding the activities and operation of government in how public funds are allocated and who are the persons responsible for the public trust of allocating the funds on both the Federal and local levels. These names and documents are not exempt from disclosure to the public pursuant to exemption **6 of 5 USC 552 (b) (6)** as implemented by the Department of Transportation's regulation **49 CFR 7.13 (c) (6)** and in fact these provisions have been **wrongfully applied.**

5 USC (b) (6) in determining the applicability of the federal Freedom of Information Act Specifically states ..

"This section does not apply to matters that are *-personnel and medical files* and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

49 CFR 7.13© (6) provides:

"Exempted from FOIA's statutory disclosure requirement are matters that are *personnel and medical files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

My client is **NOT** requesting "personnel or medical files" or any files containing any personal information. Nor is my client requesting any *list* of names or addresses for any marketing or commercial purposes. The disclosure of the names within the documents requested would not

constitute an invasion of personal privacy as they disclose “nothing about any of the individuals listed therein other than the fact that they are (Transportation Department) officials.” Hopkins v. Department of the Navy Civil No.84-1868, slip Op 4(D.D.C.Feb.5, 1985) Sikes v. U.S. No.CV312-045, 2013 WL 6633082 (S.D.GA dec.6,2013)... My client is not seeking the names of law enforcement officials, FBI or anyone who the disclosure of which would impede any investigation or put any individual potentially in harm’s way. My client is merely requesting un-redacted public transportation documents required by law to be filed with the Department of Transportation which simply indicate “what the government is up to” and the public employees responsible for the requests, use and allocation of public transportation funds. The documents requested do not contain any personal information regarding public officials. *Clearly* the public has a right to know the names and titles of individual public employees responsible for public filings and the disbursement of public funds.

My client’s position is unequivocally supported by **5 CFR 293.311 (a)(1)** (published January 1, 2014) entitled **Availability of Information** which specifically states that not only **names** but various other information *is available to the public even from personnel files*.

5 CFR sec. 293.311(a) (1) provides:

“ The following information from both the OPF and employee file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees **is available to the Public:**

- (1) Name;**
- (2) Present and past position titles and occupational series;
- (3) Present and past grades;
- (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials);
- (5) Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment; and
- (6) Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness.....” (Emphasis added)

In addition to 5 CFR 293.311(a), the case law in this area clearly establishes that **there is no viable privacy interest in the names, titles or business addresses of most federal/public employees**. Indeed as indicated above, the Office of Personnel Management has promulgated a regulation that requires the names of most individual employees and their official duty addresses and other specified data even from personnel files, in fact **be made available** to the public.

The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on governmental agencies and as a consequence the listed exemptions to the normal disclosure rule are to be construed narrowly. Department of the Air Force v. Rose, 425 U.S.352, 361; 96 S.Ct.1592, 1599.

This is particularly true with respect to exemption (6) cited for the decision being appealed herein. Exemption (6) in both instances protects only against disclosure which amounts to a 'clearly unwarranted invasion of personal privacy'. That clarity does not exist in the present instance. To the contrary, it is clearly in the public's interest to understand how and by whom public money is being spent. The clear language of the statute requires the Agency to "tilt the balance of disclosure interests against the privacy interests in favor of disclosure." Id. citing Washington Post Co. v. Dept. of Health and Human Services, 690 F.2d.252,261 (D.C.Cir.1982) (quoting Ditlow v. Schultz, 517 F.2d 166,169 (D.C. Cir.1975)). Any privacy interest alleged must be more palpable than mere possibilities. Cameranesi v. DOD No.C 12-0595, 2013 WL174175 (N.D.Cal. April 22, 2013)

Thus, the release of the mere names of public employees paid by public tax dollars has been specifically held **not to constitute** an unwarranted invasion of personal privacy. Hopkins v. Department of the Navy, *supra*; Sikes, *supra* and National Western Life insurance Company v. United States, 512 F.Supp. 454,461 (N.D. Tex.1980)

My client is not seeking medical or personnel files. Nor is he seeking the names of law enforcement officials, home addresses, telephone numbers, or social security numbers or any list of names of individuals for commercial purposes. He is however seeking the publically mandated documents which require and indicate the names and titles of public employees responsible for the allocation of public funds. Clearly this request has a legitimate public purpose in ascertaining and understanding the workings of local and federal government.

On behalf of my client, [REDACTED], a transportation specialist, I respectfully request in light of the foregoing that the decision of the Director of Office Management and Planning be overturned and the public documents requested be provided and without redaction of the names and titles of the individuals responsible for filing those mandated forms.

[REDACTED]

Agreed to by:

[REDACTED]

A

Enclosure



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

March 28, 2014



File No. FY14-0090

Dear 


This letter is in response to your e-mail of February 3, 2014, requesting information under the Freedom of Information Act (FOIA). Below is the list of items that you requested and the status of the documents as they relate to FTA's response to each request:

1. NTD report for 2013 and 2014 and/or the most recent past two years available ID: NTD2006 - *(FTA documents responsive to your request are enclosed. The two most recent years available are 2011 and 2012).*
2. TEAM quarterly reports and any information regarding open grants in the TEAM system related to the City of Long Beach, NY- *(FTA documents responsive to your request are enclosed).*
3. ECHO WEB documentation on the users and drawdowns associated with grantees in the Long Beach, NY area - *(FTA documents responsive to your request are enclosed).*
4. USDOT Drug and Alcohol MIS Reports for 2013 and 2014 and/or the most recent two years available – *(FTA documents responsive to your request are enclosed).*
5. Triennial Review for 2013 and the most recent findings and closings report - *(FTA documents responsive to your request are enclosed).*
6. Any FTA seminars in which a representative from Long Beach, NY attended - *(FTA documents responsive to your request are enclosed).*

As stated above, a search of the FTA files has disclosed documents responsive to your request which are enclosed. Personal privacy information has been removed from some of the documents. We have based these deletions on Exemption 6 of the FOIA, USC § 552 (b)(6), as implemented by the Department of Transportation's regulations, 49 CFR § 7.13(c)(6), on the grounds that the release of this information would constitute a clearly unwarranted invasion of personal privacy.

The persons responsible for this determination are the undersigned and Scheryl Portee, an attorney with the Office of Chief Counsel. To the extent that information is being withheld and that FTA does not have some of the requested documents, this is a partial denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., 5th Floor, East Building, Washington, D.C. 20590. An appeal must be submitted within thirty (30) days after you have received this determination. It should contain any information and arguments you may wish to rely on, and the envelope in which the appeal is sent should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,


for Tommy Carter
Director, Office of Management
Planning

Enclosure

From: [REDACTED]

To: [REDACTED]

Subject: Fwd: FOIA request for the City of Long Beach NY

Date: Thu, Apr 17, 2014 4:54 pm

On Mon, Feb 3, 2014 at 11:47 AM, [REDACTED] wrote:
Nancy Sipes-

I am looking to FOIA information on the City of Long Beach NY.

The documents I am looking to obtain are:

1. NTD report for 2013 and 2014 the most recent last two years ID: NTD2006
2. TEAM quarterly reports and info for any open grants in the TEAM system
3. ECHO WEB documentation on the users and draw downs
4. MIS report for 2013 and 2014 the most recent last two years
5. TRI Annual review for 2013 the most recent findings and closings report
6. Any FTA seminars in which a representative from Long Beach NY attended

Please contact me at 516-270-5676

[REDACTED]



U.S. Department
of Transportation

Federal Transit
Administration

Deputy Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

MAY 21 2014

[REDACTED]

Re: Appeal of partial denial of FOIA request FY14-0090

Dear [REDACTED]:

This letter responds to [REDACTED] April 17, 2014 appeal to the Federal Transit Administration ("FTA") of its partial denial of his request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 CFR Part 7. For the reasons described below, FTA's decision is reversed.

I. Background

[REDACTED] submitted a FOIA request dated February 3, 2014 seeking certain records pertaining to the City of Long Beach, New York. Specifically, [REDACTED] requested:

1. NTD report for 2013 and 2014 the most recent last two years ID: NTD2006
2. TEAM quarterly reports and info for any open grants in the TEAM system
3. ECHO WEB documentation on the users and draw downs
4. MIS report for 2013 and 2014 the most recent last two years
5. TRI Annual review for 2013 the most recent findings and closing report
6. Any FTA seminars in which a representative from Long Beach NY attended¹

On March 28, 2014, FTA partially granted [REDACTED] request for records. FTA produced the City's NTD reports from 2011 and 2012, which were the two most recent years for which reports were available; the TEAM grant application, milestone progress report, and federal financial report for FTA grant number NY-90-X619, which was the City's only open grant in TEAM; the ECHO-Web report of all three drawdowns made by the City between January 1, 2013 and March 5, 2014; the City's MIS reports from 2011 and 2012, the two most recent years for which reports

¹ "NTD" is the National Transit Database, a database to which FTA's grant recipients report statistical information about their operations. "TEAM" is the Transportation Electronic Award and Management web-based system through which FTA awards and manages grants. "ECHO-Web" is the Electronic Clearing House Operation, a web-based application used by FTA's grant recipients to request payments from the U.S. Treasury. "MIS" is the U.S. Department of Transportation's Drug and Alcohol Testing Management Information System, to which FTA grant recipients report the results of their anti-drug and alcohol misuse testing programs. A triennial review is a broad review FTA conducts of each grant recipient at least triennially to examine the recipient's performance and compliance with FTA requirements and policies.

were available; the City's most recent triennial review, dated January 8, 2014; and a list of National Transit Institute classes attended by the City in the last two years.

FTA partially denied ██████████ request by redacting the names of individuals appearing in the TEAM, ECHO-Web, and MIS reports. The redacted names include both federal employees and third parties, and appear in business contexts, such as submitting or certifying federal forms, or as individuals assigned certain responsibilities in project descriptions. FTA claimed that the redacted names were protected by FOIA Exemption 6.

██████████ timely made the present appeal, in which he raises two challenges to FTA's production: (1) that FTA improperly applied Exemption 6 to the individuals' names, and (2) that FTA's production was incomplete because it did not include "the Transportation Department's Echo Payment Request Form, the Echo Web Authorization and Certification form V 2, and the Echo User Access form filed by the City of Long Beach".

II. Discussion

A. Exemption 6 Redactions

Under FOIA, an agency must disclose all records requested by any person, 5 U.S.C. § 552(a)(3), unless the information sought falls within a specific statutory exemption. 5 U.S.C. § 552(d). FOIA Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As a threshold to applying Exemption 6, an agency first must determine whether the records in question are personnel, medical, or "similar" files. If the records are of the kind that are protected by Exemption 6, the agency then must determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy. *Multi Ag Media v. Department of Agriculture*, 515 F.3d 1224, 1228 (D.C. Cir. 2008).

The Supreme Court has instructed that Exemption 6 is to be interpreted broadly with regard to the kinds of records that can be protected. *See Department of State v. Washington Post*, 456 U.S. 595, 602 (1982). Exemption 6 is not limited to a "narrow class of files containing only a discrete kind of personal information." *Id.* Rather, all information that "applies to a particular individual" can be protected by Exemption 6. *Id.* To the extent that the records in question identify specific individuals and information about those individuals, they are within the meaning of "similar" files for purposes of Exemption 6.

Next, FTA must consider whether the named individuals have a substantial, as opposed to merely de minimis, privacy interest in the requested information. *See Multi Ag Media*, 515 F.3d at 1229. As observed in ██████████ appeal, civilian federal employees who are not involved in law enforcement generally do not have an expectation of privacy regarding their names, titles, salaries, job descriptions, and other similar information about their public employment. *See* 5 CFR § 293.311 (Office of Personnel Management regulation making certain information contained in federal employees' personnel records available to the public). The federal employees' names redacted from FTA's production, if disclosed, would reveal only the employees' names and some information about their general job duties. The employees do not

have a privacy interest in this information, and FTA's decision is reversed as to the federal employees' names.

The analysis is different with regard to the third-party names that have been redacted. While federal employees have a reduced privacy interest in certain job-related personal information by virtue of their public employment, the same is not necessarily true for third parties interacting with a federal agency. Private individuals have a greater than de minimis privacy interest in personally identifying information such as names, locations, employment information, etc. *See Washington Post*, 456 U.S. at 600 (even information that is not "highly personal" "would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy").

When a greater than de minimis privacy interest is found, it must be weighed against the public interest in disclosure. *Multi Ag*, 515 F.3d at 1230. "A privacy interest may be substantial—more than de minimis—and yet be insufficient to overcome the public interest in disclosure." *Id.* The only relevant public interest in the FOIA balancing analysis is that purpose which underlies FOIA itself: "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.'" *DOD v. FLRA*, 510 U.S. 487, 497 (1994) (quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). In the instant matter, the information that would be revealed by disclosure includes barely more than the names and some job duties of some of the officials of a recipient of federal grant funds. The privacy interest in such business information is minimal, and, as ██████████ correctly argues in his appeal, there is strong public interest in knowing the identities of federal and local officials responsible for the request, disbursement, and administration of federal grant funds. Therefore, FTA's decision as to the third-party names is reversed.

B. Incomplete Production

██████████ appeal also asserts that certain ECHO-Web records responsive to his request should have been included in FTA's response but were not. Implicitly, ██████████ argues that FTA either improperly construed his request or failed to conduct an adequate search for records. Using the list of specific missing ECHO-Web records provided by ██████████ in his appeal, FTA conducted a second search for records on April 29, 2014. This second search located additional records that are responsive to the ECHO-Web portion of ██████████ request: (1) an Automated Clearing House Payment Information form for the City of Long Beach, (2) an ECHO-Web User Change/Modify form for the City of Long Beach, (3) an ECHO-Web User Access Authorization and Certification from the City of Long Beach, (4) an ECHO-Web User Access form for the City of Long Beach, and (5) an ECHO-Web System Rules of Conduct form signed by a City of Long Beach authorized user.

Without comment on FTA's construction of ██████████ request or the adequacy of FTA's initial search, the additional records are included as enclosures with this decision, except that bank account information has been redacted pursuant to FOIA Exemption 4. 5 U.S.C. § 552(b)(4). Exemption 4 protects "the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the

public by the person from whom it was obtained.” *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). *See also Fox News Network v. Department of the Treasury*, 739 F.Supp.2d 515, 564-65 (S.D.N.Y. 2010) (applying Exemption 4 to bank account information).

III. Conclusion

For the foregoing reasons, FTA’s partial denial of ██████████ FOIA request is reversed. Records that were the subject of this appeal are included as enclosures with this decision as described above.

