EXHIBIT 12

Letter from Albert B. Krachman, Blank Rome LLP, to the Secretary of the Air Force Thru: HQ ACC/A6XP (FOIA) (January 26, 2015)

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January 26, 2015

VIA AIR FORCE PUBLIC ACCESS LINK AND FIRST CLASS MAIL

Secretary of the Air Force
Thru: HQ ACC/A6XP (FOIA)
180 Benedict Avenue, Suite 217
Joint Base Langley-Eustis VA 23665-1993

Re: Freedom of Information Act Appeal – FOIA Request 2014-03641

Dear Madam Secretary:

This is an appeal under 6 C.F.R. § 5.9(a) (2011) and the U.S. Attorney General Holder's FOIA Policy Memorandum, dated March 19, 2009 ("Holder FOIA Directive"),[1] for release of documents requested by Blank Rome LLP pursuant to the Freedom of Information Act ("FOIA"). This appeal concerns a partial November 20, 2014 response[2] from the Defense Logistics Agency ("DLA" or "the Agency") of the Department of the Air Force ("Air Force") to our March 25, 2014 FOIA request. This letter summarizes the grounds for appeal. The attached Appendix provides the legal justifications.

I. The Air Force's Response and Blank Rome's Grounds for Appeal

A. In response to Blank Rome's March, 2014 FOIA request, in November 2014, the Air Force released 82 documents and accompanying attachments, comprising 384 pages.

B. To withhold an undetermined number of addition responsive documents, the Air Force invoked the deliberative process exemption at 5 U.S.C. §552(b)(5).

C. By this Appeal, Blank Rome shows that the search itself was inadequate, and that the deliberative process exemption has no applicability to the requested documents.

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[1] Memorandum for the Heads of Executive Departments and Agencies from the Attorney General regarding the Freedom of Information Act (FOIA) (March 19, 2009) *See* Holder FOIA Directive (Exhibit1).

[2] Blank Rome first received a response to its March 25, 2014 FOIA request on November 14, 2014. However, this response was incomplete in that it was missing the index of withheld documents, which was specifically listed as an attachment to the Air Force's release letter. *See* release letter with "List of Denied Records" shown as the second attachment (Exhibit 2). Blank Rome subsequently notified the Air Force that the response to the FOIA request was incomplete. The Air Force later transmitted the full and complete response, including the missing attachment, on November 20, 2014 and advised Blank Rome that the appeal suspense date would be extended until January 30, 201(4) *sic*. *See* e-mail correspondence dated 11/20/14 between Rand Bethea and Albert Krachman (Exhibit 3).

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II. The Scope of the Air Force's Search for Responsive Documents Was Inadequate.

A. Blank Rome's FOIA request included ten categories of requested records.

B. The legal review memorandum accompanying the Air Force's response only provides justifications for withholding documents in **three of the ten categories**, and includes no affirmative statements regarding any attempted search for the other seven categories, or any basis for withholding records that fall into the remaining seven categories.

C. Scores of responsive documents were required by regulation to have been generated in response to DVP's June 2012 termination proposal, but not one document was identified or provided.

III. The Air Force's Response Provides Insufficient Detail.

A. Both the release letter and the legal review memorandum set forth non-disclosure determinations without providing the legal bases for such determinations, and without citation to any legal authority.

B. The release letter, legal review memorandum, and list of denied records all lack specific details on why each individual document was withheld.

C. The list of denied records is deficient in that it lacks sufficient descriptions of each of the withheld documents for purposes of assessing the applicability of the claimed privilege and/or FOIA exemption.

IV. The Air Force Response Fails To Provide Reasonably Segregable, Non-Exempt Information.

A. There are several categories of requested records for which factual portions of the requested documents could have been provided, as opposed to withholding them in their entirety.

B. The legal review memorandum specifically recommends "that certain requested records be released to Dominion Virginia Power if they are redacted to exclude any deliberative or decision-making thoughts." There is no way to discern whether this occurred or not.

C. The Air Force clearly made blanket exclusions, without considering whether the withheld documents contained any non-exempt information that could be released after redacting any purported protected portions.

V. The Air Force Withheld Records Claiming Privileges That Do Not Apply.

A. Although the Air Force claims that privileged records were rightfully withheld, all of the records Blank Rome requested would be routinely discoverable under the Federal Rules of Civil Procedure. Documents such as these are not privileged in the context of a FOIA request.

