September 28, 2017

U.S. General Services Administration
FOIA Requester Service Center (H1F)
1800 F Street, NW, Room 7308
Washington, DC 20405

VIA EMAIL

Re: Freedom of Information Act Appeal, FOIA No. GSA-2017-001067

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA) and Section 105-60 of the regulations of the General Service Administration (GSA),[1] this letter serves as an appeal on behalf of the National Law Center on Homelessness and Poverty (NLCHP) of GSA's incomplete response on September 18, 2017, to NLCHP's FOIA request submitted May 24, 2017, for certain records, documents, and materials (collectively "records").[2] NLCHP appeals on the grounds that GSA inadequately searched for responsive records, failed to offer even a modicum of support for its decision to withhold responsive records, and blatantly violated its own regulations as to the timing and nature of its response.

Background

On May 24, 2017, NLCHP submitted a FOIA request with nine items. The request related to GSA's oversight of Title V of the Stewart B. McKinney Homeless Assistance Act of 1987 (Title V), which requires federal agencies to screen their surplus real property for suitability to be used by providers of services to the homeless. GSA did not acknowledge receipt of the FOIA request and assign it a control number until 55 days later on July 18, 2017. Several subsequent requests to GSA staff regarding the timing and substance of the agency's response and timing went unanswered. Staff further delayed its response on September 6, 2017, citing "additional research and extensive legal review."[3]

GSA did not respond to NLCHP until September 18, 2017, 118 days after the FOIA request was submitted. While GSA's regulations provide for the extension of time not exceeding 10 workdays–upon written notice to the requester–for "unusual circumstances,"[4] staff never articulated any unusual circumstances and had no communication with NLCHP for months after the request was submitted. There has no indication that GSA's response to NLCHP warranted an extension of time, for example by involving a "voluminous amount of separate and distinct records."[5]

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[1] 5 U.S.C. § 552 (2012); 41 C.F.R. § 105-60.403 (2016).
[2] A copy of NLCHP's FOIA request and GSA's response are attached as Appendix A.
[3] Email correspondence from A. Brooks to P. Varnado, September 6, 2017.
[4] 41 C.F.R. § 105-60.404 (2016).
[5] *Id.*

GSA's cursory response on September 18, 2017, does not reflect careful consideration or "extensive legal review" and *only contained 16 records*, most of which were publicly available or already in the possession of NLCHP. The response ignores discrete elements of NLCHP's clearly-articulated requests. For example, Request No. 4 asked for application materials and other communications between GSA and applicants for specific federal properties; the agency's response consisted only of a short generic description of the Title V process.

GSA's response to Request No. 6 only included documents regarding four federal properties, despite that between 2011 and 2016, the Department of Health and Human Services (HHS) corresponded with GSA on at least fifty (50) Title V properties as part of GSA's obligations throughout the Title V process for excess/surplus property. NLCHP believes that GSA should have corresponded with potential applicants and with HHS with respect to these properties, on subjects including the availability determination, property information, property history, and environmental profile.[6]

GSA's response to Request No. 7 included zero documents and stated that "evaluation and vetting of the applications occur [sic] within the landholding agencies, not by GSA." This ignores the fact that GSA frequently *is* the landholding agency for excess/surplus properties[7] and also ignores the fact that even when GSA is not the landholding agency, Title V regulations require GSA to play an active rule in the process, including by making availability determinations for the Department of Housing and Urban Development (HUD).[8]

As explained below, NLCHP believes that GSA identified but withheld numerous responsive records in their entirety without adequate justification, providing scant information or means by which NLCHP can make a reasoned judgment about the legitimacy of those denials. As a result, GSA has failed to adhere to the letter or spirit of FOIA and its own agency regulations requiring that agency records be made publicly available.

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[6] As one example, GSA was heavily involved in the evaluation of a property in Edison, New Jersey during 2016 (GSA No. NJ-0944-AA). There were no records provided to NLCHP related to that property.

[7] In the past year alone, GSA has been the landholding agency, the disposal agency, or the property's main point of contact for at least fifteen (15) suitable and available Title V properties. For example, a posting published on January 27, 2017, lists GSA as the landholding agency for properties in California and Virginia, and as the disposal agency for properties in Texas and Montana. 82 FR 8622 (2017). GSA was the landholding agency and/or the disposal agency for many more unavailable or unsuitable properties. *See, e.g.,* 81 FR 75140 (Nov. 18, 2016) (listing at least 60 such properties).