This decision has been concurred in for Kathryn Thomson, the General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA request number FY14-0090. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, reading "Therese W. McMillan" with a stylized flourish at the end.

Therese W. McMillan

Enclosures

From: [Hall, Christopher \(FTA\)](#) on behalf of [FTA FOIA Appeals](#)
To: [Hall, Christopher \(FTA\)](#)
Subject: FW: Appeal of FOIA FY15-0070
Date: Thursday, January 22, 2015 12:11:30 PM
Attachments: [FTAappealResponseFY15-0070.docx](#)

-----Original Message-----

From: [REDACTED]
Sent: Thursday, January 22, 2015 11:36 AM
To: FTA FOIA Appeals
Subject: Appeal of FOIA FY15-0070

[REDACTED]

January 22, 2015

Deputy Administrator FTA
1200 New Jersey Ave., SE
East Building, 5th Floor,
Washington, DC 20590
FTA.FOIA.Appeals@dot.gov

Re: Appeal of FOIA FY15-0070

Thank you for the opportunity to appeal the January 16, 2015 decision of your agency to partially deny my December 9, 2014 FOIA request given your file number FY15-00070.

The agency response noted that some information was being withheld (either not included in the packet or redacted) and cited the

5USC552(b)(5) exemption – attorney client privilege. Your representative, Nancy Sipes, was good to explain that exemption to me noting that it applies in two areas:

1) Where an attorney provides legal advice to a client in response to a request for a legal opinion.

2) Where agency staff discusses and formulates new policies.

There is no indication which other documents were withheld from the packet nor does the record show which aspects of Exemption 5 apply to which portions of the redacted documents.

If redacted portions are in response to a request for a legal opinion please disclose what question was asked. Please also disclose the general nature of the attorney's response – negative or affirmative.

If redacted portions would compromise the formulation of future policies please review what was redacted to ensure that no redactions were made to discussions of existing laws and policies.

Respectfully yours,

[REDACTED]

--

[REDACTED]





U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

APR 07 2015

Re: Appeal of FOIA decisions FY15-0070 and FY15-0094

Dear [REDACTED]

This letter responds to your appeals of the Federal Transit Administration's (FTA) responses to your requests for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. Your requests FY15-0070 and FY15-0094 have been consolidated on appeal because they concern the same set of records and your appeals raise substantially similar issues in each case. For the reasons described below, FTA's decisions are affirmed as to both requests.

Background

You submitted FOIA request FY15-0070 on December 9, 2014, requesting "all internal and external, inter-office and intra-office, emails, writings, notes, comments, responses, rebuttals, telephone recordings and logs, texting communications, or archiving records pertaining to the letters and emails originally from [you] dated October 1, 2014 to present." Preceding your FOIA request, you had submitted several communications to FTA regarding C-TRAN's Fourth Plain Bus Rapid Transit Project in Vancouver, Washington. You submitted FOIA request FY15-0094 on January 22, 2015, which requested the same records, except dating from September 26, 2014.

The FTA responded to FY15-0070 on January 16, 2015, and to FY15-0094 on January 22, 2015. The same responsive records were discovered in both cases, and FTA made the same two redactions to the records in both responses. The first redaction removed a paragraph from an email sent by Kenneth Feldman dated December 3, 2014, addressed to regional counsel Gwendolyn Franks and copied to three other regional employees, one regional counsel, and the regional administrator. The second redaction removed a paragraph from an email sent by regional counsel Ted Uyeno dated December 3, 2014, addressed to two regional employees and copied to one other regional employee and the regional administrator. The FTA noted that its redactions were made pursuant to 5 U.S.C. § 552(b)(5) ("Exemption 5"), and cited both the attorney-client privilege and deliberative process privilege. The redactions constituted partial denials of your FOIA requests.

You appealed FTA's responses to FY15-0070 and FY15-0094 on January 22, 2015, and February 10, 2015, respectively. Your appeal of FY15-0070 requested review of FTA's decision and also requested that "[i]f redacted portions are in response to a request for a legal opinion

please disclose what question was asked”, and also “disclose the general nature of the attorney’s response—negative or affirmative.” Your appeal of FY15-0094 wholly included your appeal of FY15-0070, with the addition of two specific concerns. First, that FTA’s redactions to the Feldman email were inappropriate because the email was carbon copied to non-attorneys, and so could not have been privileged. Second, that FTA conducted an inadequate search for records because you suspected that additional responsive records existed that were not produced.

Applicable Law

Under FOIA, an agency must disclose all records requested by any person, unless the information sought falls within a specific statutory exemption. 5 U.S.C. § 552(a)(3), (b). A responding agency must undertake a search for requested records that is reasonably calculated to uncover all relevant records. See Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

FOIA Exemption 5 protects from disclosure those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption incorporates common civil discovery privileges such as the attorney-client privilege. See, e.g., Mead Data Central, Inc. v. U.S. Dep’t of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). The attorney-client privilege protects the “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” Id. at 252. It serves public ends by enabling the free exchange of information, advice, and opinion between an attorney and the client-agency.

Exemption 5 also incorporates the deliberative process privilege, which protects “‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” Department of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001) (quoting N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The deliberative process privilege protects the decision-making processes of government agencies by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s decision. See N.L.R.B., 421 U.S. at 151-53; Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir.1980). To this end, records that are predecisional and deliberative are exempt from disclosure under the privilege. Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

Discussion

The FTA has reviewed the searches for records and the redactions made to the documents produced in response to FOIA requests FY15-0070 and FY15-0094. All responsive records that were discovered were produced to you, with the redactions described above. In the course of responding to this appeal, FTA Region 10 employees performed another search for records on March 3, 2015. This latest search did not discover any responsive records that were not already provided to you.

Both redactions made to the records produced to you were communications between FTA employees and FTA attorneys seeking or conveying legal advice related to the application of the National Environmental Policy Act ("NEPA") to the C-TRAN Fourth Plains project. In the case of the Feldman email, for the purpose of the attorney-client privilege, it is immaterial that the email was copied to non-attorneys. The employee's question was addressed specifically to the attorney recipient and the non-attorneys copied on the email all were FTA employees--clients of the FTA regional counsel. In addition to conveying legal advice to the clients, the material redacted from the Uyeno email also contains an advisory opinion or recommendation expressed as part of FTA's NEPA decision-making process as applied to the C-TRAN Fourth Plains project. As such, the redacted materials are properly exempted from disclosure by FOIA Exemption 5, and FTA's partial denials of requests FY15-0070 and FY15-0094 are affirmed.

Your appeals also request disclosure of what legal advice was sought by FTA employees and the "general nature of the attorney's response—negative or affirmative". The FOIA requires a responding agency to disclose existing records upon request; it does not require an agency to create new records or to answer questions. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985). Furthermore, revealing the substance, if not the exact words, of attorney-client communications would undermine the very purpose of the Exemption 5 privilege, which is to allow the free exchange of information and advice between attorneys and their client agencies. Accordingly, FTA declines to provide details of the substance of the redacted material beyond what is contained in this opinion.

This decision has been concurred in for Kathryn Thomson, the General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA requests numbers FY15-0070 and FY15-0094. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Therese W. McMillan", with a long, sweeping horizontal line extending to the right.

Therese W. McMillan
Acting Administrator

From: [Hall, Christopher \(FTA\)](#) on behalf of [FTA FOIA Appeals](#)
To: [Hall, Christopher \(FTA\)](#)
Subject: FW: Appeal of FOIA FY15-0094
Date: Thursday, February 19, 2015 12:17:31 PM
Attachments: [environmentaljusticeOct6,2014.doc](#)
[redactedemails.pdf](#)

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, February 10, 2015 11:48 AM
To: FTA FOIA Appeals
Subject: Appeal of FOIA FY15-0094

Deputy Administrator FTA
1200 New Jersey Ave., SE
East Building, 5th Floor,
Washington, DC 20590
FTA.FOIA.Appeals@dot.gov

Re: Appeal of FOIA FY15-0094

Thank you for the opportunity to appeal the February 4, 2015 decision of your agency to partially deny my January 2, 2015, FOIA request given your file number FY15-00094.

The agency response noted that some information was being withheld (either not included in the packet or redacted) and cited the

5USC552(b)(5) exemption – attorney client privilege. Your representative, Nancy Sipes, was good to explain that exemption to me noting that it applies in two areas:

1) Where an attorney provides legal advice to a client in response to a request for a legal opinion.

2) Where agency staff discusses and formulates new policies.

There is no indication which other documents were withheld from the packet nor does the record show which aspects of Exemption 5 apply to which portions of the redacted documents.

If redacted portions are in response to a request for a legal opinion please disclose what question was asked. Please also disclose the general nature of the attorney's response – negative or affirmative.

If redacted portions would compromise the formulation of future policies please review what was redacted to ensure that no redactions were made to discussions of existing laws and policies.

I have attached copies of the redacted pages. Please apply your review standards to the following concerns:

1) Kenneth Feldman email Dec 3, 2014, 8:23 AM broadcast to team members and attorneys. Since the topic appears to ask for their responses to my complaint and the email was sent to various engineers and team members, as well as attorneys, the communication can hardly be considered privileged, even though the attorney's response might be privileged. Since my complaint dealt with possible violations of existing laws and policies, not future policies under development, any discussion of my complaint among team members is not privileged or subject to Exemption 5.

2) Ted Uyeno email October 6, 2014, 3:03 PM broadcast to Kenneth Feldman and other team members. This email appears to be in response to my October 6 public input on environmental justice issues and the inextricable link between the proposed BRT project and the defunct Columbia River Crossing project (see attached [environmentaljusticeOct6,2014.doc](#)). Perhaps Mr. Uyeno offers an opinion that no part of my public input is relevant and that all discussions of it should cease. That would explain why I am not privy to any of the subsequent emails or discussions subject of my FOIA request. However, it does not explain Mr. Feldman's response, broadcast to all original recipients,

"...Steve can forward the EJ comments to Chris." Apparently, discussions between Chris and Steve are not subject to the attorney's directive. Please review those discussions and decide if they should have been included in the agency response to my FOIA request.

Respectfully yours,

--

A black rectangular redaction box covering the signature area.



U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

1200 New Jersey Ave., S.E.
Washington, DC 20590

APR 07 2015

Re: Appeal of FOIA decisions FY15-0070 and FY15-0094

Dear [REDACTED]

This letter responds to your appeals of the Federal Transit Administration's (FTA) responses to your requests for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. Your requests FY15-0070 and FY15-0094 have been consolidated on appeal because they concern the same set of records and your appeals raise substantially similar issues in each case. For the reasons described below, FTA's decisions are affirmed as to both requests.

Background

You submitted FOIA request FY15-0070 on December 9, 2014, requesting "all internal and external, inter-office and intra-office, emails, writings, notes, comments, responses, rebuttals, telephone recordings and logs, texting communications, or archiving records pertaining to the letters and emails originally from [you] dated October 1, 2014 to present." Preceding your FOIA request, you had submitted several communications to FTA regarding C-TRAN's Fourth Plain Bus Rapid Transit Project in Vancouver, Washington. You submitted FOIA request FY15-0094 on January 22, 2015, which requested the same records, except dating from September 26, 2014.

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You appealed FTA's responses to FY15-0070 and FY15-0094 on January 22, 2015, and February 10, 2015, respectively. Your appeal of FY15-0070 requested review of FTA's decision and also requested that "[i]f redacted portions are in response to a request for a legal opinion

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Applicable Law

Under FOIA, an agency must disclose all records requested by any person, unless the information sought falls within a specific statutory exemption. 5 U.S.C. § 552(a)(3), (b). A responding agency must undertake a search for requested records that is reasonably calculated to uncover all relevant records. See Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

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Exemption 5 also incorporates the deliberative process privilege, which protects “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Department of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001) (quoting N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The deliberative process privilege protects the decision-making processes of government agencies by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s decision. See N.L.R.B., 421 U.S. at 151-53; Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir.1980). To this end, records that are predecisional and deliberative are exempt from disclosure under the privilege. Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

Discussion

The FTA has reviewed the searches for records and the redactions made to the documents produced in response to FOIA requests FY15-0070 and FY15-0094. All responsive records that were discovered were produced to you, with the redactions described above. In the course of responding to this appeal, FTA Region 10 employees performed another search for records on March 3, 2015. This latest search did not discover any responsive records that were not already provided to you.

Both redactions made to the records produced to you were communications between FTA employees and FTA attorneys seeking or conveying legal advice related to the application of the National Environmental Policy Act ("NEPA") to the C-TRAN Fourth Plains project. In the case of the Feldman email, for the purpose of the attorney-client privilege, it is immaterial that the email was copied to non-attorneys. The employee's question was addressed specifically to the attorney recipient and the non-attorneys copied on the email all were FTA employees--clients of the FTA regional counsel. In addition to conveying legal advice to the clients, the material redacted from the Uyeno email also contains an advisory opinion or recommendation expressed as part of FTA's NEPA decision-making process as applied to the C-TRAN Fourth Plains project. As such, the redacted materials are properly exempted from disclosure by FOIA Exemption 5, and FTA's partial denials of requests FY15-0070 and FY15-0094 are affirmed.

Your appeals also request disclosure of what legal advice was sought by FTA employees and the "general nature of the attorney's response—negative or affirmative". The FOIA requires a responding agency to disclose existing records upon request; it does not require an agency to create new records or to answer questions. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985). Furthermore, revealing the substance, if not the exact words, of attorney-client communications would undermine the very purpose of the Exemption 5 privilege, which is to allow the free exchange of information and advice between attorneys and their client agencies. Accordingly, FTA declines to provide details of the substance of the redacted material beyond what is contained in this opinion.

This decision has been concurred in for Kathryn Thomson, the General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision constitutes the final administrative action on FTA FOIA requests numbers FY15-0070 and FY15-0094. You may appeal this decision to the U.S. District Court for the judicial district in which the requestor resides or has its principal place of business, the judicial district in which the requested records are located, or the judicial district for the District of Columbia.

Sincerely yours,



Therese W. McMillan
Acting Administrator

Sipes, Nancy (FTA)

From: maria torres <mujercoahuilteca@gmail.com>
Sent: Wednesday, May 13, 2015 4:06 PM
To: FTA.FOIA.Appeal@dot.gov; Sipes, Nancy (FTA); Patel, Elizabeth (FTA); valerie Hauser; cwilson@achp.gov; gee.randy@epa.gov; maria torres
Subject: Re: The Pacuache Clan of Texas Request to FTA EIS Final Report Appeal FY15-0122
Attachments: Request EIS for Valero Mission El Alamo.pdf

To the Deputy Administrator of The Federal Transit Administration our Tribe submit Appeal FY 15-0122 our Tribe Request to FTA for the EIS Report dated August 20, 2015 conducted at San Antonio, Texas Bexar County conducted at San Antonio De Valero Mission The Alamo.

