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8 LEMIEUX & O'NEILL, EX REL. LAS
9 VIRGENES-TRIUNFO JOINT POWERS AUTHORITY

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

13 LEMIEUX & O'NEILL, EX REL. LAS
14 VIRGENES - TRIUNFO JOINT POWERS
15 AUTHORITY,

16 Plaintiffs,

17 v.

18 GINA McCARTHY, Administrator of the
19 UNITED STATES ENVIRONMENTAL
20 PROTECTION AGENCY, and DOES 1-10,
21 inclusive,

22 Defendants.

CASE NO.:

EXHIBIT 9
TO COMPLAINT FOR INJUNCTIVE
RELIEF



4165 East Thousand Oaks Blvd. • Suite 350 • Westlake Village • California 91362 • Tel: 805-495-4770 • Fax: 805-495-2787

December 2, 2015

Via U.S. Mail & Email

National Freedom of Information Officer
U.S. EPA, FOIA and Privacy Branch
1200 Pennsylvania Ave., N.W. (2822T)
Washington, DC 20460
hq.foia@epa.gov

**Re: Freedom of Information Act Appeal – Follow-Up Letter
FOIA Request No. EPA-R9-2015-003385 (HQ-APP-2015-010002)**

To Whom It May Concern:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 522, we appealed the partial denial of our FOIA request by the U.S. Environmental Protection Agency, Region 9. The National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch (“FOIA Officer”) confirmed receipt of the appeal on August 19, 2015.

The FOIA Officer was required to make a determination on the merits of a FOIA appeal within 20 working days of receipt. (5 U.S.C. §552(a)(6)(A)(ii).) This period has passed, and we have not yet received a determination on our appeal. We request a determination in our favor.

FOIA Request and Appeal

On December 16, 2014, and January 20, 2015, we submitted FOIA requests to the Environmental Protection Agency (“EPA”) for documents related to the “Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments.” Specifically, we requested correspondence, including emails, between the EPA and any of the following: (1) consultants; (2) contractors and subcontractors; (3) nonpublic entities; (4) public entities and joint powers authorities; (5) non-governmental organizations; (6) academic institutions; and (7) the general public, for the period between 2010 and 2014, in connection with the “Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments” promulgated by the EPA in 2013 (“2013 TMDL”). (True and correct copies of our FOIA requests are attached as Exhibit A.)

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National Freedom of Information Officer
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December 2, 2015
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EPA produced certain records on March 24, 2015, May 7, 2015, May 21, 2105, and July 2, 2015. The EPA partially denied the request on July 2, 2015.

The EPA alleges 260 emails between the EPA and its contractor for the preparation of the Malibu Creek TMDL, Tetra Tech, are exempt from disclosure as part of the “deliberative process.” (5 U.S.C. §552(b)(5).) (A true and correct copy of the EPA’s determination, which is the subject of our appeal, is attached hereto as Exhibit B.)

On July 7, 2015, we requested a *Vaughn* index of the withheld emails. (*Vaughn v. Rosen* [“*Vaughn II*”] (D.C. Cir. 1975) 523 F.2d 1136, 1144; *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827-28.) We specifically requested a log of the dates, authors and recipients, and a description of each email. (A true and correct copy of a July 7, 2015 email from Christine Han to Brett Moffatt is attached hereto as Exhibit C.)

Initially, Brett Moffatt of the EPA agreed to provide us with an index of the withheld documents. (Attached hereto as Exhibit D is a true and correct copy of a July 9, 2015, email from Brett Moffatt to Christine Han.) However, on July 29, 2015, Mr. Moffatt advised the EPA would not produce an index of the documents because it is withholding a significant number of documents. Moffatt provided the following description of the withheld emails:

“All withheld records are email communications between EPA staff and the staff of EPA’s contractor, Tetra Tech, dated from September 2010 to July 2013, and pertaining either to the development of the Malibu Creek and Lagoon TMDL, or to EPA’s contract with Tetra Tech for its work in support of the TMDL. The estimate of withheld emails contained in our response letter is incorrect because I forgot to include a set of emails when I calculated the total. The total number of withheld emails is 485. This number may include some duplicates. These emails are withheld under exemption 5 U.S.C. 552(b)(5) (deliberative process). Some of the emails discussing EPA’s contract with Tetra Tech may also contain confidential business information (CBI) that is exempt from disclosure.”