B. The Air Force also claims to have withheld documents because they were deliberative in nature. However, any purely factual portions of these documents should have been released.

   a. Example 1: Blank Rome requested records related to the impacts of BRAC at Fort Monroe. Records such as these would likely include purely factual, raw data that is not considered deliberative under FOIA.

   b. Example 2: Blank Rome requested DCAA draft and final audit reports, which necessarily include purely factual information that should have been released, consistent with the Air Force's legal review memorandum.

C. The Air Force incorrectly asserts the attorney-client privilege as a reason for withholding certain records.

   a. The Air Force has made no showing that any of the withheld records were actually attorney-generated, that attorneys were involved, or that they are of a confidential nature that warrants protection from disclosure.

   b. Even if the documents include communications between Air Force attorneys and agency employees, under FOIA, the attorney-client privilege only exempts documents from release where there is an articulable claim that is likely to lead to litigation. There is no basis for such a position.

      i. Although it may be conceivable that litigation might occur at some unspecified time in the future, this mere possibility is not enough to protect attorney-generated documents from being released.

      ii. Because the documents sought by Blank Rome were not originally prepared in anticipation of litigation, the work-product privilege does not automatically apply simply because the documents could potentially become part of a litigation-related case file.

   c. The Air Force also justifies not releasing certain records because they are "attorney-client work product." However, no such privilege exists under the common law.[3]

[3] Under the common law, "attorney work product" is privileged, and there is also an "attorney-client privilege." However, there is no recognized common law privilege for "attorney-client work product."

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VI. The Air Force Erroneously Withheld *Post*-Decisional Records.

A. The Air-Force's decision to withhold records related to the terminated contract with Dominion Virginia Power is erroneous because the termination occurred in September 2011, and most of the requested records post–date that decision.

B. The Air Force incorrectly asserts that because negotiations regarding the contract termination proposal are still ongoing, information that is deliberative or part of the decision-making process should not be released as it could be detrimental to the ongoing negotiations.

a. There is no applicable FOIA exemption or legal precedent to support this contention.

b. To the extent the Air Force is citing ongoing negotiations between DVP and the Air Force on DVP's termination proposal, the Air Force may be confusing the scope of request. DVP submitted the termination proposal now being considered by Air Force in August 2014. Our March 2014 FOIA Request **is not** seeking records related to that proposal. We seek records related to the 2011 termination, and any that relate to DVP's June 2012 termination proposal, which the Air Force rejected in March 2014, and which was superseded by DVP's August 2014 proposal. All requested documents relate to the 2011 termination and the rejected June 2012 termination proposal, and all are post decisional.

VII. The Air Force's Response Is Inconsistent with the Administration's Open Government and FOIA Directives.

A. The Air Force's response is not indicative of the Administration's commitment to the principles of transparency, participation, and collaboration, as outlined in the Open Government Directive.

B. The Air Force's response conflicts with Attorney General Holder's FOIA Memorandum, which instructs that agencies should not withhold records merely because it can demonstrate that the records fall within the scope of a FOIA exception.

For these reasons, as discussed more thoroughly in the attached Appendix, the Secretary of the Air Force should sustain this appeal and release the requested records either in their entirety, or redacted as necessary. If this appeal is not sustained in its entirety, the Air Force is required to provide a written response describing the reasons for the denial, the names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. *See* § 552(a)(6)(ii). Blank Rome reserves its rights under FOIA to seek judicial review, including the award of attorney's fees.

We await your prompt reply.

Sincerely,

Albert B. Krachman

Enclosure: Appendix

APPENDIX

1. The Air Force Should Release the Records It Withheld Pursuant to Exemption (b)(5) Because the Deliberative Process Privilege Does Not Apply.

The Air Force withheld several categories of requested records after determining that these documents were "deliberative in nature." However, the Agency failed to show that these withheld records are protected under the deliberative process privilege. Exemption (b)(5) protects from public 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." § 552(b)(5). To qualify for protection, "a document must 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).

a. The Withheld Records Are Not Protected Under Exemption (b)(5) Pursuant to the Deliberative Process Privilege.

The deliberative process privilege only protects information that is pre-decisional, or "'antecedent to the adoption of an official policy,'" and deliberative in nature." *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). To be both pre-decisional and deliberative, documents must "reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated" or constitute the "personal opinions of the writer prior to the agency's adoption of a policy." *See Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2009) (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981)).

