

EXHIBIT 15



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VIA E-MAIL (HQ.FOIA@EPA.GOV)

National Freedom of Information Officer
U.S. Environmental Protection Agency
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

Re: **Freedom of Information Act Appeal - Request No. EPA-R4-2015-000406**

Dear FOIA Officer:

Please accept this appeal of the U.S. Environmental Protection Agency's ("EPA") response to my Freedom of Information Act ("FOIA") request, as identified above (the "FOIA Request"), which I submitted on behalf of my firm's client, the Drummond Company. EPA issued its final response to the FOIA Request on December 17, 2014, after issuing a partial response on December 1, 2014. In both the December 1 and December 17 responses, EPA withheld a number of records and portions of records pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). With this letter, I hereby appeal EPA's final response to the FOIA Request.

First, EPA has failed to establish the applicability of the FOIA exemptions it cites in withholding responsive information. As part of each of those responses, EPA provided an index of withheld records and portions of records, which reflect a total of approximately 285 pages of withheld or partially withheld responsive information. For each instance in which EPA withheld a record or partial records, EPA cites generally "Exemption 5," and then either "DPP" (deliberative process privilege), "AWP" (attorney work product), or "ACP" (attorney-client privilege). However, EPA provides no explanation or other information establishing that these Exemption 5 privileges in fact apply to the respective withheld information. It is well established under FOIA that an agency withholding responsive records carries the burden of establishing that the withheld records fall within the scope of the exemption(s) asserted. See *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (explaining that it is agency's burden "to justify the withholding of any requested documents"); *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'"). In this instance, EPA has not provided adequate information to carry this burden and thus has improperly withheld responsive information. Therefore, I am appealing EPA's bases for withholding this information.

Second, upon review of the records produced by EPA, it appears that EPA did not perform a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d

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1344, 1351 (D.C. Cir. 1983). During discussions between Drummond's counsel and EPA Region 4 FOIA staff, EPA estimated that it had over 250,000 pages of responsive materials. Yet, the total volume of responsive information for which EPA accounts in its December 1 and December 17 responses is significantly less than one percent (1%) of that estimated amount (including both produced and withheld information). Therefore, it is evident that EPA's search methods used in response to the FOIA Request were substantially flawed, and I am thus appealing EPA's response on the basis that EPA has failed to perform a search reasonably calculated to uncover all relevant documents, as it was required to do under FOIA.

Thank you for your attention to this matter. I look forward to EPA's decision on this appeal within twenty (20) working days. Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Tal Simpson
BALCH & BINGHAM LLP