A true and correct copy of the July 29, 2015, email from Brett Moffatt to Christine Han is attached hereto as Exhibit E.

Courts Have Rejected the EPA’s Broad View of the Deliberative Process

To come within the deliberative process exemption, a document must “be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” (*Vaughn v. Rosen, supra*, 523 F.2d 1136 at 1144 [emphasis added].) Mr. Moffatt clearly indicates the withheld emails were sent and received by and between EPA staff and

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Tetra Tech, EPA's consultant, and pertained to the 2013 TMDL. It is unlikely all 485 emails were used in, or made a part of, the EPA's final decision relating to the 2013 TMDL.

In *Vaughn v. Rosen, supra*, 523 F.2d 1136, as here, the government argued that its entire process of management, appraisal, evaluation, and recommendations for improvements was a deliberative process. The court rejected this argument, reasoning the government interpreted the exemptions too broadly. (*Id.* at 1145-46.) The court found the government's assertion of the deliberative process "would result in a huge mass of material being forever screened from public view." (*Id.* at 1146.) Here, as in *Vaughn*, the EPA seeks to screen a mass of emails from public view without assessing whether each email is exempt. This is improper under FOIA.

Even if, *arguendo*, the EPA's claimed deliberative process exemption had merit, which we contend it does not, those portions of the documents containing *facts* (as opposed to opinions) *must be disclosed*. Here, the EPA made no effort whatsoever to disclose the portions of emails and attached reports containing facts. EPA has never alleged the 485 withheld documents are devoid of facts. Thus, at the very least, redaction and production would be required by FOIA.

Courts Have Rejected the Broad View of the "Confidential Business Information" Exemption (Exemption 4) Offered by the EPA

EPA attempts to rely on Exemption 4. Exemption 4 protects (1) trade secrets and (2) confidential commercial information. The definition of a "trade secret" is narrow under FOIA. (*Public Citizen Health Research Group v. FDA* (D.C. Cir. 1983) 704 F.2d 1280.) It is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." (*Id.* at 1288.) There must be a direct relationship between the trade secret and the productive process to fall under Exemption 4. (*Id.*) Trade secret protection has been recognized for product manufacturing and design but has been denied for general information on a product's performance or physical characteristics when release would not reveal the formula itself. (See DEPT. OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT ["GUIDE TO FOIA"], EXEMPTION 4, pp. 264-265.)

The definition of "confidential commercial information" is also narrow under FOIA. The D.C. Circuit rejected an agency's tortured argument that data relating to the location of endangered pygmy owls qualified as "confidential commercial or financial information" merely because it was submitted pursuant to a government-to-government cooperative agreement under which a state agency provided access to database in return for money from the federal government. (*National Assn. of Home Builders v. Norton* (D.C. Cir. 2002) 309 F.3d 26, 38.) Owl-sighting data was not commercial (having been created by the government rather than in connection with a commercial enterprise) and did not have a commercial function as there was no evidence the

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parties who supplied owl-sighting information had a commercial interest in its disclosure or nondisclosure. (*Id.*; see also Guide to FOIA, pp. 268-269.)