Enclosed pdf document. Please confirm/reply. Thank you.

The Pacuache Clan of Texas
Coaguilteca Indian Tribe First Nation
San Antonio Missions Indigenous People
Mary Torres
Tribal Chairwoman
(210) 483-3879

The Pacuache Clan of Texas

Missions Indigenous Lineal Descendants San Juan Bautista-San Bernardo De la Candela our Sacred Anacacho Dacate Sacatsol Mountains, Chotilapacquen Ona River, Elm Creek, Pilapaxam-Pulapacxam River, Nueces River, Yanaguana River San Antonio Missions, Indigenous Missions Lineal Descendants to South Texas and Northeastern Mexico, Tribal nation Inherent Sovereign, Self-Government, Foundation 1675

May 11, 2015

Re: The Pacuache Clan of Texas Appeal File No. FY15-0122 our Tribe request under the FOIA the Final EIS Report dated August 20, 2014 conducted at our Indian Religious Ancestral Sacred Site of San Antonio De Valero Mission/El Alamo.

To The Deputy Administrator of the Federal
Transit Administration
1200 New Jersey Avenue, S.E., East Building 5th
Floor, Washington, D.C. 20590

To The Deputy Administrator,

Enclosed please find our Tribe Appeal File No. FY 15-0122 to our requested on February 27, 2015 for a copy of the EIS Report conducted by your Agency the FTA and dated August 20, 2015 conducted at San Antonio, Texas Bexar County at San Antonio De Valero Mission/El Alamo an Indian Religious Sacred Burial Site and a National Treasure.

Our Tribe requested this EIS copy Report under our Indian Religious Practices in protecting our Sacred Site under Executive Order 13007 the Protection of Religious Sacred Sites. Presently the Site is in great fragile state of preservation and is a proposed World Heritage Nomination Inscription and with a final decision on June 2015 by the UNESCO Cultural Fund at Bonn Germany and where our Tribe is protected under the UNESCO Indigenous Human Rights Declaration and our Tribe cites NAGPRA, The Native American Graves Protection Repatriation Act, The Native American Religious Freedom Act and where our Tribe follow protocol with your Agency FTA and timely requested Consultation, submitted commentaries for the EIS Report.

Our Tribe is been injured and continue to be injured by your Agency FTA under our Indian Religious Practices and Indigenous Human Rights by your Agency the FTA in depraving us under our Indigenous Human Rights, the United States Constitutional Rights under Amendments 1st, 4th, 5th, the Fourteen Amendment Equal Protection and for you to provide our Tribe with a copy of this EIS Report necessary for our Tribe in the protection of our Religious Sacred Site the San Antonio De Valero Mission the Alamo

our Ancestral Land. Our Tribe understands your Agency the FTA in assisting us to provide us a copy of this EIS Report if necessary Report can be re-read or highlighted.

Commented [mt1]:

Our Tribe in the interest of Justice is asking you assist us in providing us a copy of this EIS Report where this information will greatly provide our Tribe direct and indirect adverse effects in the protection our Religious Sacred Archeological Site of San Antonio De Valero Mission El Alamo Archeological Historical Cultural Resources.

Our Tribe in the Interest of Justice is in great need of this EIS Report copy. Our Tribe is sending this appeal via electronically email to FTA.FOIA.Appeals@dot.gov.

Respectfully,

The Pacuache Clan of Texas
The Coaguiteca Indian Tribe First Nation
San Antonio Missions Indigenous People
Mary Torres
Tribal Chairwoman
935 W. Silver Sands Dr. Apt. # 2705
San Antonio, Texas 78216
(210) 483-3879
Email: mujercoahuilteca@gmail.com

Cc:

National Council Historical Preservation
Valerie Hauser, Director of Native American Affairs
Chris Wilson, Project Analyst

EPA Region 6
Randy Gee, EPA Coordinator of Native American Affairs

Elizabeth Patel
FTA Historical Preservation Officer

Nancy Sipes
FTA Office of Management Planning



U.S. Department
of Transportation
**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

JAN 12 2016

Ms. Mary Torres
Tribal Chairwoman
The Pacuache Tribe of Texas
935 West Silver Sands Drive No. 2705
San Antonio, TX 78216

Re: Appeal of FOIA request No. FY15-0122

Dear Chairwoman Torres:

This letter responds to your appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons described below, FTA's decision is affirmed in part and reversed in part.

Background

On behalf of the Pacuache Tribe of Texas, you submitted FOIA request FY15-0122 on February 27, 2015, requesting the "Environmental Assessment Report for the Proposed Streetcar Project completed on August 20, 2014 for San Antonio, Texas Bexar County".

The FTA's search for records produced an unissued draft of an environmental assessment, prepared in compliance with the National Environmental Policy Act (NEPA), for a proposed San Antonio streetcar project. The draft was prepared jointly by FTA and the local project sponsor, VIA Metropolitan Transit. As a draft, the document was never endorsed or issued by FTA, and has no completion date. The document is written with the anticipation that, had it been issued, a public hearing to discuss the document would have been held on August 20, 2014. Ultimately, no such hearing occurred because the proposed project was suspended and the environmental assessment was never completed.

The FTA responded to request FY15-0122 on March 31, 2015. In its response, FTA stated that a search had identified a record responsive to your request, however "FTA is withholding this document under FOIA Exemption 5". The FTA's response explained that Exemption 5 incorporates common civil discovery privileges such as the attorney-client privilege and the executive deliberative process privilege.

You made the present appeal on May 13, 2015. Your appeal reiterates your request for a copy of an “Environmental Impact Statement (EIS) Report conducted by ... the FTA and dated August 20, 2015” for San Antonio, Texas.

To support your argument that the record should be made available under the FOIA, your appeal also refers to Executive Order 13007, 3 C.F.R. § 13007 (1996), which relates to the protection of Native American sacred sites by Federal land management agencies; the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, which requires Federal agencies to restore Native American human remains and funerary objects to Native American tribes; and the American Indian Religious Freedom Act, 42 U.S.C. § 1996, which expresses the United States’ policy of protecting Native American religious practices, including the protection of sacred objects and sites.

Applicable Law

Under the FOIA, an agency must disclose all records requested by any person, 5 U.S.C. § 552(a)(3), unless the records sought fall within a specific statutory exemption. 5 U.S.C. § 552(d). When only part of a record is exempted from disclosure, an agency must disclose any reasonably segregable non-exempt portion of that record after deleting the exempted portions. 5 U.S.C. § 552(b).

Exemption 5 of the FOIA protects from disclosure “inter-agency or intra-agency” records which would not be available by law to a party in litigation with an agency. 5 U.S.C. § 552(b)(5). Courts have incorporated within this exemption common civil discovery privileges, including the “deliberative process” or “executive” privilege, which shields “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” *Dep’t of the Interior v. Klamath Water Users*, 532 U.S. 1, 8 (2001). This privilege serves three primary purposes: (1) to encourage policy makers to speak candidly with each other without fear that their choice of language will be subject to public inspection; (2) to prevent premature release of proposed policies before they are adopted; and (3) to protect against the public confusion and the spread of erroneous information that might result from disclosing rationales that were not ultimately the grounds for an agency’s action. *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir.1982) (citing *Jordan v. Dep’t. of Justice*, 591 F.2d 753, 773 (D.C. Cir.1978)).

Thus, to qualify for protection under the deliberative process privilege of Exemption 5, a document must satisfy two conditions: it must be inter- or intra-agency in nature, and it must form part of an agency’s deliberative process. The threshold inquiry when applying Exemption 5 is whether the record in question is inter- or intra-agency. For purposes of the FOIA, the term “agency” refers to the agencies and corporations of the executive branch of the Federal Government, including independent regulatory agencies, and not to State or local government agencies. 5 U.S.C. §§ 551(1), 552(f)(1).

The term “agency” also includes the many non-Federal experts and consultants whose documents are incorporated into an agency’s deliberative process, whether those consultants are serving as formal contractors, volunteers, or in certain other capacities. *See Klamath*, 5 U.S. at 9-11 (recognizing the so-called “consultant corollary” to Exemption 5). In the particular scenario of a Federal agency cooperatively preparing NEPA documents with a project sponsor that is non-Federal, the non-Federal entity acts as a consultant to the Federal agency, and the documents passed between them are considered intra-agency. *E.g.*, *Judicial Watch, Inc. v. U.S. Dep’t of Transp.*, 950 F. Supp. 2d 219 (D.D.C. 2013) (holding that documents shared between the Federal Railroad Administration and the California High Speed Rail Authority as part of NEPA process were intra-agency for purposes of Exemption 5).

The second consideration in applying the deliberative process privilege of Exemption 5 is whether the record in question forms part of an agency’s deliberative process, i.e., whether the record is both predecisional and deliberative. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is predecisional “if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process.” *Id.* Generally, information that is merely factual is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel. *E.g.*, *EPA v. Mink*, 410 U.S. 73, 91 (1973) (declining to extend privilege to “factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion”). If it is reasonably segregable from protected portions of a record, an agency is required by 5 U.S.C. § 552(b) to disclose such non-protected factual material.

Discussion

The draft environmental assessment is an intra-agency document. The present situation is the same as that considered by the court in *Judicial Watch*: a Federal agency has cooperated with a non-Federal project sponsor as required by NEPA to produce an environmental analysis. VIA Metropolitan Transit acted in the role of a consultant to FTA, and the communications between FTA and VIA Metropolitan Transit are eligible for Exemption 5 protection as if they had occurred entirely within FTA.

The draft environmental assessment is also predecisional. As stated above, the streetcar project was suspended and the assessment was never issued. The opinions, policy expressions, and conclusions contained within the document are, therefore, not agency decisions, but only proposed decisions that FTA may or may not adopt in the future. To safeguard the internal candidness of agency decision-making, to prevent the premature release of unadopted policies, and to protect the public from confusing and erroneous information, the deliberative portions of the environmental assessment are entitled to Exemption 5 protection, and FTA’s denial is affirmed as to the deliberative portions of the document.

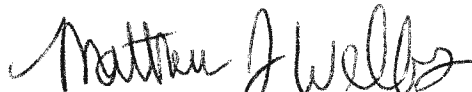
However, not all of the draft environmental assessment is deliberative in nature. Much of the document is a factual recitation—of earlier actions taken by FTA, VIA Metropolitan Transit, other agencies, and the city of San Antonio, of the factual results of environmental investigations in the San Antonio area, etc.—that are already publicly known or that could be obtained by the public. The factual portions of the draft environmental assessment do not expose agency deliberations or agency decisions that could be made based on those facts. To the extent that any portions of the draft environmental assessment are factual, rather than deliberative, and can be reasonably segregated from the deliberative portions of the document, FTA's decision is reversed as to those portions.

Conclusion

The FTA's decision denying your FOIA request is affirmed in part and reversed in part. The denial is affirmed as to the deliberative portions of the draft environmental assessment and reversed as to any purely factual and segregable elements of the draft. A redacted copy of the draft environmental assessment is provided enclosed with this decision.

Attorney Claire McKenna has concurred with this decision on behalf of Kathryn Thomson, the General Counsel of the U.S. Department of Transportation. This decision is the final administrative action with regard to FOIA request FY15-0122. You may appeal this decision to the U.S. District Court for the district in which the requestor resides or has its principle place of business, the district in which the requested records are located, or the district for the District of Columbia.

Sincerely yours,


Matthew J. Welbes
Executive Director

Enclosure

June 15, 2015

To: Deputy Administrator of the Federal Transit Administration

1200 New Jersey Avenue
S.E. East Building
5th Floor
Washington, D.C. 20590

Requestor Contact Information:



Re: FOIA APPEAL
FTA File No. FY15-0163 / Dated April 14, 2015

Background: [REDACTED] was a triennial reviewer, subcontracted to the CDI/DCI JV team and assigned to conduct seven triennial reviews in Region IV for FY2015. He was (is) employed as a member of the faculty of the University of Wisconsin Systems where he designs and instructs on-line continuing education courses for the Center for Transportation Education and Development. Recognizing that the TR process may be the most comprehensive, concise and inclusive coverage of federal compliance requirements available and that an overview course on the TR process might be of benefit to anyone with either an interest or obligation in transit, he discussed the possibility of a pilot test of an on-line TR overview course with the then FTA COR. This course was proposed to be self-contained (pre-written tutorial) and self-paced with opportunity for asynchronous discussion. The University of Wisconsin Milwaukee CTED offered the on-line continuing educational course titled "FTA Triennial Review, Overview and Tips" in late October 2014. Prior to the course, a disclosure/description of the course was sent to current TR COR John Bodnar.

In February 2015, FTA Contracting Officer Karoline Starr sent notification to CDI/DCI JV alleging [REDACTED] committed conflict of interest for teaching the course. CDI/DCI JV provided a defense, suspending [REDACTED] in the interim. [REDACTED] filed a civil rights complaint with the FTA Office of Civil Rights in March 2015, requesting input on the issue of academic freedom. (Ten weeks later OCR indicated academic freedom was not in their jurisdiction). In late March 2015, CO Starr informed CDI/DCI JV that a final determination was made that COI existed and iterated FTA's option to terminate their contract for default. CDI/DCI JV immediately terminated [REDACTED] contract without discussion, protest or appeal. The CDI/DCI JV Project Manager, Assistant Project Manager and one other team reviewer (a combined 60+ years of triennial review experience) resigned in direct protest to the manner

in which the issue was handled. A substantial number of FY2015 triennial reviews were significantly delayed, rescheduled, and/or reassigned to newly acquired, hastily chosen, less experienced replacement reviewers midstream.

There is strong reason to believe that conflict of interest did not occur and could not have occurred. The COI investigation appeared flawed and may have encroached on the First Amendment right of academic freedom. An FOIA was filed by [REDACTED] to review records regarding the FTA investigation process.

Purpose of the FOIA Appeal: The FTA FOIA appeal procedure offers the opportunity to provide additional information and argument. FTA's initial FOIA response was not adequate to address the concerns that prompted the FOIA. Therefore, additional information and argument are being offered and documents are being re-requested. **A critical step in resolution is a more adequate response to the FOIA by FTA and a review of the investigation by those who hold higher position in the organization.**

Structure of this Appeal: The FOIA request listed nine items. Each item is listed below with additional information as to its intent, relevance and importance. All documents referenced in this appeal are attached. Specific requests for follow-up information to the FOIA are bolded. Primary concerns are summarized in the closing paragraphs.

