

**EXHIBIT 10**

**Memorandum of Susan Bond, Attorney-Advisor, Dep't of Air Force (August 25, 2014)**



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS 633D AIR BASE WING  
JOINT BASE LANGLEY-EUSTIS VA

25 August 2014

MEMORANDUM FOR 633 CS/SCOKQ (FOIA)

FROM: 633 ABW/JA

SUBJECT: Legal Review of Freedom of Information Act (FOIA) Request 2014-03641-F  
(Dominion Virginia Power, Inc.)

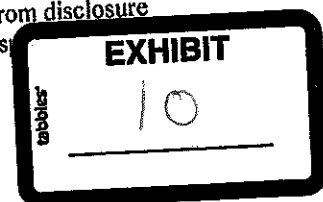
1. I provide this legal review with respect to the above-numbered request, making the recommendations described in paragraph 4 below.

2. Background:

a. On 25 March 2014, the requester, Albert Krachman, Esq., of Blank Rome, LLP, submitted a FOIA request via letter to the FOIA Officer at HQDA (DAJA-KL) requesting the following:

- (1) "All records relating to or discussing of the costs to the government of the termination of CLIN 0007 of the Contract";
- (2) "All records submitted to the Base Adjustment and Realignment Commission relating to or discussing the cost of terminating CLIN 0007 of the Contract";
- (3) "All draft and final DCAA audit reports concerning the termination of CLIN 0007 of the Contract";
- (4) "All records discussing or related to the BRAC of Fort Monroe as possibly ending the government's responsibility for the cost of upgrading the Fort Monroe electric utility system to meet commercial or residential standards";
- (5) "All records comprising or discussing the government estimates for the cost of terminating CLIN 0007 of the Contract";
- (6) "All records discussing or relating to any funding or appropriations requests for the costs of terminating CLIN 0007 of the Contract";
- (7) "All records discussing or relating to the termination proposal for Contract CLIN 0007 submitted by Dominion Virginia Power dated June 29, 2012";

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- (8) "All records discussing or relating to the certified claim filed by Virginia Electric and Power Company on October 30, 2013";
- (9) "All records provided to the Government Accountability Office related to the Contract in connection with GAO Report No. GAO-13-337, dated April 18, 2013"; and
- (10) "All records provided to any Member of Committee of Congress related to the termination of CLIN 0007 of the Contract."

b. In an 8 July 2014 Memorandum from 633 CONS/LGCC to 633 CS/SCOKQ, 633 CONS/LGCC recommended that requests numbers (4), (5), and (7) above not be disclosed under exemption (b)(5) because the records are deliberative in nature and are part of the decision making process that contain opinions and recommendations.

### 3. Law and Analysis under Freedom of Information Act:

a. The FOIA, 5 U.S.C. 552, is commonly known as a "release statute" since it mandates the agency release the requested records unless one of the nine exemptions applies. In addition, in cases where discretionary exemptions apply, federal agencies will not automatically withhold the requested records under a discretionary exemption unless there exists a sound legal basis for doing so. To the contrary, "DoD Components are encouraged to exercise discretionary releases whenever possible." DoD 5400.7-R/AF Supplement, paragraph C1.5.6. Nondiscretionary exemptions include those at subsections (b)(1), (b)(3), (b)(4), (b)(6), and (b)(7)(C). *Id*

b. Exemption (b)(5) allows the Air Force to exempt inter and intra agency records that could be withheld under the Federal Rules of Civil Procedure in civil litigation. Such privileges include the "deliberative process privilege," asserted when necessary to "prevent injury to the quality of agency decisions" (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). Asserting this exemption is discretionary with the Initial Denial Authority, and is permissible where the record is "deliberative in nature, as well as part of a decision-making process." See DoD 5400.7-R/AF Supplement, paragraph C3.2.1.6. It would be appropriate to invoke this privilege where there would be harm to the internal rules and practices of the Air Force by releasing the relevant materials, such as producing a chilling effect on future deliberations or recommendations. Such matters would include "those non factual portions of evaluations by DoD Component personnel of contractors and their products." Paragraph C3.2.1.7.1.3. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

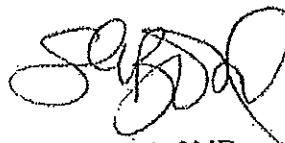
c. DoD 5400.7-R/AF Supplement, paragraph C3.2.1.7. states "Attorney-client records could include, e.g., when a commander expresses concerns in confidence to his or her judge advocate and asks for a legal opinion. The legal opinion and everything the commander tells the judge advocate in confidence qualify under this privilege. Unlike deliberative process privilege, both facts and opinions qualify under the attorney work product or attorney-client privilege. Attorney work product records are records an attorney prepares, or supervises the preparation of, in contemplating or preparing for administrative proceedings or litigation.

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4. Recommendation: We recommend that certain requested records be released to Dominion Virginia Power if they are redacted to exclude any deliberative or decision-making thoughts, but others that are totally deliberative in nature and part of the decision-making process not be released under (b)(5). Any inter or intra agency records that are not deliberative in nature and not part of the decision making process should be released. For example, the contract between the Defense Energy Support Center and Dominion Virginia Power (CLIN 0007) may be released, as well as any final report prepared. However, the requests for records discussing the impact of the BRAC of Fort Monroe on the cost of upgrading the Fort Monroe electric utility system, records discussing the termination proposal for contract CLIN 0007, and records discussing the costs to the government of terminating contract CLIN 0007, should not be released. Furthermore, any draft audit reports or other records that are deliberative in nature or are part of the decision-making process should not be released, or in the alternative, should be redacted. Finally, any records containing discussions between contracting personnel, legal advisors, and technical experts, to include this legal review, are non-releasable in their entirety because they are attorney-client work product protected from disclosure. Negotiations are still ongoing between Dominion Virginia Power and 633 CONS, so it will be important to ensure the nonrelease of information that is deliberative or part of the decision-making process because the release of such information could be detrimental to the ongoing negotiations.

To that end, I have attached a list of the responsive documents provided by CONS with an annotation beside each document providing my recommendation whether that document is releasable in its entirety (indicated by yellow highlighter), exempt in its entirety (indicated by the number of the applicable exemption), or releasable in part (indicated by yellow highlighter which parts are releaseable).

If you have any questions please feel free to contact me at 878-5286 x 248.



SUSAN BOND  
Attorney-Advisor

Enclosure

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