[8] *See* 45 C.F.R. § 12a.5(a)-(b) (2016). GSA is also notified by HHS each time an expression of interest has been received for a particular property, 45 C.F.R. § 12a.9(a)(3) (2016), and GSA has an active role in evaluating applications for an available property including considering the potential for other federal uses. 45 C.F.R. § 12a.8-12a.10 (2016).

Applicable Standards

Presumption in Favor of Disclosure

FOIA operates in the context of a "general philosophy of full agency disclosure," subject only to the application of several exclusive and narrowly construed exemptions.[9] GSA, along with other government agencies, has long been directed to adopt a presumption in favor of disclosure when evaluating each FOIA request.[10] GSA's FOIA regulations explicitly impose a higher burden on agency staff than beyond what is statutorily required by FOIA: In response to a records request, GSA must "not withhold a record unless there is a *compelling* reason to do so; i.e., disclosure will likely cause harm to a Governmental or private interest. In the absence of a compelling reason, GSA will disclose a record even if it otherwise is subject to exemption."[11]

Here, GSA has not met its burden to overcome the presumption in favor of disclosure. GSA's September 18, 2017, response to NLCHP cursorily invoked a broad FOIA Exemption, such that NLCHP does not have a reasonable basis to conclude that the withheld information is properly within the scope of that exemption. GSA offers no compelling reason to withhold responsive records and fails to articulate any reason, much less a "compelling" reason, to do so.

Segregability

In withholding any records responsive to a FOIA request, GSA must provide sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."[12] FOIA also requires that in the event a requested record is withheld because portions of it are exempted from release, the remainder must still be released.[13] The D.C. Circuit Court of Appeals has held that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."[14]

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[9] *See Nat'l Ass'n. of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002).

[10] *See, e.g.,* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government") available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[11] 41 C.F.R. § 105-60.103-2 (2016) ("GSA will cite the compelling reason(s) to requesters when any record is denied under FOIA.")

[12] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979).

[13] 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.") *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC,* 1989 WL 44655, 2 (D.D.C. 1989) (finding that the Commission had met its FOIA obligations by disclosing reasonably segregable factual materials).

[14] *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). This standard is met by the agency "look[ing] to a combination of intelligibility and the extent of the burden in 'editing' or 'segregating' the nonexempt material." *Yeager v. DEA*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1978).

Courts have long held that in responding to a FOIA request, an agency cannot rely on "boilerplate" privilege claims, or simply recite that the withholding of responsive records meets statutory standards without tailoring its explanation to each specific document along with a "contextual description" of how those standards apply to the specific contents of each document.[15] The agency's explanation must "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information."[16]

Index of Withheld Documents

On appeal of FOIA denials, courts have required agencies to meet their burdens of proving exemption by compiling and submitting a "*Vaughn* index" – a descriptive listing of withheld records or documents and the rationale for not disclosing each, under the rule from *Vaughn v. Rosen*.[17] Though typically not required until the reviewing court hears an agency's motion for summary judgment of a FOIA appeal, the United States District Court for the District of Columbia has exercised its discretion to require agencies to produce *Vaughn* indices earlier to expedite the process – as early as virtually simultaneous to when the agency completes processing of FOIA requests.[18]

To the extent GSA has already prepared a *Vaughn* index of the records responsive to NLCHP's request, it should provide that index in the interest of fairness and efficiency as soon as practicable, rather than wait for a district court to inevitably compel it to do so.

FOIA Exemption 5

FOIA Exemption 5 protects "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."[19] To qualify for Exemption 5, an agency document must "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."[20] GSA invoked Exemption 5 to withhold records responsive to Request No. 5, without

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[15] *King v. United States Dep't of Justice*, 830 F.2d 210, 219-25 (D.C.Cir.1987) (finding that the government's "[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate."); *see also Wiener v. FBI*, 943 F.2d. 972, 977-79 (9th Cir. 1991).

[16] *King,* 830 F.2d at 223-24.

[17] 484 F.2d 820, 827 (D.C. Cir. 1973) (requiring an itemized index which "must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant.")

[18] *See, e.g. Natural Resources Defense Council v. Dep't of Energy*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002) (requiring agency to produce a *Vaughn* index within 15 days of completing FOIA review and response).

[19] 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007).