Items listed in the FOIA Request with Explanation:

- 1) Source and content of information regarding the allegation of conflict of interest, including the name of the complainant.

In an email to COR Bodnar dated February 25, 2015, [REDACTED] requested the name of the complainant alleging COI and was denied. Further, the FOIA response states, "The FTA searched but could not locate any documents responsive to this item." There was discussion between Bodnar and [REDACTED], a member of another contracted TR firm regarding the course. If [REDACTED] was the source of the allegation, limited discussion in order to lodge a complaint was understandable. If not, any discussion regarding a possible confidential investigation of conflict of interest that includes a member of another contractor would be unethical and result in a biased investigation.

[REDACTED] is again requesting the name of the complainant alleging COI as well as information on the nature, extent and timing of conversations between Bodnar and [REDACTED] regarding the issue.

- 2) The initial exchange between the COR and CO regarding the allegation of conflict of interest.

A memo from Bodnar dated December 30, 2014 titled "Summary of COI Discussion" was included in the FOIA response. This would not be the initial exchange as this memo was sent to others as a summary of prior discussion. However, in that memo, the following summary of points regarding [REDACTED] and COI were listed:

- An online class titled “FTA Triennial Review: Overview and Tips” was offered by the University of Wisconsin-Milwaukee in the Fall of 2014. [the course is currently listed here: <http://www4.uwm.edu/sce/course.cfm?id=29012>]
- The instructor was [REDACTED]
- There was a registration fee, although it is no longer listed on the UWM website. It is believed to have been \$300.
- The syllabus includes references to outdated TR practices.
- Course materials include the TR guide and Grantee Information Request (GIR).
- The course is not listed in the Spring 2015 course directory.

Regarding the COI discussion summary listing:

The source for the items on the summary was not disclosed.

The course disclosure/description memo submitted by [REDACTED] to Bodnar prior to the course was not listed in the summary. This disclosure/description memo contained information about content, purpose and design of the course. This critical document should have been part of this discussion.

The university determines whether a fee is charged for a course and the amount if applicable. Fees are the responsibility of the student and are paid directly to the university. The reason for speculation on the amount of the fee in this discussion is unclear.

The statement is made that the syllabus includes “references to outdated TR practices.” In fact, [REDACTED] was part of the team that developed the content and PowerPoint presentation used by all TR trainers in all FY2015 regional FTA workshops. The curriculum could not have been more current. Outdated practices are often referred to in curriculum. Since this statement has no relevance to COI, its inclusion as a point of discussion would appear to be solely to discredit the instructor and the course.

Course materials did include the TR guide and GIR, both of which are in the public domain. The TR guide is downloadable from the FTA public website. A basic metaphor for many on-line CE courses is to utilize relevant materials that are in the public domain and to have experienced and qualified instructors mold them into curriculum format. This course was no exception.

FOIA request 2) was made to better understand why and how the investigation was initiated.

[REDACTED] is again requesting records or other documentation of the initial exchange regarding the allegation of COI.

3) FTA Policy and Procedures for investigating COI allegations against TR contractors.

This document was missing from the FOIA response.

Does a Policy or Procedure exist for investigating conflict of interest allegations against TR reviewers or is it being withheld from the FOIA response. If the former, was it followed?

Please provide a copy. If the latter, please indicate the reason it was withheld in the FOIA response.

- 4) All documentation from the CO regarding the investigation into the allegation of COI.

Regarding additional questions about the FOIA response and the purpose for repeating request 4):

No record or documentation is provided to indicate that anyone from FTA considered the course disclosure/description memo submitted by [REDACTED] the defense submitted by CDI/DCI JV or the issue of academic freedom.

In the letter of COI determination, CO Starr refers to [REDACTED] as an employee of CDI/DCI. [REDACTED] has never been an employee of CDI/DCI JV.

The final determination letter from Starr referenced H.12 and H.13 of the contract. H.13 addresses disclosure. That disclosure was made. The need to draw attention to H.13 in the final determination letter regarding the allegation was neither justified nor necessary.

How the on-line course violated H.12 or any portion of the contract remains a mystery. If TR educational overview contact biases objectivity, etc., then one needs to ask why FTA annually assigns and compensates reviewers to teach TR overview workshops in the regions where they have current and pending reviews.

Enrollees of the course were students of the University of Wisconsin Milwaukee and were, by law, participants of UWM. Therefore, whether or not a student had any affiliation with a federally funded grantee was not relevant, was not subject to disclosure and is not open for debate.

The solicitation of any business between student and instructor outside the course is considered COI by signed university contract. As a point in fact, there was never any contact or communication between any student and [REDACTED] at any time before, during or after this course. This is not unusual for programmed courses.

The language in both the allegation and determination letters from CO Starr was generalized and never identified a specific action that could have been constituted as COI. There is strong reason to believe the specific offense of COI was not identified because it could not be identified.

Again, please provide all documentation from CO Starr regarding the investigation, including her determination of which part of H.12 or H.13 of the contract was identified as the issue in question. Additionally, please provide supporting documentation on the COI final determination process that assures that all information was reviewed and considered.

- 5) All correspondence between the CO and CDI/DCI JV regarding [REDACTED] and COI, from allegation to determination.

Five letters between CO Starr and CDI/DCI JV were part of the FOIA response.

- 6) A copy of Section H, Conflict of Interest clause in contracts with TR contractors.

This information was included in the FOIA response as part of the contract with CDI/DCI JV.

- 7) Names of any and all parties consulted in the determination of COI against [REDACTED]

A list of names was received. However, neither the reason for their participation nor their contribution was identified.

Is there documentation or record to identify the participation or contribution of those involved with the investigation?

- 8) FTA Policy and Procedures for Protesting or Appealing COI determinations.

The contract offers procedures for protesting COI determinations for the contractor only. CDI/DCI JV had no knowledge of or participation with [REDACTED] conduct as a faculty member of UWM. Nor did they or do they have either the capability or the responsibility to provide a defense of academic freedom.

[REDACTED] was excluded in all correspondence between FTA and CDI/DCI JV and CDI/DCI JV refused to give [REDACTED] the identity of the FTA staff involved. [REDACTED] informed CDI/DCI JV in writing that any information they provided to FTA on his behalf concerning university activity without his prior review was not authorized. [REDACTED] asked CDI/DCI JV to inform FTA that this involved an academic freedom issue and to instruct FTA to contact him directly. Instead, CDI/DCI JV submitted a defense without [REDACTED] review, authorization or knowledge. The first time [REDACTED] reviewed CDI/DCI's defense was as part the FOIA released by FTA. His first notice of COI determination by FTA was with a termination notice from CDI/DCI JV. [REDACTED] wasn't aware that there was a protest or appeal opportunity until he received the contract as part of the FOIA response nearly six weeks after the termination of his contract.

Both the University of Wisconsin Systems and [REDACTED] should have been given the opportunity to participate in an appeal with an issue of this significance. This exclusion of opportunity to participate in appeal is the direct result of the process used by FTA that mandated that CDI/DCI JV represent [REDACTED] and allowed them to "neutralize" the situation at their convenience (terminating [REDACTED] contract) while ignoring the significant issue of academic freedom or the appropriateness of the investigation. It is easy to believe that the terse language contained in FTA's determination letter sent by CO Starr, threatening to terminate their contract by default, contributed to CDI/DCI JV's kneejerk, fearful reaction to terminate [REDACTED] contract. [REDACTED] also believes that CDI/DCI JV recognized they did not have either the capability or the incentive to protest the determination. FTA's protest and appeal procedure allowed and actually motivated CDI/DCI JV to take the easiest way out - resulting in the denial of due process for [REDACTED] and eliminating any opportunity for the University of Wisconsin Systems to participate in the appeal process.

Are there additional components of FTA's COI protest procedures that include faculty and academic freedom issues? Do FTA's COI protest and appeal procedures encourage denial of opportunity to participate?

9) FTA Oversight Procedures for Triennial Review Contractors.

A copy of the FTA Triennial Review Standard Operating Procedure was included with the FOIA response. This document overviews the process for conducting triennial reviews. This is not an FTA oversight procedures document of FTA TR Contractors or subcontracted reviewers.

Does the FTA have Oversight Procedures for Triennial Review Contractors or is this document being withheld. If the latter, please provide the reason the document is being withheld.

In support of the FOIA appeal, these are the key concerns and questions regarding the FTA COI investigation of [REDACTED]

- There appears to be no written FTA document on conduct or process for the investigation of a conflict of interest allegation against a triennial reviewer.
- Any conversation between COR Bodnar and [REDACTED] another contractor, about this issue, other than to formalize a complaint, would have been a violation of privacy and bias the investigation.
- There was no record to indicate that the course disclosure/description memo, a critical component, was part of the investigation.
- The "summary of points from the COI discussion" memo contained a statement regarding reference to outdated course content that has no relevance to COI.
- There is no record that the investigation considered any element of the defense submitted by CDI/DCI JV or the issue of academic freedom.
- All comment in CO Starr's correspondence to CDI/DCI JV regarding COI was in general terms and never identified how COI might have occurred or was determined.
- Language in CO Starr's final determination letter to the contractor iterating FTA's right to terminate for default was unnecessarily forceful and intimidating in nature and may have "bullied" the contractor into making the hasty decision to terminate the subcontract with [REDACTED] for convenience.
- There was no opportunity for either [REDACTED] or the University of Wisconsin Systems to participate in an appeal within FTA in order to address the appropriateness of the investigation or the issue of academic freedom and government interference.

- Three highly experienced CDI/DCI JV reviewers, including both Project Managers, resigned in protest as a direct result of the manner in which the matter was handled.
- The contractor was allowed to hastily acquire non-experienced and less experienced replacement reviewers and insert them into a review process that was well underway.
- Due to the loss of four active reviewers, a substantial number of transit agencies were forced to delay and reschedule their site visits and/or have their reviews and reports reassigned to new reviewers who had not been part of the process from the beginning. The quality of the reviews may have been compromised.
- Academic freedom is afforded to university faculty as part of the freedom of speech entitlement of the First Amendment. Judicial precedent has established this academic freedom as a civil right that is entitled to certain protections from harm, harassment and financial loss, including protection from government interference and influence.

FTA is being asked in this FOIA appeal to provide more adequate, relevant records as identified. FTA's response to this appeal is considered critical in establishing FTA's position on this issue and will be closely evaluated in determining actions that may follow.

Your attention and consideration is appreciated.

Deputy Administrator
Federal Transit Administration
1200 New Jersey Avenue, SE
East Building, Fifth Floor
Washington, DC 20590

FOIA APPEAL: CASE FY15-0166

CERTIFIED AND ELECTRONIC MAIL: FTA.FOIA.Appeal@dot.gov

June 18, 2015

Dear Sir or Madam:

I received your letter dated June 5, 2015, which provided the Agency's reply to my April 16, 2015 Freedom of Information Act (FOIA) request (see the original email message sent to FTA employee David Lee, reproduced below). I have attached a copy of your letter for your reference. Please reconfirm that the Agency does not have any records that are responsive to this request. Also, please state the method(s) involved in your document search, and the responsive Agency officials and departments, if this information is available.

Thank you for your attention to this matter.

Sincerely,

[Redacted Signature]

[Redacted]

[Redacted]

[Redacted]

Attachments

From: [REDACTED]
Sent: Thursday, April 16, 2015 1:14 PM
To: Lee, David (FTA); [REDACTED]
Cc: Patterson, Tyler (PHMSA); [REDACTED]
Subject: Re: Re: [REDACTED]

Mr. Lee,

Please provide a list of all Federal Transit Administration "disruptive behavior" misconduct and the corresponding disciplinary action, if any, including a threat made during a Policy Department meeting in 2006. Please state the title of the employee and the department or office of the employee. Please provide this information by Monday, April 20, 2015. In addition, please provide a list of all FTA "away without leave" misconduct, and the corresponding disciplinary action, if any, within the past five years. Please state the title of the employee and the department or office of the employee. Please provide this information by April 20, 2015.

Thank you,

[REDACTED]



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

June 5, 2015

[REDACTED]

Our File No.: FY15-0166


Dear [REDACTED]:

This is in response to your e-mail of April 22, 2015, requesting information under the Freedom of Information Act (FOIA). Specifically, you requested "a list of all Federal Transit Administration 'disruptive behavior' misconduct and the corresponding disciplinary action, if any, including a threat made during a Policy Department meeting in 2006. Please state the title of the employee and the department or office of the employee. Please provide this information by Monday, April 20, 2015. In addition, please provide a list of all FTA "away without leave" misconduct, and the corresponding disciplinary action, if any, within the past five years. Please state the title of the employee and the department or office of the employee. Please provide this information by April 20, 2015."

We have searched our records and find that we do not have any records responsive to your request. FTA does not maintain a list of the requested misconduct and corresponding disciplinary action. Under FOIA, FTA is not required to create a document to respond to a request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and

any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,


Nancy Sipes
Office of Management
Planning



U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

NOV 04 2015



Re: FOIA Appeal FY15-0166

Dear [REDACTED]:

This letter responds to your appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons described below, FTA's decision is affirmed in part and reversed in part.

You submitted FOIA request FY15-0166 on April 16, 2015. The request sought:

a list of all Federal Transit Administration "disruptive behavior" misconduct and the corresponding disciplinary action, if any, including a threat made during a Policy Department meeting in 2006. Please state the title of the employee and the department or office of the employee. Please provide this information by Monday, April 20, 2015. In addition, please provide a list of all FTA "away without leave" misconduct, and the corresponding disciplinary action, if any, within the past five years. Please state the title of the employee and the department or office of the employee. Please provide this information by April 20, 2015.

On June 5, 2015, FTA denied your request for records because FTA does not maintain the sought information compiled into any kind of list that would have responded to your request or in an electronic medium that could have produced a list. Agencies responding to FOIA requests are not required to answer questions posed as record requests and are not required to create records that did not exist in order to respond to a request. *See, e.g., Krohn v. DOJ*, 628 F.2d 195, 197-98 (D.C. Cir. 1980).