In addition to making overly-broad assertions of the deliberative process privilege, the Air Force's response also fails to establish that the privilege applies in this case. The Air Force has not indicated what, if any, official agency policy is at issue here. This request simply concerns costs on a terminated utility service contract. There's no policy here, it's mostly an accounting issue mixed in with the application of cost principles. We are not asking for Pentagon strategies on closing Gitmo or covert planning documents to battle counter insurgencies. We are asking for DCAA Audit materials on payments for utility fixtures on a BRAC-impacted Army Base that closed four years ago. There is nothing remotely policy oriented about this request.

b. The Air Force Has Failed to Establish that the Deliberative Process Exemption Applies, and Has Provided an Insufficient *Vaughn* Index.

Agencies bear the burden of demonstrating the applicability of FOIA exemptions and courts have found that "conclusory assertions of privilege will not suffice to carry the government's burden of proof in defending FOIA cases." *See Pub. Citizen*, 598 F.3d at 869; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). To meet its burden, an agency "must describe not only the contents of [all] document[s] [allegedly subject to an exemption], but also enough about [their] context" to establish that they are both predecisional and part of the decision-making process. *See SafeCard Servs., Inc. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1204 (D.C. Cir. 1991). This is often done through

the provision of an index correlating each redacted or withheld document to a particular exemption, commonly known as a "*Vaughn* index." *See Budik v. Dep't of the Army*, 742 F. Supp. 2d 20, 34-35 (D. D.C. 2010) (citing *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975)). No particular format is required for *Vaughn* indices, but courts assess their adequacy in accordance with the functions they were intended to serve: "(a) to force the agency to carefully analyze any information withheld; (b) to enable the district court to fulfill its duty of evaluating the applicability of claimed exemptions; and (c) to empower the plaintiff to present his case to the district court." *Id.* at 35.

The Air Force's release letter, legal review memorandum and list of denied records (which serves as the Air Force's *Vaughn* index), are all wholly inadequate. There are no descriptions of the documents that were withheld under the deliberative process privilege, nor is there any explanation of *how* the withheld documents could potentially impact the ongoing settlement negotiations between DVP and the Agency. The Air Force not only withheld final versions of DCAA audit reports concerning the contract justification – in direct conflict with the recommendations made in its own legal review – but the Agency also failed to explain why the draft versions of the reports were pre-decisional and in what manner they contributed to the agency's decision-making process.

Moreover, the *Vaughn* index (Exhibit 4) only provides e-mail subject lines or document file names for purposes of describing documents. The index lacks even a basic description of the documents, much less any explanation for why Exemption (b)(5) purportedly justified each withholding. By failing to provide meaningful descriptions of the documents and by not giving any insight into how each document relates to the Air Force's decision-making process, the Air Force has failed to meet its burden of proving that Exemption (b)(5) applies to the withheld records.

c. The Withheld Records Are Not Pre-decisional

While the Air Force may contend that the Agency's decisions related to the terminated DVP contract constitute official policy decisions, thus exempting related records from disclosure (b)(5), the deliberative process privilege still does not apply to such records because they are not pre-decisional. The Government put Fort Monroe on the BRAC list in 2005, and finally terminated the privatization contract in September 2011. All requested documents dated or created after September 2011 are covered by the March 2014 FOIA request, and since they post-dated the termination action, they are post-decisional. As such, these records have no impact on the Air Force's decision-making process and are not protected from disclosure under Exemption (b)(5).

Further, documents related to DVP's June 2012 termination proposal are not pre-decisional because the Air Force rejected that proposal (except for one cost element) in March 2014. The proposal now under discussion, submitted in August 2014, completely replaced and superseded the June 2012 proposal. There is nothing pre-decisional about those records dated or created between 2009 and March 2014.

A document is pre-decisional only if "it was generated before the adoption of an agency policy . . ." *See Pub. Citizen*, 598 F.3d at 874 (quoting *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)); *see also Coastal States*, 617 F.2d at 866. Pre-decisional documents typically are those that "inaccurately reflect or prematurely disclose the views of the agency." *Coastal States*, 617 F.2d at 866. Moreover, even documents that were pre-decisional when created can "lose that status if [the decision at issue] is adopted, formally or informally, as the agency position on an issue." *Pub. Citizen*, 598 F.3d at 875 (quoting *Coastal States*, 617 F.2d at 866).

