

EXHIBIT B



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY
7701 TELEGRAPH ROAD
ALEXANDRIA, VA 22315-3860

July 16, 2018

Office of Counsel

Mr. Jacob Hutt
ACLU
125 Broad Street, 18th Floor
New York, New York 10004

Dear Mr. Hutt,

This is in response to your Freedom of Information Act (FOIA) request, dated January 23, 2018, for information records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline. By email dated February 12, 2018, Ms. Mary Alice Smith confirmed receipt of your FOIA request and assigned tracking number FP-18-009115.

I have coordinated with our Headquarters Operational Protection Division and received 12 pages of emails that were considered responsive to your request. One email consisting of five pages is being withheld in its entirety pursuant to Exemptions 5, 6, and 7(A) of the FOIA as discussed below. The remaining seven pages are provided in redacted form pursuant to Exemption 6 of the FOIA.

Exemption 5 of the FOIA addresses “inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency.” See: 5 U.S.C. § 552(b)(5). The applicable privilege recognized by Exemption 5 is the Deliberative Process Privilege. The Deliberative Process Privilege protects “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149. The information that has been characterized as deliberative includes an email between HQUSACE and the Department of Justice. That email, and its attachment contains information, and discussions concerning potential protest activity and protestor targeting of USACE leadership. This material embodies the purpose for the Deliberative Process Privilege which exists to encourage open and frank discussions between government agencies and officials, to protect against premature disclosure of proposed policies before they’re finally adopted, and to protect against public confusion that could result from disclosure of rationales that are not ultimately adopted as an agency decision. *Kidd v. U.S. Department of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would “inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents”). The potential disclosure of any and every comment in a policy discussion would surely chill the climate of open communication between government personnel.

Exemption 6 protects information that if released, would constitute a clearly unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). In applying Exemption 6, an individual privacy interest must be weighed against the public interest in that information. If the privacy interest outweighs the public interest, the information should be withheld. Since the terrorist attacks of September 11, 2001, there has been a heightened interest in protecting the security and privacy of DOD personnel. In the current world security climate, DOD personnel and their families are particularly vulnerable to harassment and attack from terrorists and others wishing to do them harm. See: Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001). In this instance, the information that has been redacted includes names and email addresses of certain Army Employees. I have determined that the privacy interests at stake are greater than the public's interest in the personal contact information of individuals involved in the requested correspondence.

Exemption 7 of the FOIA protects from disclosure "records or information compiled for law enforcement purposes..." 5 U.S.C. §552(b)(7)(2006). The applicable Exemption 7 subpart is 7(A) which protects information that, if released, could reasonably be expected to interfere with enforcement proceedings. As previously stated, the email withheld pursuant to Exemption 7(A) is an email between a Department of Justice Intelligence Specialist and the USACE Operational Protection Division concerning potential protest activity and protestor targeting of USACE leadership. Release of this type of material may impact federal agencies' ability to anticipate and respond to certain threats thereby interfering with prevention of the same and law enforcement proceedings in response thereto.

For any further assistance and to discuss any aspect of your request, you have the right to contact the USACE FOIA Public Liaison at foia-liaison@usace.army.mil or by calling (202) 761-4791. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-36001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Finally, if you are not satisfied with this response, you have the right to appeal my determination to the Secretary of the Army. Your appeal package should bear the notation "Freedom of Information Act Appeal" and should be emailed to foia@usace.army.mil or sent to me at the address depicted on the letterhead above. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response.

Sincerely,



FR Damon Roberts
HECSA Counsel