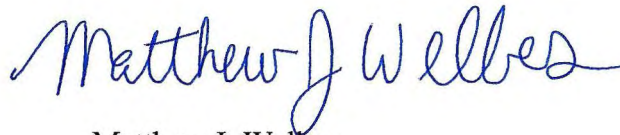
Notwithstanding that the information you are seeking is not compiled into a list, FTA does possess other records that may be responsive to your request. Enclosed with this decision are redacted discipline records for the misconduct described in your request or similar misconduct, for the last five years.

The records have been redacted to remove employee names, offices, and other information that could be used to identify a disciplined employee, pursuant to FOIA Exemption 6. Exemption 6 protects from disclosure information contained in "personnel ... files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(6). In the instant matter, the employees in question have a significant privacy interest in their disciplinary records that outweighs the public's interest in knowing the employees' offices, supervisors, or other redacted information.

The FTA Office of Human Resources did not have any information available regarding a threat made at a meeting in 2006. Nor does the Office of Human Resources record instances of employee misconduct that are not part of an agency disciplinary action. To the extent that FTA has redacted information from the enclosed records, or does not possess records responsive to your request, this is a continued denial of your request.

This decision has been concurred by attorney John E. Allread on behalf of Kathryn Thomson, the General Counsel of the U.S. Department of Transportation. This decision is the final administrative action with regard to FOIA request FY15-0166. You may appeal this decision to the U.S. District Court for the district in which the requestor resides or has its principle place of business, the district in which the requested records are located, or the district for the District of Columbia.

Sincerely,



Matthew J. Welbes
Executive Director

Enclosures

Sipes, Nancy (FTA)

From: Sid Goldstein <editasst17@cs.com>
Sent: Friday, August 07, 2015 9:50 AM
To: FOIA, FTA (FTA)
Subject: FOIA appeal FY15-0193
Attachments: FOIA Appeal FTA FY15-0193.pdf

08/07/05

FTA, attn FOIA Office:

Attached please find PDF file containing 6-page FOIA appeal in FY15-0193.

I respectfully request that the appeal be forwarded through appropriate FTA channels for consideration.

Hard copy follows by postal mail addressed to FTA Deputy Administrator.

Thank you.

Sid Goldstein, Editor
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616

Phone (860)667-7250
Fax (860)667-3635

"Accessibility and Mobility Issues
... in Public Transportation"

LETTER PUBLICATIONS

PO Box 271616
West Hartford CT 06127-1616
Phone (860)667-7250
Fax (860)667-3635

August 7, 2015

Deputy Administrator
Federal Transit Administration
Washington DC 20590

ATTN: FOIA APPEAL

RE: FY 15-0193

VIA E-MAIL AND POSTAL MAIL

To the Deputy Administrator:

This is an appeal of the denial of my request pursuant to the Freedom of Information Act under your file number FY15-0193.

(The original request is attached as ATTACHMENT A. The denial letter issued by FTA is attached as ATTACHMENT B.)

FTA's response denying this FOIA request was dated July 22, 2015. Accordingly, this appeal is timely filed.

The denial letter invoked Exemption 5 of the FOIA as the basis for withholding records found in response to the request, citing the incorporation of the "deliberative process privilege" in that exemption. The assertion of this privilege represents a misapplication of Exemption 5.

Exemption 5 pertains to "inter-agency" or "intra-agency" records. I call your attention to the *Department of Justice Guide to the Freedom of Information Act* ("DOJ Guide"), which states, at page 359 (see ATTACHMENT C), that as an "initial consideration" under Exemption 5 it must be determined whether the records are either "inter-agency" or "intra-agency" records. They are neither in this case, and thus the Exemption 5 privilege cannot be invoked.

The FTA is an "agency" under the FOIA. (5 USC 551, 5 USC 552(f)(1).)

The withheld records are not "intra-agency" records, because they represent communications between the FTA and another party.

TriMet is *not* an "agency" under the FOIA. (See 5 USC 551.)

Therefore, the withheld records, in addition to not being "intra-agency" records, are not "inter-agency" records either.

Therefore, the Exemption 5 claim fails to meet the threshold test of application only to "inter-agency" or "intra-agency" records.

Accordingly, the claim to privilege in the subject records is inappropriate.

I request that you grant this appeal and forward the records responsive to the above-referenced FOIA request without further delay.

Sincerely,

A handwritten signature in black ink, appearing to read 'SG', is written over the printed name.

Sid Goldstein, Editor
TRANSIT ACCESS REPORT

ATTACHMENT A

From: Sid Goldstein <editasst17@cs.com>

To: fta.foia <fta.foia@dot.gov>

Subject: Transit Access Report (re: TriMet)

Date: Fri, Jun 26, 2015 8:40 am

06/26/15

To FTA/FOIA:

Pursuant to the Freedom of Information Act, with reference to TriMet Paratransit Compliance Review Report, dated Jan. 15, 2015, I request copies of all written communications, including emails, including all attachments, between FTA and TriMet following issuance of this report.

Format requested: hard copy.

This is a news media request.

Respectfully submitted,

Sid Goldstein, Editor
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616

Phone (860)667-7250
Fax (860)667-3635

"Accessibility and Mobility Issues
... in Public Transportation"



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

July 22, 2015

Attachment B

Sid Goldstein
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford, CT 06127-1616

Our File No: FY15-0193

Dear Mr. Goldstein:

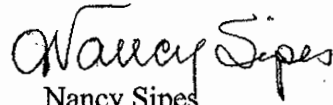
This is in response to your email of June 26, 2015, requesting "copies of all written communications, including emails, including all attachments, between FTA and TriMet following issuance of the TriMet Paratransit Compliance Review Report, dated Jan. 15, 2015"

We have searched our records and find that we have any records responsive to your request. However, FTA is withholding the information under Exemption 5, of the FOIA, 5 USC § 552 (b)(5), as implemented by the Department of Transportation's regulations, 49 CFR § 7.13(c)(5) until such time as the review process is completed. Exemption 5 incorporates the deliberative process privilege. The basis for the privilege is to protect these working documents and to encourage open, frank exchange of opinions and recommendations between government personnel, to protect against premature disclosure of proposed policies before they are finally adopted, and to protect against public confusion that might result from disclosure of reasons and rationale that are not in fact ultimately the grounds for an agency's action. The persons responsible for this determination are the undersigned and Steven Pereira, an attorney in FTA's Office of Chief Counsel.

To the extent that the material is being withheld, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should

include the FTA file or reference number assigned to the request and any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,

A handwritten signature in cursive script that reads "Nancy Sipes".

Nancy Sipes
Office of Management Planning

being used to circumvent civil discovery rules.¹³

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"¹⁴), the attorney work-product privilege, and the attorney-client privilege.¹⁵ First, however, Exemption 5's threshold requirement must be considered.

"Inter-Agency or Intra-Agency" Threshold Requirement

The initial consideration under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums."¹⁶ Though the "most natural reading" of this language would seem to encompass only records generated by and internal to executive branch agencies,¹⁷ federal courts have long given a more expansive reading to this portion of the text. This is because courts quickly recognized that federal agencies frequently have "a special need for the opinions and recommendations of temporary consultants,"¹⁸ and that such expert advice can "play[] an integral function in the government's decision[making]."¹⁹ Consistent with this analysis, courts have allowed agencies to protect

¹²(...continued)
process privilege under Exemption 5).

¹³ See Weber Aircraft, 465 U.S. at 801 ("[R]espondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA."); see also Martin, 819 F.2d at 1186 ("[Plaintiff] was unable to obtain these documents using normal civil discovery methods, and FOIA should not be read to alter that result.").

¹⁴ See, e.g., Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1305 (Fed. Cir. 2006) (noting that deliberative process privilege is one of many privileges that generally fall under rubric of "executive privilege") (non-FOIA case).

¹⁵ See Sears, 421 U.S. at 149.

¹⁶ 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹⁷ See DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988); see also, e.g., Maydak v. DOJ, 362 F. Supp. 2d 316, 322 (D.D.C. 2005) (ruling that documents exchanged between federal prisoner and prison staff do not meet threshold standard); Homick v. DOJ, No. C 98-00557, slip op. at 18 (N.D. Cal. Sept. 16, 2004) (holding that document exchanged between agency employee and private attorney does not qualify under threshold standard).

¹⁸ Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

¹⁹ Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."); Ryan v. DOJ, 617 F.2d 781, (continued...)



U.S. Department
of Transportation

**Federal Transit
Administration**

The Administrator

1200 New Jersey Avenue, SE
Washington, D.C. 20590

OCT 02 2015

Mr. Sid Goldstein
Letter Publications, Inc.
P.O. Box 271616
West Hartford, CT 06127-1616

Re: FOIA Appeal FY15-0193

Dear Mr. Goldstein:

This letter responds to your appeal of the Federal Transit Administration's (FTA) response to your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons described below, FTA's decision is affirmed in part and reversed in part.

1 Background

You submitted FOIA request FY15-0193 on June 26, 2015, requesting a copy of "with reference to [the Tri-County Metropolitan Transportation District of Oregon (TriMet)] Paratransit Compliance Review Report, dated January 15, 2015, ... copies of all written communications, including emails, including all email attachments, between FTA and TriMet following issuance of this report."

The FTA denied your request on July 22, 2015. The FTA's decision stated that records responsive to your request had been found. However, because a review of TriMet's paratransit services was pending at the time of your request, FTA withheld the records according to the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

You appealed FTA's decision on August 7, 2015, challenging the applicability of Exemption 5 to communications between FTA and TriMet.

2 Discussion

The FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 is interpreted "to exempt those documents ... normally privileged in the civil discovery context". *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). To this end, Exemption 5 incorporates statutory, rules-based, and common law privileges against disclosure that would apply in a civil discovery setting, including the "executive" or "deliberative process" privilege.

However, as you observe in your appeal, the threshold inquiry when applying any Exemption 5 privilege is whether the record in question is inter- or intra-agency. If a record is neither inter- nor intra-agency in nature, it cannot be protected by Exemption 5, even if it would otherwise fit within a civil discovery privilege. For purposes of FOIA, the term "agency" refers to the agencies and corporations of the executive branch of the Federal Government, including independent regulatory agencies, and not to State or local government agencies. 5 U.S.C. §§ 551(1), 552(f)(1). As TriMet is not a Federal agency, and in the context of its Paratransit Compliance Review was not acting as an agent or consultant to FTA, the protections of Exemption 5 do not extend to the requested records exchanged between FTA and TriMet.

The FTA's decision is reversed, and the requested records are produced to you as enclosures with this decision, except that the names and addresses of TriMet paratransit customers and applicants have been redacted pursuant to FOIA Exemption 6. Exemption 6 protects from disclosure agency records the release of which would constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). In this matter, the individuals' privacy interests in their identities and home addresses outweigh the potential usefulness of this information to the public for shedding light on FTA's activities and its performance of its statutory duties. *See DOD v. FLRA*, 510 U.S. 487 (1994).

This decision has been concurred in for Kathryn Thomson, the General Counsel of the U.S. Department of Transportation, by Claire McKenna, an attorney on her staff. This decision is the final administrative action regarding FOIA request FY15-0193. You may appeal this decision to the U.S. District Court for the district in which the requestor resides or has its principal place of business, the district in which the requested records are located, or the district for the District of Columbia.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Therese W. McMillan", with a stylized flourish at the end.

Therese W. McMillan
Acting Administrator

Enclosures

ATTACHMENT A

From: Sid Goldstein <editasst17@cs.com>
To: fta.foia <fta.foia@dot.gov>
Subject: Transit Access Report (re: TriMet)
Date: Fri, Jun 26, 2015 8:40 am

06/26/15

To FTA/FOIA:

Pursuant to the Freedom of Information Act, with reference to TriMet Paratransit Compliance Review Report, dated Jan. 15, 2015, I request copies of all written communications, including emails, including all attachments, between FTA and TriMet following issuance of this report.

Format requested: hard copy.

This is a news media request.

Respectfully submitted,

Sid Goldstein, Editor
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford CT 06127-1616

Phone (860)667-7250
Fax (860)667-3635

"Accessibility and Mobility Issues
... in Public Transportation"



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

July 22, 2015

Attachment B

Sid Goldstein
Transit Access Report
Letter Publications, Inc.
PO Box 271616
West Hartford, CT 06127-1616

Our File No: FY15-0193

Dear Mr. Goldstein:

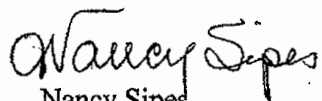
This is in response to your email of June 26, 2015, requesting "copies of all written communications, including emails, including all attachments, between FTA and TriMet following issuance of the TriMet Paratransit Compliance Review Report, dated Jan. 15, 2015"

We have searched our records and find that we have any records responsive to your request. However, FTA is withholding the information under Exemption 5, of the FOIA, 5 USC § 552 (b)(5), as implemented by the Department of Transportation's regulations, 49 CFR § 7.13(c)(5) until such time as the review process is completed. Exemption 5 incorporates the deliberative process privilege. The basis for the privilege is to protect these working documents and to encourage open, frank exchange of opinions and recommendations between government personnel, to protect against premature disclosure of proposed policies before they are finally adopted, and to protect against public confusion that might result from disclosure of reasons and rationale that are not in fact ultimately the grounds for an agency's action. The persons responsible for this determination are the undersigned and Steven Pereira, an attorney in FTA's Office of Chief Counsel.

To the extent that the material is being withheld, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should

include the FTA file or reference number assigned to the request and any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,

A handwritten signature in cursive script that reads "Nancy Sipes".

Nancy Sipes
Office of Management Planning

being used to circumvent civil discovery rules.¹³

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"¹⁴), the attorney work-product privilege, and the attorney-client privilege.¹⁵ First, however, Exemption 5's threshold requirement must be considered.

"Inter-Agency or Intra-Agency" Threshold Requirement

The initial consideration under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums."¹⁶ Though the "most natural reading" of this language would seem to encompass only records generated by and internal to executive branch agencies,¹⁷ federal courts have long given a more expansive reading to this portion of the text. This is because courts quickly recognized that federal agencies frequently have "a special need for the opinions and recommendations of temporary consultants,"¹⁸ and that such expert advice can "play[] an integral function in the government's decision[making]."¹⁹ Consistent with this analysis, courts have allowed agencies to protect

¹²(...continued)
process privilege under Exemption 5).

¹³ See Weber Aircraft, 465 U.S. at 801 ("[R]espondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA."); see also Martin, 819 F.2d at 1186 ("[Plaintiff] was unable to obtain these documents using normal civil discovery methods, and FOIA should not be read to alter that result.").