The Air Force has wholly failed to identify the official agency policies that relate to each withheld document (or category of documents), or that these documents were created prior to any particular policy. In fact, much of the information that the Air Force claims is protected under Exemption (b)(5) relates to agency budget and procurement decisions regarding the costs of terminating DVP's contract at Fort Monroe, which were in the planning stages in 2005 and finally executed in 2011. The withheld records, therefore, are not pre-decisional and could not possibly "prematurely disclose the views of the agency" on a particular policy because they are not related to any Air Force policy decision.

Even if the withheld records are somehow linked to an agency policy, at this point, they have lost their pre-decisional status. The Air Force's legal review memorandum identified three categories of records that were deemed non-releasable under Exemption (b)(5): those related to the impact of the BRAC on upgrades to Fort Monroe's electric utility system; those related to estimated contract termination costs; and those related to DVP's contract termination proposal. While some of these records may contain information reflecting the Air Force's viewpoints prior to the contract termination, they lost pre–decisional status in September 2011, the date of contract termination. Therefore, the withheld records are either post-decisional because they were not created prior to an identifiable agency policy, or they lost their pre-decisional status once the Air Force terminated DVP's contract and made a decision on DVP's June 2012 termination proposal. Regardless, Exception (b)(5) simply does not apply.

d. The Withheld Information Does Not Protect the Air Force's Decision-making Process.

The deliberative process privilege was intended to protect an agency's decision making process so that "subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism" and "to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States*, 617 F.2d at 866; *see also Vaughn*, 523 F.2d at 1146. Agency explanations of final actions are not deliberative because there is no major risk that agency employees would be hindered from freely exchanging thoughts and advice. *See SafeCard*, 926 F.2d at 1204 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975)). Moreover, a document is deliberative only if "it reflects the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866; *see also United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 43 (D.D.C. 2008). A deliberative document is one that weighs "the pros and cons of agency adoption of one viewpoint or another." *Coastal States*, 617 F.2d at 866.

Here, there is no basis to contend that withholding the three categories of documents was necessary to protect and foster the type of agency communication environment that Exemption (b)(5) was intended to protect. The documents that fall within these three categories all relate to costs on a utility contract, which are factual in nature – not deliberative, as the Air Force claims. Additionally, the release of the information contained within the withheld records could not have stifled any "give-and-take" between Air Force officials before DVP's contract was terminated, nor can this information do so now, during the settlement negotiation process. And, there is no conceivable reason why any Air Force officials would feel inhibited in giving their opinions as they relate to factual cost data, nor is there any risk of Air Force officials being "subject to ridicule" for discussing this type of data. Even if the withheld records involved balancing the "pros and cons of agency adoption of one viewpoint or another," they can no longer be considered pre-decisional because the agency's decisions related to DVP's contract termination were made four years ago.

In summary, the withholdings that the Air Force made pursuant to Exemption (b)(5) were inappropriate. The Air Force has not demonstrated that the deliberative process privilege applies to the withheld records, and has failed to cite any official policy decision related to the deliberative process privilege. Moreover, the withholdings can no longer be considered pre-decisional and there has been no explanation of *how* the withheld information could impact the agency's decision-making process. For these reasons, none of the withholdings made pursuant to Exemption (b)(5) are justifiable, and the requested records should be produced either in their entirety, or in a redacted state.

2. The Air Force Should Release the Documents Withheld Pursuant to the Attorney-Client Privilege and Attorney Work Product Privileges Since Neither Privilege Applies.

Both the cover letter and the legal review memorandum that accompanied the Air Force's response indicate that certain documents were deemed non-releasable because they constituted "attorney-client work product." No such privilege exists under common law[4], nor does Exemption (b)(5) refer to this type of privilege. Presumably, the Air Force intended to assert either the attorney-client privilege, or the attorney work product privilege, or both. But regardless, neither privilege applies here, and the requested records should not have been withheld on these grounds.

Exemption (b)(5) incorporates the attorney work product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure). The work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980). The mere fact that it is conceivable that litigation might occur at some unspecified time in the future does not necessarily protect documents generated by attorneys. *See Senate of P.R. v. DOJ*, 823 F.2d 574, 587 (D.C. Cir. 1987) (emphasis added) (citing *Coastal States*, 617 F.2d at 865). Moreover, documents that were not originally prepared in anticipation of litigation cannot assume the protection of the work-product privilege merely through their later placement in a litigation-related file. *See Dow Jones & Co. v. DOJ*, 724 F. Supp. 985, 989 (D.D.C. 1989), aff'd on other grounds, 917 F.2d 571 (D.C. Cir. 1990); *MacLean*, No. 04-2425, slip op. at 13 n.13 (S.D. Cal. June 6, 2005).