Similarly, here, the withheld emails do not contain a secret, commercially valuable formula, process, or device used for the making or processing of trade commodities. The EPA has asserted Tetra Tech was its consultant, and the EPA and Tetra Tech exchanged records related to the Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments. However, the establishment of a TMDL is a public process, and by definition, the consultant's work is public. (*Am. Farm Bureau Fed'n v. EPA*, 984 F.Supp.2d 289, 334, n. 25 (M.D. Pa. 2013); see 5 U.S.C. § 553; see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).) Moreover, here, as in *National Association of Home Builders*, the mere fact the government hired a consultant does not render emails with the consultant "secret." (*National Assn. of Home Builders v. Norton*, *supra*, 309 F.3d at 38.)

Appellant Has a Right to a *Vaughn* Index Under FOIA

Appellant has a right to a "*Vaughn*" index because the EPA bears the burden of proving each email falls within the asserted exemption. (*Vaughn v. Rosen* (D.C. Cir. 1975) 523 F.2d 1136, 1144; *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827-28.) The fact that there are numerous emails is irrelevant to the EPA's duty to provide a *Vaughn* index.

Mr. Moffatt's assertion that the EPA does not provide an index when a large number of documents are withheld is inconsistent with the law. Although the *Vaughn* court recognized that providing a detailed justification and specific privilege index may impose a substantial burden on the agency, the court did not carve out any exceptions to the requirement of an index based on the number of documents being withheld. (*Id.* at 828.) A *Vaughn* index is required regardless of the number of documents being withheld. Each separate email and attachment is a responsive government record under FOIA, and each record's withholding must be justified.

Moreover, an entire email and its attachment, if any, "is not exempt merely because an isolated portion need not be disclosed." (*Vaughn v. Rosen*, *supra*, 484 F.2d at 825.) EPA therefore "may not sweep an email under a general allegation of exemption." (*Ibid.*)

Conclusion

Based upon the above discussion, we request the FOIA Officer overturn EPA's partial denial of our FOIA request and disclose all of the withheld emails, and provide a justification and index of any withheld emails or portions of emails. To the extent part of an email or attachment is exempt, redaction and production is appropriate.

National Freedom of Information Officer
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In light of the already significant delay in receiving the requested materials, and the delay in responding to our appeal, please respond by December 30, 2015.

Thank you for your time and attention.

Very truly yours,

LEMIEUX & O'NEILL



Christine Carson

CC/mdd
Enclosures

cc: Shirley Blair, EPA Office of the General Counsel

EXHIBIT A



4165 East Thousand Oaks Blvd. • Suite 350 • Westlake Village • California 91362 • Tel: 805-495-4770 • Fax: 805-495-2787

December 16, 2014

Regional Freedom of Information Officer
U.S. Environmental Protection Agency, Region 9
(OPPA-2)
75 Hawthorne Street
San Francisco, CA 94105

Re: Freedom of Information Act Request

This letter requests a copy of records pursuant to the Freedom of Information Act ("FOIA"), which are believed to be held by your agency. (5 U.S.C. § 552.)

We are requesting records and correspondence, including email, between the Environmental Protection Agency ("EPA"), and any of the following: (1) consultants; (2) contractors and subcontractors; (3) nonpublic entities; (4) public entities and joint powers authorities; (5) non-governmental organizations; (6) academic institutions; and (7) the general public for the period between 2010 and 2014, in connection with the "Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments" promulgated by the EPA in 2013 ("2013 TMDL"). As used herein, "EPA" includes officers, agents and employees of EPA, and, as used herein, email includes email sent to or received by EPA, regardless of the name of the addressee who purportedly sent or received the email and regardless of email address.

This request does not include records and correspondence between EPA and Las Virgenes Municipal Water District, Triunfo Sanitation District, or between EPA and Las Virgenes - Triunfo Joint Powers Authority. We are also not requesting records and correspondence which have been included in the Administrative Record prepared for *Las Virgenes - Triunfo Joint Powers Authority v. E.P.A., et al*, U.S.D.C. Case No. C 14-01392 SBA.

FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We request you provide the non-exempt portions which are reasonably segregable. We further request you describe the deleted or withheld material in detail and specify the statutory basis for the failure to provide the material and as your reasons for asserting a statutory justification for failure to provide applies in this instance.

Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether

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to appeal an adverse determination. The EPA's written justification might also help avoid unnecessary litigation. We reserve the right to appeal the withholding or deletion of information and expect you will list the office and address where such an appeal may be sent.

We anticipate you will make the requested materials available within the statutorily prescribed period. Failure to respond within 20 business days from the date of your receipt of this letter shall be viewed as a denial of this request, in which case the requestors may immediately file an administrative appeal.

If you have any questions or need additional information, please do not hesitate to contact our office.

Thank you for your time and attention.

Very truly yours,

LEMIEUX & O'NEILL

A handwritten signature in black ink, appearing to be 'Christine N. Han', written over the typed name. The signature is stylized and includes a long horizontal flourish extending to the right.

Christine N. Han

CNH/mdd

Christine Han

From: r9foia@epa.gov
Sent: Tuesday, January 20, 2015 10:15 AM
To: Christine Han
Subject: FOIA Request EPA-R9-2015-003385 Submitted

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: EPA-R9-2015-003385
- Requester Name: Christine Han
- Date Submitted: 01/20/2015
- Request Status: Submitted
- Description: On December 16, 2014, we submitted a written FOIA request requesting certain records and correspondence related to the "Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments." We have neither received a response to our December 2014 request nor a confirmation that you have received our request. In speaking with one of your representatives, it has come to our attention that you did not receive our FOIA request. As such, please find attached our December 16, 2014 FOIA request, which contains the requested records and correspondence. Thank you.

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

Christine Han
Lemieux & O'Neill
4165 East Thousand Oaks Blvd, Suite 350
Westlake Village, CA 91362

Re: Freedom of Information Act Request EPA-R9-2015-003385

Dear Ms. Han:

This is in response to your Freedom of Information Act request regarding records and correspondence between the Environmental Protection Agency (EPA) and certain outside parties, pertaining to the Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients.

Responsive, releasable documents have been uploaded to EPA's FOIAOnline system found at <https://foiaonline.regulations.gov/foia/action/public/home>. To access the documents, reference your FOIA request as EPA- R9-2015-003385.

We are unable to provide you with 260 emails sent between EPA and its contractor, which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. § 552(b)(5) (deliberative process).

You may appeal this partial denial to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed and includes the assigned FOIA request number - EPA- R9-2014-006254). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

You will receive an invoice for the fees incurred in processing this request.

Please contact Brett Moffatt of our Office of Regional Counsel at (415) 972-3946, should you have any questions concerning this matter.

Sincerely,



Nancy Woo
Acting Director, Water Division

EXHIBIT C

Christine Han

From: Christine Han
Sent: Tuesday, July 7, 2015 3:44 PM
To: 'Moffatt, Brett'
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Brett -

While I understand that the emails were withheld because they allegedly contained information related to the deliberative process, the EPA bears the burden of showing the emails fall within the exemption. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). As such, I would like to request a privilege log or index of the 260 emails that have been withheld. See *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). Please provide the dates, authors and recipients of the emails, a description of each email, etc., to ensure that the emails were predecisional and deliberative. See, e.g., *Hussain v. U.S. Dept. of Homeland Sec.*, 674 F.Supp.2d 260, 270-71 (D.C. 2009); *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147-48 (D.C. Cir. 2006).

Thanks!
Christine

Christine N. Han
Associate Attorney
LEMIEUX & O'NEILL
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Tel: 805.495.4770
Fax: 805.495.2787

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From: Moffatt, Brett [mailto:Moffatt.Brett@epa.gov]
Sent: Monday, July 6, 2015 9:51 PM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine,

Thank you for contacting me first. We released all of the responsive emails to and from outside entities. All of the 260 withheld emails are communications between EPA staff and the staff of EPA's consultant, Tetra Tech, and pertain to the development of the TMDL and/or contracting matters. For the purpose of 5 U.S.C. § 552 (b)(5), consultant assistance is treated the same as internal agency staff work. See, e.g., *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11. We released the Tetra Tech communications pertaining to the development of the TMDL which did not contain deliberative information.