¹⁴ See, e.g., Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1305 (Fed. Cir. 2006) (noting that deliberative process privilege is one of many privileges that generally fall under rubric of "executive privilege") (non-FOIA case).

¹⁵ See Sears, 421 U.S. at 149.

¹⁶ 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹⁷ See DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988); see also, e.g., Maydak v. DOJ, 362 F. Supp. 2d 316, 322 (D.D.C. 2005) (ruling that documents exchanged between federal prisoner and prison staff do not meet threshold standard); Homick v. DOJ, No. C 98-00557, slip op. at 18 (N.D. Cal. Sept. 16, 2004) (holding that document exchanged between agency employee and private attorney does not qualify under threshold standard).

¹⁸ Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

¹⁹ Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."); Ryan v. DOJ, 617 F.2d 781, (continued...)

From: [Hall, Christopher \(FTA\)](#) on behalf of [FTA FOIA Appeals](#)
To: [Hall, Christopher \(FTA\)](#)
Subject: FW: FOIA APPEAL File FY15-0272
Date: Monday, November 16, 2015 5:00:06 PM

From: [REDACTED]
Sent: Monday, November 16, 2015 8:00 AM
To: FTA FOIA Appeals
Subject: FOIA APPEAL File FY15-0272

Hello,

I received a response to my request stating that there were no records relating to the SCRRRA RFP SP415-15 Ground Penetrating Radar.

Our firm submitted a proposal, and I know at least one other firm submitted and was awarded the project. Government funds are used for this project. How is it possible that there are no records? I am requesting that someone look into this more closely and respond to my request.

Thank you,

[REDACTED]
[REDACTED]
[REDACTED]



U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

DEC 11 2015



Re: FOIA Appeal, File No. FY15-0272

Dear [REDACTED]:

This letter responds to your appeal of the Federal Transit Administration's (FTA) denial of your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. part 7. For the reasons described below, FTA's decision is affirmed.

1 Background

You submitted FOIA request Fiscal Year (FY) 2015-0272 on September 23, 2015. Your request sought "copies of proposals made to the Southern California Regional Rail Authority for RFP No. SP415-15 Ground Penetrating Radar Services on the Metrolink System" dated from July 1, 2015, to the time of your request.

After conducting a search for responsive records, FTA denied your request on November 4, 2015. The reason for the denial was that FTA did not possess any records responsive to your request.

You submitted the present appeal on November 16, 2015. Your appeal challenges the sufficiency of FTA's search for records: "Our firm submitted a proposal, and I know at least one other firm submitted and was awarded the project. Government funds are used for this project. How is it possible that there are no records? I am requesting that someone look into this more closely and respond to my request."


2 Discussion

An agency responding to a FOIA request is required to undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Because your request concerned records of the Southern California Regional Rail Authority, FTA forwarded your request to FTA's regional office responsible for California, which did not possess any responsive records.

In this context, FTA's search was reasonable. It is not unusual that FTA would not possess records related to a procurement conducted by the Southern California Regional Rail Authority. The FTA does not ordinarily receive copies of documents of procurements conducted by recipients of FTA grant funds. The FTA may obtain copies of a recipient's procurement documents if, for example, FTA has cause to review the specific procurement to ensure compliance with Federal requirements, but that does not appear to have been the case in this instance.

This decision has been concurred by attorney John Allread on behalf of Kathryn Thomson, the General Counsel of the U.S. Department of Transportation. This decision is the final administrative action regarding FOIA request FY 2015-0272. You may appeal this decision to the U.S. District Court for the district in which the requestor resides or has its principal place of business, the district in which the requested records are located, or the district for the District of Columbia.

Sincerely,

A handwritten signature in black ink that reads "Matthew J. Welbes". The signature is written in a cursive, flowing style.

Matthew J. Welbes
Executive Director



WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

March 15, 2016

VIA ELECTRONIC MAIL

Deputy Administrator
Federal Transit Administration
1200 New Jersey Avenue, S.E.
East Building, 5th Floor
Washington, DC 20590
FTA.FOIA.Appeals@dot.gov

Re: FOIA Request No. FY16-0098

To Whom It May Concern,

I write in regard to the attached letter from Nancy Sipes of the FTA's Office of Management Planning, dated February 26, 2016. In her letter, Ms. Sipes states that the Federal Transit Administration ("FTA") has searched its records and found no documents responsive to my Freedom of Information Request.

I write to appeal this decision and request another review of FTA's records. I believe that as a recipient of Federal Transit Administration funding, vRide, Inc., which also conducts business under the name VPSI, Inc., has an obligation to collect, audit, and submit data on their vanpool program to the FTA's National Transit Database. I have enclosed an agreement between the Northern Virginia Regional Commission and vRide, Inc., which outlines vRide's requirement to submit information to the National Transit Database. I have also attached vRide, Inc.'s "Title VI Policy Statement," which states that it is a recipient of funding from "the Federal Transportation Administration (FTA) [*sic*]."

I again request all of the documents responsive to my original inquiry, particularly, but without limitations, any assurances or certifications regarding compliance with disability rights laws that vRide, Inc. or VPSI, Inc. provided to the FTA as a recipient of FTA funding as well as any information that these companies has submitted to FTA through the National Transit Database.

Please do not hesitate to contact me with any questions at deepa_goraya@washlaw.org or 202-319-1000 x132.

Sincerely,

Deepender K. Goraya
Deepa Goraya

Disability Rights Staff Attorney
The Washington Lawyers' Committee
for Civil Rights and Urban Affairs

Encl.



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

February 26, 2016

Deepa Goraya
Washington Lawyers' Committee for
Civil Rights and Urban Affairs
11 Dupont Circle, NW, Suite 4000
Washington, D.C. 20036

Our File No: FY16-0098

Dear Ms. Goraya:

This is in response to your Letter of January 27, 2016, requesting a copy of "any and all records (including, but not limited to, letters, correspondence, tape recordings, notes, data, memoranda, reports, e-mails, or any other materials) relating to the provision by the Federal Transit Administration (FTA) of funding to vRide, Inc ('vRide') or VPSI, Inc.('VPSI')." The time period covered by the documents is from January 1, 2013 to the present.

We have searched our records and find that we do not have any records responsive to your request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,

Nancy Sipes
Office of Management Planning

MEMORANDUM OF UNDERSTANDING (MOU)
BETWEEN
NORTHERN VIRGINIA REGIONAL COMMISSION (NVRC)
AND
VRIDE, INC.
FOR
FORT BELVOIR AND QUANTICO INSTALLATIONS RIDESHARE AND COMMUTER CENTER PROGRAM
SUPPORT
AGREEMENT NUMBER 2016-01

Subject: Memorandum of Understanding between vRide, Inc. and the Northern Virginia Regional Commission (NVRC) for the provision of a Commuter Center Program on the Fort Belvoir and Marine Corps Base Quantico installations (the "Installations") and for the promotion of the FORT BELVOIR & MARINE CORPS BASE QUANTICO (MCBQ) Commuter Centers.

This is a Memorandum of Understanding (MOU) between NVRC and vRide, Inc. and this is a follow-up to the signed MOU's with both bases to provide commuter Center Services. See the Attached MOUs and the Description of the Commuter Center Services being offered. When referred to collectively, NVRC and vRide, Inc. are referred to as the "Parties".

- 1. BACKGROUND:** This MOU is established in order to set the parameters for the Parties to provide on an as-needed basis educational materials, informational support, attend meetings, councils and various venues across FORT BELVOIR & MCBQ in support of FORT BELVOIR & MCBQ Rideshare and Commuter Program to more effectively utilize the Mass Transportation Benefit Program (MTBP) provided by the Department of Defense and structured according to IRS Section 132(f) Transportation Fringe Benefits as well as promote all sustainable modes of transportation and sell fare media.
 - 1.1. The Commuter Center Program will promote and provide information regarding transportation options including local bus service and ridesharing opportunities such as vanpooling and carpooling.
 - 1.2. The Commuter Center Program will also aid individual personnel with completion of the MTBP application and implementation of the benefit.
 - 1.3. The services benefit the entire population of FORT BELVOIR & MCBQ by encouraging the use of multimodal transportation options and ultimately reducing the impact of FORT BELVOIR & MCBQ on the local community through reduction of traffic congestion and pollution on Virginia infrastructure as well as an overall reduction in single occupant vehicles traveling to and from the base.
 - 1.4. The goal of the Commuter Center Program is to provide educational materials regarding transportation options in the area, Mass Transportation Benefit implementation services and general commuting assistance to all base personnel: both active duty and civilian. The transportation options can include but are not limited to; vanpool, carpool, bus, biking and walking information. These services will emphasize livability and sustainability of the Mass Transit Benefit (MTB) program by emphasizing the reduction of single occupant vehicles traveling to, from and within FORT BELVOIR & MCBQ.

2. AUTHORITY:

2.1. **AUTHORITY TO EXECUTE:** This MOU is by the direction of the Base Commanders with an MOU with NVRC and the Bases to provide Commuter Services. NVRC in response, is relying upon vRide to provide the customer care services on the bases. NVRC is subject to the approval and signature of all parties to include NVRC and vRide, Inc.

3. **PURPOSE:** The purpose of this MOU is to outline the educational activities and Installation access of the Commuter Center Program that are provided by the Parties that may be beneficial to all FORT BELVOIR & MCBQ personnel whether active duty or civilian. The intent of this MOU is to establish an understanding of these two parties. It does not create any mandatory practices.

4. UNDERSTANDINGS OF THE PARTIES:

4.1. NVRC may:

- 4.1.1. Provide updated informational briefings and educational materials regarding transportation options in the area, Mass Transportation Benefit implementation services, and general commuting assistance to all base personnel: both active duty and civilian.
- 4.1.2. Provide Installation access and support to vRide personnel through Base Public Affairs and Installation and agency POCs.
- 4.1.3 Communicate with FORT BELVOIR & MCBQ personnel through briefings and presentations at various venues across the Installation to promote the FORT BELVOIR & MCBQ Commuter Center. NVRC will set up meetings and/or presentations with vRide personnel to discuss the Commuter Center Services with individual agency decision makers.
- 4.1.4 Share Contact lists of Base Personnel interested in vanpooling options.

4.2. vRide, Inc. may:

- 4.2.1. Provide updated informational briefings and educational materials regarding van pooling options in the area, Mass Transportation Benefit implementation services, and general commuting assistance to all base personnel: both active duty and civilian.
- 4.2.2. Provide information on transportation options including but not limited to: vanpool, carpool, bus, biking, walking and incentive programs.
- 4.2.3. Advocate and emphasize livability and sustainability of the MTB program by reducing single occupant vehicles traveling to, from and within FORT BELVOIR & MCBQ.
- 4.2.4. Provide education, assistance and support in using online ride matching software and tools including website or smart phone applications.
- 4.2.5. Provide marketing and advertising activities as deemed appropriate by both Parties. These activities can include and are subject to budget and cost sharing approval by both parties:
 - Website construction/use – A landing page and customized ride matching site will be constructed and used as the primary resource for ride matching potential groups on FORT BELVOIR, National Geospatial Intelligence Agency, & MCBQ.

- Email – vRide staff will provide email campaigns.
- Onsite events – vRide staff will support onsite events to (1) identify potential rideshare participants and aid them in the registration process, (2) sell fare media on an as-needed basis, and (3) discuss all transportation options available to onsite populations. vRide staff will do so in this order of precedence and staff events according to return on investment for both Parties.

4.2.6. Provide monthly reports and performance measures on FORT BELVOIR & MCBQ rideshare and Commuter Center participation that will be determined by both Parties. Reports could include:

- Event Attendance Rates
- Fare Media Sales
- Mode Split conversion rate
- Rideshare Adoption and Retention Rates
- Marketing and Advertising Return on Investment (ROI) – Number of respondents, reach of campaign, media used for campaign, etc.
- Utilization of Rideshare Program - number of vehicles, ridership levels, termination rates, etc.

4.2.7 Provide personnel in the following structure:

- Access to vRide leadership and regional management support for implementation and execution oversight of Commuter Center activities.
- One (1) Customer Care Specialist – The Customer Care specialist is a dedicated Installation employee that will; have access to both Installations, cross-trained on vRide daily group operations as well as sales, have access to vRide resources (email, website), will be located on the Installation (FORT BELVOIR & MCBQ) – time spent at each location determined and agreed upon by both Parties, manage/execute any onsite events, be the main point of contact between NVRC and vRide, Inc. and other duties as assigned and deemed necessary by both Parties.
- One (1) Account Manager – The Account Manager will have access to both Installations, perform sales campaign as described above under the above marketing section solely for ridesharing opportunities (vanpool, carpool), attend onsite events deemed worth the ROI for ridesharing activities by the Account Manager and other duties as assigned and deemed necessary by both Parties. The Account Manager will spend up to 25% of her time on NVRC and Commuter Center activities and will not be solely dedicated to this program.
- The primary function of all vRide staff is to promote and implement ridesharing opportunities for the populations of Fort Belvoir and Quantico. They will also promote all other non-SOV travel options such as transit, biking and walking if those options are available to the population of the Installations. vRide employees will not staff a table/booth to sell transponders only. If NVRC is interested in

selling aforementioned transponders, NVRC will provide staff to do so alongside vRide staff.

4.2.8 Provide National Transit Database Collection and Direct Submittal

- Vanpool groups will be able to easily collect and submit their miles monthly via vRide's online NTD reporting system. Registration and training on this system will be provided by vRide staff.
- vRide will collect, audit and submit data directly to the National Transit Database.

5. DELIVERABLES, BENCHMARKS, PERFORMANCE

5.1 On a quarterly basis, NVRC staff and vRide personnel will meet to evaluate the previous quarter and plan for the next. The time and location of these meetings will be agreed up by both parties and will include at a minimum:

- Previous quarterly sales and marketing activities based on reports detailed in section 4.2.6 for both NVRC staff and vRide personnel.
- Analyze the return on investment for time spent at various agencies and determine how to move forward with those agencies.
- Plan following quarter's 3-4 agency contacts detailed under section 4.1.2.
- Address questions concerns and timeline of activities on an as needed basis.
- Create a yearly strategic plan for outreach and goals for the Commuter Center.
- Construct, assess and modify overall benchmarks and goals of program.

6. PERSONNEL BUDGET AND NATURE OF OBLIGATIONS IN THIS MOU: Each Party is responsible for all incidental costs of its designated personnel as it pertains to unique training and travel requirements. No Party is expected nor required to incur cost not included within their respective budgets for implementing service

7. GENERAL PROVISIONS:

7.1. POINTS OF CONTACT: The following points of contact will be used by the Parties to communicate the implementation of this MOU. Each Party may change its point of contact upon reasonable notice to the other Parties involved.