Additionally, while Exemption (b)(5) protects confidential communications within the attorney-client relationship, the government must be able to demonstrate the confidentiality of attorney-client communications. *See e.g., Maine v. U.S. Dep't of the Interior*, 298 F.3d 60, 71-72 (1st Cir. 2002) (holding that district court did not err in finding privilege inapplicable where defendants failed to show confidentiality of factual communications); *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977) (requiring government to make affirmative showing of confidentiality for privilege to apply); *Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba*, 624 F. Supp. 572, 578 (D.D.C. 1984) (holding that confidentiality must be shown in order to properly invoke Exemption 5); *Nat'l Res. Def. Council v. DOD*, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (noting that privilege requires agency to demonstrate that withheld documents reflect confidential communication between agency and its attorneys, not merely that they be exchanges between agency and its attorneys).

[4] *See* n.3, *supra*.

The records withheld by the Air Force do not meet any of the aforementioned criteria for asserting the attorney work product privilege or the attorney-client privilege. There is no articulable claim likely to lead to litigation, nor is litigation even being contemplated given the ongoing settlement negotiations. None of the requested documents were created in anticipation of litigation, and given the lack of sufficient detail in the list of denied records, the Air Force has provided no showing that any of the withheld documents constitute attorney-client communications, nor has the Agency made an affirmative showing of the confidentiality of these records. The withheld records, therefore, are not privileged and should be released.

3. The Air Force Should Release the Withheld Records As Their Release Will Not Be Detrimental to Ongoing Negotiations and There Is No Applicable Privilege Under FOIA.

The Air Force claims in both the cover letter and legal review memorandum that certain records containing "information that is deliberative or part of the decision-making process" were withheld because "negotiations are still ongoing between Dominion Virginia Power and the 63rd Contracting Office," and their release "could be detrimental to the ongoing negotiations." However, Exemption (b)(5) provides no legal authority for withholding documents on these grounds, and none of the requested documents fall into this category.

Notably, in one communication with the FOIA office, the FOIA officer indicated that he was instructed not to release documents because they contained information "detrimental to the government's interests" in the termination. *See* Exhibit 5. Plainly, there is no FOIA exemption that shields this.

The Supreme Court has held that Exemption 5 incorporates Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery." *See Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979). However, this is a *qualified* privilege that is only available "to the extent that this information is generated by the Government itself *in the process leading up to the awarding of a contract*," and the privilege expires *upon the awarding of the contract* or upon the withdrawal of the offer. *Id.* at 360. (emphasis added). In fact, where a contractor is not "engage[d] in . . . selling" to the government, records requested under FOIA should be released. *See Actuaries v. Pension Benefit Guar. Corp.*, No. 82-2806, slip op. at 4 (D.D.C. July 22, 1983)[5]

The Air Force has not provided any explanation as to how the requested records could be detrimental to its ongoing negotiations with DVP. Even if the requested records could somehow be shown as being detrimental to the negotiations, there is still no privilege to protect them from being disclosed.

4. The Air Force Should Release the Withheld Records Pursuant to the Holder FOIA Directive and the Open Government Directive.

[5] Additionally, many courts have held there is no civil discovery privilege for settlement negotiation documents *See Performance Aftermarket Parts Group*, 2007 WL 1428628, at *3 (declining to recognize settlement negotiation privilege in a non-FOIA case); *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d at 211-212 (deciding against recognition of settlement privilege in a non-FOIA case), aff'd on other grounds, 439 F.3d 740, 754 (D.C. Cir. 2006). This issue has not been addressed to date in the context of a FOIA case.

Even if there are certain requested records that could be subject a FOIA Exemption, the Air Force should nonetheless release them under both the Open Government Directive, which reinforces the Administration's commitment to the principles of transparency, participation, and collaboration, and the Holder FOIA Directive, which states in pertinent part:

> As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."
>
> [A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.
>
> Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.

The records at issue here relate all to the Air Force's termination of DVP's utility contract with DLA. There is no conceivable harm to the Air Force in releasing the information contained in the withheld documents. Moreover, Exemption (b)(5) provides no relevant justification for withholding the records. Even if one were to determine that some of the withheld records were properly protected under FOIA, the Holder FOIA Directive together with the Open Government Directive make clear that, in this Administration, openness should prevail and contract information should be released whenever possible.