Please contact me if you have any further questions.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Monday, July 06, 2015 2:32 PM
To: Moffatt, Brett
Subject: FOIA Request No. EPA-R9-2015-003385

Brett,

After reviewing the partial denial letter, I have a question about the exemption that is cited in support of the EPA's inability to provide us with 260 emails sent between EPA and a contractor. The letter, which I attached hereto, cites 5 U.S.C. § 552 (b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency." As you may or may not be aware, we represent Las Virgenes Municipal Water District and are currently involved in litigation against the EPA. We expect to be involved in said litigation for some time. Therefore, we don't believe this particular exemption applies to the 260 emails that were not provided to us.

Please let me know whether you will provide these emails or whether we need to go through a formal appeals process.

Thanks for your time and attention.

Christine

Christine N. Han
Associate Attorney
LEMIEUX & O'NEILL
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Tel: 805.495.4770
Fax: 805.495.2787

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EXHIBIT D

Christine Han

From: Moffatt, Brett <Moffatt.Brett@epa.gov>
Sent: Thursday, July 9, 2015 9:07 AM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine, We will provide you with an index or other description of the withheld documents.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Tuesday, July 07, 2015 3:45 PM
To: Moffatt, Brett
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Brett -

While I understand that the emails were withheld because they allegedly contained information related to the deliberative process, the EPA bears the burden of showing the emails fall within the exemption. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). As such, I would like to request a privilege log or index of the 260 emails that have been withheld. See *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). Please provide the dates, authors and recipients of the emails, a description of each email, etc., to ensure that the emails were predecisional and deliberative. See, e.g., *Hussain v. U.S. Dept. of Homeland Sec.*, 674 F.Supp.2d 260, 270-71 (D.C. 2009); *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147-48 (D.C. Cir. 2006).

Thanks!
Christine

Christine N. Han
Associate Attorney
LEMIEUX & O'NEILL
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From: Moffatt, Brett [<mailto:Moffatt.Brett@epa.gov>]
Sent: Monday, July 6, 2015 9:51 PM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine,

Thank you for contacting me first. We released all of the responsive emails to and from outside entities. All of the 260 withheld emails are communications between EPA staff and the staff of EPA's consultant, Tetra Tech, and pertain to the development of the TMDL and/or contracting matters. For the purpose of 5 U.S.C. § 552 (b)(5), consultant assistance is treated the same as internal agency staff work. *See, e.g., DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11. We released the Tetra Tech communications pertaining to the development of the TMDL which did not contain deliberative information.

Please contact me if you have any further questions.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [<mailto:C.Han@lemieux-oneill.com>]
Sent: Monday, July 06, 2015 2:32 PM
To: Moffatt, Brett
Subject: FOIA Request No. EPA-R9-2015-003385

Brett,

After reviewing the partial denial letter, I have a question about the exemption that is cited in support of the EPA's inability to provide us with 260 emails sent between EPA and a contractor. The letter, which I attached hereto, cites 5 U.S.C. § 552 (b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency." As you may or may not be aware, we represent Las Virgenes Municipal Water District and are currently involved in litigation against the EPA. We expect to be involved in said litigation for some time. Therefore, we don't believe this particular exemption applies to the 260 emails that were not provided to us.

Please let me know whether you will provide these emails or whether we need to go through a formal appeals process.

Thanks for your time and attention.