7.1.1. NVRC:

7.1.1.1. Primary POC:

Peggy Tadej, Director of Community & Military Partnerships
Northern Virginia Regional Commission (NVRC)
3040 Williams Drive, Suite 200
Fairfax, VA 22031
Phone: (703) 642-4635
Email: Peggy.Tadej@novagregion.org

7.1.1.2. Alternate POC:

Mark Gibb, Executive Director
Northern Virginia Regional Commission (NVRC)
3040 Williams Drive Suite 200
Fairfax, VA 22031
Phone: (703) 642-4646
Email: gmg@novaregion.org

7.1.2. vRide, Inc.:

7.1.2.1. Primary POC:

Chris Fenderson, Regional Business Manager
vRide, Inc.
6506 Loisdale Road, Suite 310
Springfield, VA 22150
Phone: (804) 591-6317
Email: chris.fenderson@vride.com

7.1.2.2. Alternate POC:

Juanita Green, Customer Care Representative
vRide, Inc.
5815 20th Street Bldg. 213 Basement
Fort Belvoir, VA 22060
Phone: (571) 414-9534
Email: juanita.green@vride.com

7.2. CORRESPONDENCE: All associated correspondence and notices pursuant to this MOU will be addressed to:

7.2.1. NVRC:

Peggy Tadej, Director of Community and Military Partnerships
Northern Virginia Regional Commission (NVRC)
3060 Williams Drive, Suite 200
Fairfax, VA 22031
Phone: (703) 642-4635
Email: Peggy.Tadej@novaregion.org

7.2.2. vRide, Inc.:

Chris Fenderson, Regional Business Manager
vRide, Inc.
6506 Loisdale Road, Suite 310
Springfield, VA 22150
Phone: (804) 591-6317
Email: chris.fenderson@vride.com

8. **FUNDS AND MANPOWER:** This MOU does not document nor provide for the exchange of funds. NVRC will not expend any additional funds beyond mutually agreed upon costs for activities as outlined in section 4.

9. **MODIFICATION OF MOU:** This MOU may only be modified by the written agreement of both Parties, duly signed by their authorized representatives. This MOU will be reviewed annually on or around the anniversary of its effective date, and triennially in its entirety.

10. **TERMINATION OF UNDERSTANDING:** A Party's participation in this MOU may be terminated in writing at will by either Party.

11. **TRANSFERABILITY:** This MOU is not transferable except with the written consent of both Parties and approval by NVRC and vRide, Inc.

12. **ENTIRE UNDERSTANDING:** It is expressly understood and agreed that this MOU embodies the entire understanding between the Parties regarding the MOU's subject matter.

13. **EFFECTIVE DATE:** This MOU takes effect beginning on the day after the last Party signs.

14. **EXPIRATION DATE:** This MOU expires one (1) year from the effective date and can be extended on a yearly basis upon agreement by both parties and execution of an annual extension document.

15. **COUNTERPARTS:** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

16. **AGREED:** The Parties hereto have caused this MOU to be executed as of the dates set forth below:

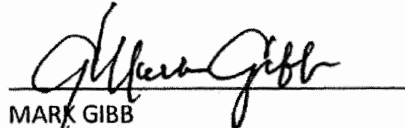
For vRide, Inc.:

For NVRC:



JON W. MARTZ

Vice President, Government Relations
vRide, Inc.



MARK GIBB

Executive Director, NVRC

Feb. 15, 2016

DATE

Feb 17, 2016

DATE

TITLE VI POLICY STATEMENT

vRide, Inc. is committed to providing vanpool support services to the general public that is free from discrimination that may be based on a person's religion, race, color, national origin, age, sex, height, weight, sexual orientation or gender identity, familial/marital status, Veteran's status, or physical or mental disability. As a recipient of federal funds provided to facilitate programs for public transportation by the Federal Transportation Administration (FTA), vRide will ensure that all of its programs, policies and activities comply with Title VI of the Civil Rights Act of 1964, as amended, Department of Transportation regulations and any comparable state or local requirements.

Any person, who believes that they have been subjected to discrimination on the basis of religion, race, color, national origin, age, sex, height, weight, sexual orientation or gender identity, familial/marital status, Veteran's status, or physical or mental disability, with respect to either vRide or Ride programs, activities, services or other transit-related benefits, may file a Title VI complaint. Complaints may be submitted by any of the following methods:

- Calling the Office of the Manager of Proposal Development and Contract Compliance at (248) 792-8511. If after business hours, leave a message briefly describing the nature of the complaint, phone number where the complainant can be reached and best time to return your call. All complaints shall be followed up within (3) business days upon receipt of the complaint.
- File complaint on www.vRide.com
- Mail email, or Fax a detailed letter to the Office of the Manager of Proposal Development and Contract Compliance to either the address or fax number listed below. The letter should describe in as much detail as possible the nature of complaint and must include an address with phone number where the complainant can be reached.

To request additional information on vRides non-discrimination obligations or to file a Title VI complaint, please submit your request or complaint in writing to:

vRide

Attn: Manager of Proposal Development and Contract Compliance

1220 Rankin Drive

Troy, MI 48083

Phone: (248) 792-8511

Direct Fax: (248) 406 – 6040

Email: civilrightsc Complaints@vride.com @vride.com

Complaint Forms can be obtained at www.vRide.com

Title VI Complaints may also be filed directly to:
Federal Transit Administration Office of Civil Rights
Title VI Program Coordinator
East Building, 5th Floor – TCR
1200 New Jersey Avenue, SE
Washington, D.C. 20590



U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

MAY 03 2016

Ms. Deepa Goraya
Washington Lawyers' Committee for Civil
Rights and Urban Affairs
11 Dupont Circle, NW, Suite 400
Washington, DC 20036

Re: Appeal of FOIA Request No. FY16-0098

Dear Ms. Goraya:

This letter responds to your appeal of the denial by the Federal Transit Administration (FTA) of your request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons described below, I affirm FTA's decision.

1 Background

You submitted FOIA Request FY16-0098 on January 27, 2016. You requested, in summary, "any and all records ... relating to the provision by the FTA of funding to vRide, Inc. ("vRide") or VPSI, Inc. ("VPSI") ... from the period January 1, 2013, to the present."¹ Your request made particular reference to vRide's possible receipt of funding under FTA's Section 5307 Formula Grants for Urbanized Areas program, possible agreements between vRide and U.S. Department of Defense installations, and vRide's possible noncompliance with the Americans with Disabilities Act or Rehabilitation Act.

The FTA denied your request on February 26, 2016, because a search of FTA's records did not produce any records responsive to your request.

You brought the present appeal on March 15, 2016. Your appeal challenges the sufficiency of FTA's search for records. For support, you provided FTA with a copy of a memorandum of understanding (MOU) between vRide and the Northern Virginia Regional Commission for the provision of a Commuter Center Program at Fort Belvoir and Marine Corps Base Quantico. The MOU describes vRide's obligation to report data to the National Transit Database and to comply with Title VI of the Civil Rights Act of 1964, which are both conditions of the receipt of funds from FTA. The MOU also refers to vRide as "a recipient of federal funds provided ... by the Federal Transportation [sic] Administration".

¹ vRide and VPSI appear to be different operating names of the same company or closely related companies. This decision refers to vRide and VPSI together as vRide.

2 Discussion

An agency responding to a FOIA request is required to undertake a search that is “reasonably calculated to uncover all relevant documents.” *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Your request was initially referred to FTA’s Office of Civil Rights, because of the request’s reference to the Americans with Disabilities Act and the Rehabilitation Act. The FTA’s Office of Civil Rights did not have any records related to vRide. The FTA also searched its electronic grant awards database and confirmed that vRide is not a direct recipient of funding from FTA, and no records relating to vRide exist in the grant awards database.

After receiving your appeal and the MOU between vRide and the Northern Virginia Regional Commission, FTA also referred your request to its Region 3 office, which is responsible for the state of Virginia. The FTA’s Region 3 office had no records related to vRide and also confirmed that the Northern Virginia Regional Commission is not a direct recipient of funding from FTA.


The FTA’s mandated requirements, such as those related to the National Transit Database or Title VI, can “flow down” to companies with whom FTA has no direct relationship as a result of sub-awards of FTA grant money or contractual relationships between FTA’s grant recipients and their service providers. In this matter, FTA’s searches were appropriate and reasonably calculated to discover records responsive to your request. Therefore, I affirm FTA’s February 26, 2016, denial of your request.

This decision has been concurred by Claire McKenna on behalf of Kathryn Thomson, the General Counsel of the U.S. Department of Transportation. This decision is the final administrative action regarding FOIA request FY16-0098. You may seek review of this decision in the U.S. District Court for the district in which the requestor resides or has its principal place of business, the district in which the requested records are located, or in the district for the District of Columbia.

Sincerely,

A handwritten signature in black ink, reading "Matthew J. Welbes". The signature is fluid and cursive, with the first name "Matthew" and last name "Welbes" clearly legible.

Matthew J. Welbes
Executive Director



April 12, 2016

Deputy Administrator
Federal Transit Administration
1200 New Jersey Avenue, S. E.
East Building, 5th Floor
Washington, D.C. 20590

via FTA.FOIA.Appeals@dot.gov and USPS

SUBJECT: "FOIA APPEAL" – FTA FILE NO. FY16-0121

**RE: FTA'S REGION VI – Dallas Area Rapid Transit D2 Core Capacity Project
Development Rating Assignment November 2015 (the "DART Project
Rating")**

Dear Deputy Administrator:

This letter is a FOIA appeal. Additionally, this letter is an attempt on my part to solve two mysteries involving the referenced Project Rating.

The background to these mysteries is that the staff of the Dallas Area Rapid Transit Agency (DART) is predisposed to construct a second light rail line through downtown Dallas on an alignment that would gravely harm a historic church, and its ministries, that have been in downtown Dallas since 1856. I am a member of that Church.

APPEAL PART ONE:

In November 2015, the FTA issued the referenced DART Project Rating. The DART Project Rating is the heart of the mystery because that document contains the following sentence:

"DART adopted a preliminary locally preferred alternative (LPA) into the region's fiscally constrained long-range transportation plan in 2014."

That sentence, candidly, was a big surprise to folks here in the Dallas area. DART has been planning D2 for many years, so many Church members and other citizens have been monitoring DART's D2 alternative alignment plans for many years. No one at the Church, or as best we can tell anyone else in Dallas (including city and regional officials and personnel at local and regional agencies), has heard of -- or has any record of -- DART "adopting a preliminary locally preferred alternative (LPA) ... in 2014."

To solve the mystery, a Texas open records request was submitted to DART. DART's responded that, in essence, it has no records about the adoption in 2014 of a preliminary LPA - or any other type or form of LPA in 2014. DART provided many documents showing that many route alternatives were under review at that time.

With that attempt to solve the mystery at a dead end, I submitted the referenced FOIA request to the FTA to determine if FTA records could solve the mystery. In that FOIA request I sought documents from 2014, but in response FTA provided only documents from September 2015 that DART submitted to the FTA, which documents FTA erroneously describes as a "revised LPA." I was not seeking these later documents, which I already had. The September 2015 documents relate to the *only* LPA adopted by the DART Board of Directors - and by Dallas City Council.

Please search again and provide the documents on which basis FTA states: "DART adopted a preliminary locally preferred alternative (LPA) into the region's fiscally constrained long-range transportation plan in 2014."

APPEAL PART TWO:

The FTA response to my FOIA request states that FTA has no material available regarding the FTA's selection and inclusion in the DART Project Rating of a map that shows a DART D2 alignment route which is NOT the LPA. The inclusion of the wrong map in the FTA's DART Project Rating made the front page of the business section of *The Dallas Morning News* with a headline of "*Whoa, where is that line going?*"

Please search again for the requested materials as specified in my FOIA.

Thank you for your attention to this appeal.

Sincerely,

A large black rectangular redaction box covers the signature area. A blue ink line extends from the top right of the redaction box, curving downwards and to the right.

MW/s

Cc: Ms. Nancy Sipes
FTA Office of Management Planning

via Nancy.Sipes@dot.gov

Mr. Robert Patrick, Region VI Administrator
Federal Transit Administration
819 Taylor St, Room 8A36
Fort Worth, TX 76106-6124



U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Appeal of FOIA Request FY16-0121

Dear [REDACTED]

This letter responds to your appeal of the partial denial by the Federal Transit Administration (“FTA”) of your request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons described below, I affirm FTA’s decision.

1 Background

1.1 Initial request

In November 2015, FTA issued a project development rating assignment for the proposed Dallas Area Rapid Transit (“DART”) central business district second light rail alignment (“D2”) project. FTA’s rating assignment included the statement that “DART adopted a preliminary locally preferred alternative (“LPA”) into the region’s fiscally constrained long-range transportation plan in 2014.” FTA’s rating assignment also included a diagram of a proposed D2 alignment along Young Street, although, at the time FTA issued the rating assignment, the Dallas City Council and DART had stated publicly that they preferred a different alignment along Jackson Street.

You submitted FOIA Request FY16-0121 on March 3, 2016. You requested records “by which DART informed the FTA that DART had adopted the preliminary LPA” referred to in FTA’s rating assignment. Your request also stated that the diagram included in FTA’s rating assignment “is not and has not been the Locally Preferred Alternative alignment” and requested all correspondence “between FTA and DART regarding the selection and inclusion of this map in this FTA document (rather than the actual LPA as adopted by both the DART Board of Directors and the Dallas City Council).” FTA referred your request to its Region 6 office, which is responsible for the state of Texas.

On March 30, 2016, FTA granted your request in part and denied it in part. FTA produced DART’s September 30, 2015, submission of materials for a project rating, which included a cover letter and a compact disk of supporting documentation. DART’s cover letter referred to the D2 project continuing to evolve over time, but did not specifically mention any “preliminary” LPA adopted in 2014.

With respect to correspondence between FTA and DART regarding the diagram included with FTA's rating assignment, FTA denied your request. The reason for the denial was that FTA discovered no records responsive to this part of your request.

1.2 Appeal

You brought the present appeal on April 12, 2016. Generally, your appeal challenges the adequacy of FTA's search for records. With regard to the records FTA produced, you state that they were not responsive to your request because they date from September 2015, and you specifically sought records upon which FTA stated that DART adopted a preliminary LPA in 2014. You also disputed that there could have been no communication between FTA and DART regarding what you called the "inclusion of the wrong map" in FTA's rating assignment, and requested that FTA repeat its search for records.