[20] *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1 (2001).

quantifying exactly how many, citing attorney-client and attorney work-product privileges as well as apparently invoking the deliberative process privilege.[21]

Attorney-Client and Work-Product Privileges

Exemption 5 prevents disclosure of materials protected by the traditional privilege for documents and memoranda prepared by an attorney in anticipation of litigation, and does not apply until "some articulable claim, likely to lead to litigation" has arisen.[22] In its response letter, GSA asserts that some of the records a being withheld are privileged, without stating how many or explaining any nexus to a claim likely to lead to litigation. It is implausible that every single communication related to GSA's routine administration of Title V programs (e.g. administrative staff sending emails about specific properties posted as available) involved attorneys acting in anticipation of litigation. A *Vaughn* index is particularly critical to NLCHP's ability to evaluate the applicability of attorney-client work work-product privileges GSA has claimed under FOIA Exemption 5.

Deliberative Process Privilege

Exemption 5 prevents disclosure of records that would reveal agency deliberations, but only such records as are both "predecisional" and "deliberative."[23] The Supreme Court has held that the deliberative process privilege exists "to prevent injury to the quality of agency decisions."[24] Materials should only be withheld where they are subjective and are "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency."[25] Factual information generally may not fall within the deliberative process privilege, which is designed to exempt only the materials that embody officials' *deliberations to make recommendations or express opinions on legal or policy matters.*[26]

The law is clear that the deliberative process privilege is inapplicable to factual material that cannot "reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment."[27] Like other bases for FOIA exemptions, the deliberative process privilege is to be construed narrowly, and not every report or memorandum qualifies as deliberative, even when it reflects the author's views on policy matters.[28] The

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[21] September 18, 2017, Response at 2. The response does not cite deliberative process privilege specifically, but refers to "pre-decisional conversations and recommendations" that NLCHP interprets as referring to deliberative processes privilege.
[22] *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980).
[23] *Jordan v. DOJ,* 591 F.2d 753, 774 (D.C. Cir. 1978) (defining "predecisional" as "antecedent to the adoption of agency policy.")
[24] *Petroleum Info Corp. v. Dept. of the Interior,* 976 F.2d 1429, 1434 (D.C. Cir. 1992), quoting *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132, 151 (1975).
[25] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added).
[26] *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).
[27] *Petroleum Information Corp. v. Dept. of the Interior,* 976 F.2d 1429, 1437 (D.C. Cir. 1992).
[28] See *Hennessey v. U.S. Agency for Int'l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (finding that a withheld report did not bear on a policy-oriented judgment of the kind

particular role played by each document in the course of the deliberative process must also be established.[29] GSA staff deeming every internal communication among GSA employees about Title V properties as "pre-decisional" suggests they misunderstand the entire FOIA legal framework, under which internal agency communications are routinely released to requesters.

NLCHP's request focused principally on GSA's actions and practices to implement its Title V program for surplus real properties. Specifically, Request No. 5 asked for "[i]nternal communications regarding federal properties potentially available under Title V." This request did not call for any materials related to GSA's formulation of its Title V policies. It is not supportable for GSA to claim that it doesn't have a single non-exempt record responsive to this request (e.g. routine communications about specific real properties undergoing the Title V screening and posting process). In any event, staff did not attempt to segregate factual portions of any deliberative documents which it claims are pre-decisional under Exemption 5.

Public Interest

The requested records are critical to NLCHP's special and longstanding role in monitoring and ensuring federal agency compliance with Title V of the McKinney-Vento Act along with related regulations and court orders. GSA's refusal to provide responsive records−and unjustified 118 day delay in responding−frustrates the public interest in ensuring meaningful implementation of the Title V program. To promote the interests of fairness, transparency, and due process, GSA should reverse its staff's refusal to produce responsive materials.

Conclusion

GSA's insufficient response to NLCHP's FOIA request violates its own regulations and is contrary to the public interest, and GSA has failed to justify its denial of responsive records under the well-established law applicable to FOIA Exemption 5. NLCHP therefore asks the Chief FOIA Officer to grant its appeal and produce promptly records responsive to NLCHP's FOIA Request GSA-2017-001067. To the extent GSA withholds responsive documents citing privilege, NLCHP requests that GSA provide promptly an index of withheld records so that NLCHP can make a reasoned judgement about the legitimacy of any claims to privilege records which continue to be withheld.

Further failure to respond to NLCHP's FOIA request will be subject to judicial review in the United States District Court for the District of Columbia on [October 27, 2017]. NLCHP is prepared to seek an order compelling GSA to comply with FOIA and its own regulations by disclosing responsive materials, and for an award of related attorneys' fees.

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contemplated by Exemption 5, *citing Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)).

[29] *See Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001).

Very truly yours,

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