Christine

Christine N. Han
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EXHIBIT E

Christine Han

From: Moffatt, Brett <Moffatt.Brett@epa.gov>
Sent: Wednesday, July 29, 2015 3:34 PM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Hi Christine,

Thank you for the reminder. Following the FOIA response criteria set out in 40 CFR 2.104(h), EPA does not usually generate a *Vaughn* index when withholding a significant number of documents in response to a FOIA request. This should provide you with a sufficiently clear description of the withheld records:

All withheld records are email communications between EPA staff and the staff of EPA's contractor, Tetra Tech, dated from September 2010 to July 2013, and pertaining either to the development of the Malibu Creek and Lagoon TMDL, or to EPA's contract with Tetra Tech for its work in support of the TMDL. The estimate of withheld emails contained in our response letter is incorrect because I forgot to include a set of emails when I calculated the total. The total number of withheld emails is 485. This number may include some duplicates. These emails are withheld under exemption 5 U.S.C. 552(b)(5) (deliberative process). Some of the emails discussing EPA's contract with Tetra Tech may also contain confidential business information (CBI) that is exempt from disclosure.

As noted in EPA's response letter, you may appeal this partial denial to the National Freedom of Information Officer. Please let me know if you have any further questions.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Wednesday, July 29, 2015 2:21 PM
To: Moffatt, Brett
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Hi Brett,

I just wanted to follow up on our request for the privilege log/index. When can we expect to receive this document?

Thanks!
Christine

Christine N. Han
Associate Attorney
LEMIEUX & O'NEILL
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Tel: 805.495.4770
Fax: 805.495.2787

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From: Christine Han
Sent: Thursday, July 9, 2015 9:11 AM
To: 'Moffatt, Brett' <Moffatt.Brett@epa.gov>
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Great. Thank you!

Christine

Christine N. Han
Associate Attorney
LEMIEUX & O'NEILL
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Tel: 805.495.4770
Fax: 805.495.2787

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From: Moffatt, Brett [mailto:Moffatt.Brett@epa.gov]
Sent: Thursday, July 9, 2015 9:07 AM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine, We will provide you with an index or other description of the withheld documents.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Tuesday, July 07, 2015 3:45 PM
To: Moffatt, Brett
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Brett -

While I understand that the emails were withheld because they allegedly contained information related to the deliberative process, the EPA bears the burden of showing the emails fall within the exemption. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). As such, I would like to request a privilege log or index of the 260 emails that have been withheld. See *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). Please provide the dates, authors and recipients of the emails, a description of each email, etc., to ensure that the emails were predecisional and deliberative. See, e.g., *Hussain v. U.S. Dept. of Homeland Sec.*, 674 F.Supp.2d 260, 270-71 (D.C. 2009); *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147-48 (D.C. Cir. 2006).

Thanks!
Christine

Christine N. Han
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From: Moffatt, Brett [<mailto:Moffatt.Brett@epa.gov>]
Sent: Monday, July 6, 2015 9:51 PM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine,

Thank you for contacting me first. We released all of the responsive emails to and from outside entities. All of the 260 withheld emails are communications between EPA staff and the staff of EPA's consultant, Tetra Tech, and pertain to the development of the TMDL and/or contracting matters. For the purpose of 5 U.S.C. § 552 (b)(5), consultant assistance is treated the same as internal agency staff work. See, e.g., *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11. We released the Tetra Tech communications pertaining to the development of the TMDL which did not contain deliberative information.

Please contact me if you have any further questions.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Monday, July 06, 2015 2:32 PM
To: Moffatt, Brett
Subject: FOIA Request No. EPA-R9-2015-003385

Brett,

After reviewing the partial denial letter, I have a question about the exemption that is cited in support of the EPA's inability to provide us with 260 emails sent between EPA and a contractor. The letter, which I attached hereto, cites 5 U.S.C. § 552 (b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency." As you may or may not be aware, we represent Las Virgenes Municipal Water District and are currently involved in litigation against the EPA. We expect to be involved in said litigation for some time. Therefore, we don't believe this particular exemption applies to the 260 emails that were not provided to us.

Please let me know whether you will provide these emails or whether we need to go through a formal appeals process.

Thanks for your time and attention.

Christine

Christine N. Han
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