2 Discussion

An agency responding to a FOIA request is required to undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). An agency's response to a FOIA request is judged, not on the fruits of its search, but based on the reasonableness of the search undertaken.

To verify the adequacy of FTA's initial search, your appeal was referred again to FTA's Region 6 office, and FTA's headquarters and Region 6 offices discussed your clarification that you specifically sought records describing a 2014 adoption of a preliminary LPA, not the LPA adopted in September 2015. The Region 6 office confirmed again that it possessed no such records. The office did, however, produce two more pieces of correspondence received in 2015 from DART concerning the D2 project's admission to Project Development. These records are not responsive to your request, because they do not describe the adoption of a preliminary LPA in 2014, but you may find them helpful for background information. They are enclosed with this decision.

The Region 6 office also performed another search for correspondence between FTA and DART related to the alignment diagram included in FTA's rating assignment, and confirmed that it did not possess any responsive records. For context, it is possible for a project's proposed alignment to change a great deal after it is admitted to Project Development and during the project's environmental study phase. The diagram included with FTA's rating assignment should be viewed as a general conceptualization of the proposed project, and not as a decision or endorsement by FTA of a particular alignment.

In conclusion, I find that FTA's search for records was reasonably undertaken and adequate under FOIA. Therefore, FTA's partial denial of FOIA Request FY16-0121 is affirmed.

[REDACTED]
FOIA Request FY16-0121

John E. Allread has concurred in this decision on behalf of Kathryn B. Thomson, the General Counsel of the U.S. Department of Transportation. This decision is the final administrative action regarding FOIA Request FY16-0121. You may seek review of this decision in the U.S. District Court for the district in which the requestor resides or has its principal place of business, the district in which the requested records are located, or in the district for the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew J. Welbes". The signature is fluid and cursive, with the first name "Matthew" being more prominent than the last name "Welbes".

Matthew J. Welbes
Executive Director

Enclosures (2)

May 12, 2016

Deputy Administrator of the Federal Transit Administration
1200 New Jersey Avenue
S.E., East Building, 5th Floor
Washington, D.C. 20590

Re: Freedom of Information Act Request Appeal

Enclosed: FOIA Request for Processing Notes, Subject Matter FOIA Request, FTA Agency Denial

Dear Deputy Administrator:

This letter constitutes an administrative appeal under the Freedom of Information Act, 5 U.S.C. Sec. 552(a)(6).

I am writing to appeal the determination by the Federal Transit Administration (FTA) with regard to my FOIA request filed on April 25, 2016, FOIA Request No. FY16-0152, requesting any and all records containing processing notes that were generated in response to FTA FOIA Request FY15-0263, wherein by letter of May 3, 2016, the FTA was unable to locate any records responsive to the FOIA request.

Specifically, I appeal the integrity of the search for records using reasonably calculated methods to uncover all relevant documents across all available databases, related cross-reference files, electronic files, and e-mail systems. Such records would include those that contain remarks, comments, notes, explanations, etc. made by FTA personnel or contractors about the processing of this request (and appeals, if appropriate), the invocation of exemptions, or related matters. This is to include any analysts' notes made during the processing of the requests, any standard worksheets completed by the analysts, any justifications for exemption invocations or other supporting documentation provided to the Appeals Authority, and any correspondence referencing the requests, including tasking orders, emails, and coordination documentation.

I trust that upon re-consideration, you will find reasonable nonexempt portions of documents that are responsive of my original request. However, if you deny this appeal, I intend to initiate litigation to compel disclosure.

I would appreciate your expediting the consideration of my appeal in every way possible.

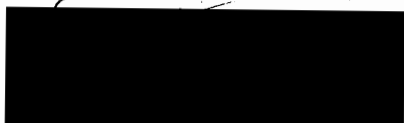
Please furnish all applicable records to:



If you have any questions regarding this request, please contact me by phone at (845) 489-5797 or email at sean.nunez@hushmail.com. I look forward to receiving your response within the twenty day statutory time period.

Thank you for your assistance.

Sincerely,



May 2016



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

May 3, 2016

COPY



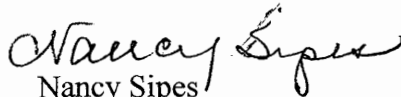
Our File No: FY16-0152

Dear 

This is in response to your letter of April 25, 2016, requesting a copy of any and all records containing processing notes that were generated in response to FTA FOIA request FY15-0263.

We have searched our records and find that we do not have any records responsive to your request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,



Nancy Sipes
Office of Management Planning



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

COPY

1200 New Jersey Avenue S.E.
Washington DC 20590

October 21, 2015



Our File No: FY15-0263

Dear 

This is in response to your letter of September 9, 2015, requesting a copy of the following:

“1. Records of Surveillance. The Requestor seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to the Requestor or its activities, including but not limited to records that relate or refer in any way to any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration and/or collection of information about the Requestor.”

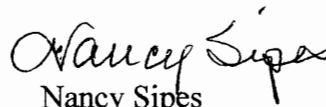
“2. How Those Records Were Used, Stored and Shared. The Requestor also seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to how any of the records identified in the *paragraph 1* have been or will be used, including but limited to: and analysis or evaluation of those records or the information contained therein; the retention, transfer, or destruction of those records; and any records identifying any recipient(s) of the records identified paragraph 1, including the recipients outside of your office.”

We have searched our records and find that we do not have any records responsive to your request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and

COPY

any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

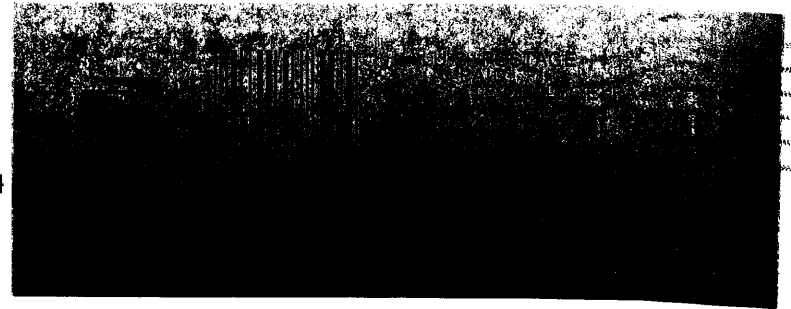
Sincerely,

A handwritten signature in cursive script that reads "Nancy Sipes".

Nancy Sipes
Office of Management Planning

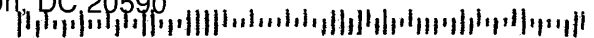


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FOIA Requester Service Center
Federal Transit Administration
1200 New Jersey Avenue, SE
4th Floor East Building
Washington, DC 20590





U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

SEP 22 2016

Re: **Appeal of FOIA request FY16-0152**

Dear [REDACTED]

This letter responds to your appeal of the Federal Transit Administration's (FTA) denial of your request for records pursuant to the Freedom of Information Act (FOIA), as implemented by the U.S. Department of Transportation at 49 C.F.R. Part 7. For the reasons stated below, I reverse FTA's denial of your request. A search of our records has uncovered records responsive to your request, and they are enclosed with this decision.

1 Background

On September 9, 2015, you filed a related FOIA request, number FY15-0263. FOIA request FY15-0263 sought "records of surveillance" that "relate or refer to the Requestor or its activities, including but not limited to records that relate to refer in any way to any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration and/or collection of information about the Requestor." You further requested any records "that relate or refer to how any of the [surveillance records] have been or will be used". FTA denied FOIA request FY15-0263 on October 21, 2015, stating that FTA did not possess any records responsive to your request.

Subsequently, you filed the FOIA request that is the subject of this appeal, number FY16-0152, on April 25, 2016. FOIA request FY16-0152 sought "any and all records containing processing notes that were generated in response to FTA FOIA request FY15-0263".

The FTA denied FOIA request FY16-0152 on May 3, 2016, which stated, similarly to FOIA request FY15-0263, "[w]e have searched our records and find that we do not have any records responsive to your request. To the extent that material is not available, this is a denial of your request."

You filed the present appeal on May 12, 2016. Your appeal challenges the adequacy of FTA's search for records responsive to FOIA request FY16-0152.

2 Discussion

An agency responding to a FOIA request is generally required to undertake a search that is reasonably calculated to uncover all relevant documents. *See Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C.Cir.1984). The reasonableness of a search is not judged by the records

uncovered by the search, but on the appropriateness of the methods used to carry out the search. *E.g., Jennings v. DOJ*, 230 F. App'x 1, 1 (D.C. Cir. 2007); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

In this matter, FTA did not preserve thorough records of the search it conducted in response to either FOIA request FY15-0263 or FY16-0152. Therefore, to ensure that your requests received appropriate attention, FTA performed new searches for both requests as follows.

With regard to FOIA request FY15-0263, FTA referred your request for surveillance and related records to the FTA Office of Safety and Oversight. An FTA security and emergency management specialist searched files and backup archives going back to 2006 “for any Joint Terrorism Task Force, Fusion Center, and/or Private Contractors that relate or refer to an individual named Sean Andre Nunez,” and confirmed that no such files exist. The results of his search were added to FTA’s file concerning FOIA request FY15-0263.

With regard to FOIA request FY16-0152, FTA conducted a search of the agency’s system of FOIA records. The file for FOIA request FY15-0263 contained several records of FTA’s processing of that request in addition to the new documentation added to that file for your appeal. Because the file for FOIA request FY15-0263 contained records even prior to FTA’s most recent search, I must reverse FTA’s denial of FOIA request FY16-0152. Records responsive to that request are enclosed with this decision.

This decision is the final administrative action regarding FOIA request FY16-0152. You may seek review of this decision in the U.S. District Court for the district in which the requestor resides or has its principal place of business, the district in which the requested records are located, or in the district for the District of Columbia.

Sincerely,



Matthew J. Welbes
Executive Director

Enclosures

September 9th, 2015

FOIA Requester Service Center
Federal Transit Administration
1200 New Jersey Avenue, SE
4th Floor East Building
Washington, DC 20590

FOIA Rec'd in TAD-10 9-14-15

DUE DATE: 10/13/15

EXTENSION: _____

CASE #: 1415-0263

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT (FOIA) AND THE
PRIVACY ACT (PA) FOR RECORDS FROM THE FEDERAL TRANSIT
ADMINISTRATION

Dear FOIA Records Officer:

This letter constitutes a request to the **Federal Transit Administration** under the provisions of the Freedom of Information and Privacy Act (FOIPA).

A. The Requestor:

Full Name	Sean Andre Nunez
Date of Birth:	February 28, 1984
Place of Birth:	Manhattan (New York, NY)
Citizenship:	Unites States of America
Social Security No:	051-70-2234
Current Address:	P.O. Box 711 State College, PA 16801
Phone Number:	(845) 489-5797

B. The Request for Information

1. **Records of Surveillance.** The Requestor seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to the Requestor or its activities, including but not limited to records that relate or refer in any way to any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration and/or collection of information about the Requestor.

The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to

correspondence, documents, data, videotapes, audio tapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

2. **How Those Records Were Used, Stored and Shared.** The Requestor also seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected, and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to how any of the records identified in the *paragraph 1* have been or will be used, including but not limited to: any analysis or evaluation of those records or the information contained therein; the retention, transfer, or destruction of those records; and any records identifying any recipient(s) of the records identified paragraph 1, including the recipients outside of your office.

If there are any fees for copying the records requested in excess of \$100, please advise me.

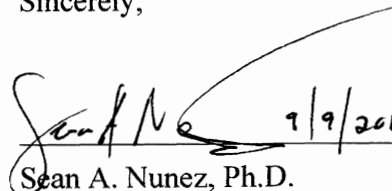
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Sean A. Nunez
P.O. Box 711
State College, PA 16804
845-489-5797
sean.nunez@gmail.com

I would appreciate a response as soon as possible and look forward to hearing from you shortly.

If for any reason any portion of this request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

 7/9/2015
Sean A. Nunez, Ph.D.

Sean A. Nunez
P. O. Box 711
State College, PA 16804

CERTIFIED MAIL®



JOH

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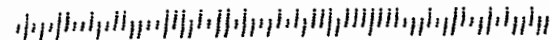
7015 1660 0001 1267 5930

RETURN RECEIPT
REQUESTED

FOIA Requester Service Center
Federal Transit Administration
1200 New Jersey Avenue, SE
4th Floor East Building
Washington, DC 20590

E42-315

FOIA REQUEST





U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

1200 New Jersey Avenue S.E.
Washington DC 20590

October 21, 2015

Sean A. Nunez
P.O. Box 711
State College, PA 16804

Our File No: FY15-0263

Dear Mr. Nunez:

This is in response to your letter of September 9, 2015, requesting a copy of the following:

"1. Records of Surveillance. The Requestor seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to the Requestor or its activities, including but not limited to records that relate or refer in any way to any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration and/or collection of information about the Requestor."

"2. How Those Records Were Used, Stored and Shared. The Requestor also seeks disclosure of all records created from January 1st, 2006 to the present that were prepared, received, transmitted, collected and/or maintained by your office, any Joint Terrorism Task Force, Fusion Center, and Private Contractors that relate or refer to how any of the records identified in the *paragraph 1* have been or will be used, including but limited to: and analysis or evaluation of those records or the information contained therein; the retention, transfer, or destruction of those records; and any records identifying any recipient(s) of the records identified paragraph 1, including the recipients outside of your office."

We have searched our records and find that we do not have any records responsive to your request. To the extent that the material is not available, this is a denial of your request. If you are not satisfied with this response, you may appeal by writing to the Deputy Administrator of the Federal Transit Administration, 1200 New Jersey Avenue, S.E., East Building, 5th Floor, Washington, D.C. 20590. If you prefer, your appeal may be sent via electronic mail to FTA.FOIA.Appeals@dot.gov. An appeal must be received within forty-five calendar days from the date the initial determination is signed and should include the FTA file or reference number assigned to the request and

any information and arguments you may wish to rely on. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically should be prominently marked "FOIA APPEAL." The Deputy Administrator's determination will be administratively final.

Sincerely,

A handwritten signature in cursive script that reads "Nancy Sipes".

Nancy Sipes
Office of Management Planning

Federal Transit Administration

TAD-10: NSipes: 10-19-15: 62496

Copies to:

TAD-10 FOIA File,

TAD-10 Reader File

C/FOIA Letter FY15-0263 Nunez denial.doc