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## Western Environmental Law Center

*Via Electronic Mail & Certified Mail Return Receipt Requested*

September 7, 2015

Deputy Agency Chief FOIA Officer  
Office of the Assistant Secretary for Public Affairs  
U.S. Department of Health & Human Services  
Parklawn Bldg. RM 19-01  
5600 Fishers Lane  
Rockville, MD 20857

Re: Second Administrative FOIA APPEAL, FOIA Case No. 15-090

Dear Deputy Agency Chief,

This letter constitutes a second administrative appeal of the Indian Health Service's ("IHS") constructive denial of a FOIA request that I submitted on behalf of Friends of Toppenish Creek and Concerned Citizens of the Yakama Reservation that was received by your agency on May 6, 2015. We are labeling this letter a FOIA Appeal even though IHS has not yet issued a final determination on our FOIA request. The IHS has repeatedly violated the FOIA and its own regulations in the handling of our FOIA request. The last written correspondence we received from your agency was dated July 22, 2015, which was characterized as a "second response" to our FOIA request. The July 22, 2015 letter was not received until several days after that date. Along with the letter, you released "additional records" and stated "although the requested information is exempt from disclosure under the FOIA, we are exercising our discretion to release the information." You did not indicate under which exemption the information was exempt from disclosure. Nor did you indicate what information you were withholding. You did not even provide the number of total responsive records identified and the number that are being withheld, as is required and customary. While you said that we had the right to appeal the decision denying us full access to the records, we are unable to do so without knowing what records are being withheld and why.

To date, therefore, we have not received a "determination" as required by 5 U.S.C. § 552(a)(6)(A)(i) that would allow us to appeal. Since IHS has not made "determination" within the relevant statutory time period, our clients are entitled to file suit to compel compliance with the FOIA's time limits. 5 U.S.C. § 552(a)(6)(C); 5 U.S.C. § 552(a)(4)(B). However, our clients have not yet initiated litigation because they feel that a cooperative approach is best suited to resolving this situation.

In an attempt to resolve this matter, after receiving the July 22, 2015 letter, we sent your agency a letter dated August 7, 2015 appealing your July 22, 2015 decision as if it were a legally

adequate “determination” and asking for additional information. In that letter, we informed you that there are several documents that we requested that have not been provided to us. We also informed you that pursuant to FOIA and your FOIA regulations, you have a legal obligation to inform us of what documents you are denying us access to and what exemption justifies your denial of the documents. Otherwise it is impossible to appeal a decision when we don’t know what that decision is, let alone the basis for that decision. The D.C. Circuit has described the “Catch–22” that one agency sought “to jam into FOIA”: “A requester cannot appeal within the agency because the agency has not provided the necessary information. Yet the requester cannot go to court because the requester has not appealed within the agency.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186-87 (D.C. Cir. 2013). Here, IHS seems to be trying to put us in just this situation. The *CREW* Court cautioned: “Although the agency may desire to keep FOIA requests bottled up in limbo for months or years on end, the statute simply does not countenance such a system, as we read the statutory text.” *Id.*

In the August 7 letter, we asked you to provide us with information about what documents we are being denied access to and why so that we can pursue an appeal if appropriate. That was never done. Instead, we received one telephone call from Janet Ingersoll on August 17, 2015 who was not able to provide us with any information about our FOIA request, let alone the reasons why we were denied full access to the records requested. Ms. Ingersoll told me that she would refer the matter to an IHS attorney who would call me back with additional information about our FOIA request and the agency’s reasons for their partial denial. That never happened. Had we known that we would receive no further information from IHS, we would have filed this second administrative appeal sooner, but we relied upon the statement of Ms. Ingersoll that we would be provided additional information about the agency’s response to our FOIA request.

So we have come to the point where we are forced to file yet another administrative appeal of your decision, even though you have still not told us what your decision is or the basis for your decision denying us access to the records. But, because you have refused to provide us the requested records, we interpret that as a constructive denial of our request. Since you have not provided any basis for your constructive denial of our request, we are in the difficult position of being forced to surmise as to the reason you are withholding the records. That in and of itself is a violation of the FOIA.

In earlier correspondence you referenced the deliberative process exemption (June 15, 2015 letter), but there is no indication what records, if any, would fall under this exemption. And this exemption clearly does not apply to this request. The “deliberative process” exemption (Exemption 5) applies to “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). Courts have upheld a distinction between “materials reflecting deliberative or policy-making process on the one hand,” which are protected by Exemption 5, and “purely factual, investigative matters on the other,” which are not. *EPA v. Mink*, 410 U.S. 73, 89 (1973). Here, we are asking for factual, investigative

materials related to a nitrate contamination study; these materials should not fall under Exemption 5. In addition, some of these documents are from the Yakama Nation, not IHS, so it is hard to fathom how they could possibly fall under Exemption 5. The documents we are seeking do not ask for the “mental processes of decisionmakers.” *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988); *Assembly of the State of California v. U.S. Dept. of Comm.*, 968 F.2d. 916, 921 (9th Cir. 1992). We are asking for the underlying scientific data that we know was collected based upon other IHS records we have seen.

IHS’s own FOIA regulations provide that the deliberative process privilege only protects “predecisional deliberative communications,” and specifically does not apply to “purely factual material,” even if that material appears in a “deliberative document.” 45 C.F.R. § 5.66(a) (“We will release purely factual material in a deliberative document unless that material is otherwise exempt.”) First, to our knowledge, there is no “decision” associated with the requested records, which are studies and data. Second, even if there was such a “decision,” the studies and data underlying that decision stand on their own and very likely can be reasonably segregated from any deliberative documents. *Id.* (“Purely factual material in a deliberative document is within this privilege only if it is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated, if it would reveal the nature of the deliberative portions, or if its disclosure would in some other way make possible an intrusion into the decisionmaking process.”) The deliberative process privilege cannot be used to justify your constructive denial of our FOIA request.

In the June 15, 2015 letter, you also stated “any information that would be an invasion of the personal privacy of others (names, addresses) is also being removed.” We do not dispute the need to redact personal names and addresses, but this exemption cannot possibly be used to justify the wholesale denial of our FOIA request.

Even if the documents qualify for exemptions, IHS has a duty to narrowly tailor its use of FOIA exemptions and provide partial or redacted versions of the responsive documents. As Attorney General Eric Holder reminded agencies in his Memorandum on the Freedom of Information Act:

Whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of the record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

Eric Holder, *Memorandum for Heads of Executive Departments and Agencies on the Freedom of Information Act*, March 19, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

If we are denied documents or redacted copies of documents, we would like to receive an index describing the withheld documents. So that we can confirm that the documents are actually being withheld pursuant to Exemption 5 or 6, the IHS must state what the documents are. This is a fairly simple process that the court can order using the Vaughn index rule in litigation. However, in order to save resources for all parties and the court, we are asking for a Vaughn index now in an attempt to avoid subsequent litigation if possible.

The IHS's constructive denial of our FOIA request, which appears to have occurred on a date unknown, violates the FOIA and IHS' implementing regulations. In addition, the agency's failure to comply with the FOIA time limits, without any justification for doing so, is another legal violation. We have still never received a substantive response to our August 7 appeal, now nearly a month later, even though your FOIA officer promised us additional information. Please let me know if you have any questions and we look forward to your response.

Sincerely,

*s/ Andrea K. Rodgers*

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