

# **EXHIBIT 19**



**DEPARTMENT OF THE ARMY**  
CORPS OF ENGINEERS, OMAHA DISTRICT  
1616 CAPITOL AVENUE  
OMAHA NE 68102-4901

September 14, 2018

REPLY TO  
ATTENTION OF

Office of Counsel

Mr. Michael Wagner, Jr.  
Seyfarth Shaw LLP  
975 F. Street, N.W.  
Washington, D.C. 20004-1454  
mewagner@seyfarth.com

Re: U.S. Army Corps of Engineers' Freedom of Information Act Request (FOIA) FA-18-0052, & U.S. Army Special Operations Command FOIA Request 18-0081/18-0157 -- Contract W9128F-14-C-0024, SOF Battalion Operations Facility Complex, Fort Carson, CO

Dear Mr. Wagner:

This letter responds to your Freedom of Information Act (FOIA) request to the U.S. Army Corps of Engineers, Omaha District (USACE), dated February 22, 2018, which requested copies of fourteen categories of documents from the agency project files. This letter also provides a response to U.S. Army Special Operations Command (USASOC) FOIA Request 18-0081/18-0157.

**USASOC FOIA Request 18-0081/18-0157**

The responsive documents identified by USASOC pursuant to FOIA Request 18-0081/18-0157 were referred to USACE for review prior to release. As you know, USACE served as USASOC's construction agent for this project. Mr. Christopher Nesbitt, the USASOC FOIA Officer, handled your FOIA request at USASOC. I understand that he facilitated a search of the government email accounts belonging to Sergeant First Class Aaron Marshall, Specialist Anthony Grimes, Lieutenant Scott Ratzler, and Major Adrian Biggerstaff, utilizing a series of operators and search terms you provided. As a result, Mr. Nesbitt obtained approximately 2500 pages of documents, which he then reviewed for documents responsive to your request. USASOC identified one four-page email string as responsive, which was then forwarded to this office for final review and release. Attached to this letter is a copy of the responsive email identified by USASOC.

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**U.S. Army Corps of Engineers' Freedom of Information Act Request (FOIA) FA-18-0052**

**Requests 1-10 & 13**

Your FOIA request to USACE requested copies of fourteen categories of documents from the agency project files. You also requested many of these documents pursuant to the rules of the Armed Services Board of Contract Appeals (ASBCA) in ASBCA Case No. 61518, Watts Constructors, LLC. I compared your FOIA request against Watts' First Set of Requests for Documents, dated May 9, 2018, and found the following FOIA requests (using the same numbering scheme from your February 22, 2018 FOIA letter) to be duplicative to those requests made via ASBCA discovery:

*1. All documents, including communications between and among USACE, USASOC, and/or 10th SFG, concerning delays to the completion of the Project.*

Duplicative to First Set of Requests for Documents, Request No. 12

*2. All documents, including communications between and among USACE, USASOC, and/or 10th SFG, regarding extension of the Project's completion time past the original completion date.*

Duplicative to First Set of Requests for Documents, Request No. 14

*3. All documents referring or relating to USASOC and/or 10th SFG's review of a Project schedule showing a completion date in May 2018 for the Project.*

Duplicative to First Set of Requests for Documents, Request Nos. 15, 17

*4. All communications between and among USACE, USASOC and/or 10th SFG regarding extending the completion date of the Project to May 2018.*

Duplicative to First Set of Requests for Documents, Request No. 14

*5. All documents concerning USASOC and/or 10th SFG's plans to occupy and use the Project.*

Duplicative to First Set of Requests for Documents, Request No. 30

*6. All documents referring or relating to the timetable for USASOC and/or 10th SFG to occupy and use the Project.*

Duplicative to First Set of Requests for Documents, Request No. 30

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*7. All documents concerning USASOC and/or 10th SFG's present need to occupy and use the Project.*

Duplicative to First Set of Requests for Documents, Request No. 30

*8. All documents referring or relating to any urgency expressed by USASOC and/or 10th SFG to USACE regarding the need to occupy and use the Project.*

Duplicative to First Set of Requests for Documents, Request No. 30

*9. All documents, including communications between and among USACE and USASOC and/or 10th SFG, concerning the termination of Watts' Contract at the Project.*

Duplicative to First Set of Request for Documents, Request No. 33

*10. All documents, including communications between and among USACE and USASOC and/or 10th SFG, regarding the plan for completion of the Project following Watts' termination, including the hiring of a replacement contractor or the procurement of Watts' subcontractors directly.*

Duplicative to First Set of Requests for Documents, Request No. 32

*13. All documents referring or relating to the unavailability of security guards, military police, or USASOC/10th SFG personnel to provide security and access at the Project beginning in February 2018.*

Duplicative to First Set of Requests for Documents, Request No. 31

The attorneys working the ASBCA litigation for USACE plan to provide documents responsive to your First Set of Requests for Production of Documents by the end of this week. Since the requests described above are duplicative to the discovery requests, the documents produced will also be duplicative as the process for identifying key custodians and identifying responsive documents in response to FOIA requests and discovery is similar. If you require a separate release under FOIA (e.g. if you plan to share the documents with the general public rather than simply for use in the litigation) please let me know and I will provide an estimate of the costs associated with reviewing the documents provided in discovery for applicable FOIA exceptions and redactions.

#### Requests 11 & 12

After comparing your FOIA request against Watts' First Set of Requests for Documents, dated May 9, 2018, I also determined that the following requests were not duplicative to those requests made via ASBCA discovery:

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11. *All documents, including communications between and among USACE and USASOC and/or 10th SFG, concerning Watts' access to the Project following termination.*

12. *All documents referring or relating to any security concerns expressed by USASOC and/or 10th SFG to USACE following the termination of Watts' Contract at the Project (if any).*

In order to provide documents responsive to requests 11 & 12, I propose to search government email messages sent and received by the following key records custodians:

Jimmy Harding  
Cheryl Bunting  
Christine Wilson  
Heather Duggan  
Brian Dziekonski

The searches will be run using the following proposed operators and search terms, and limited to the date Watts was terminated through the end of July 2018:

Watts AND access  
Watts AND security  
Watts AND guards  
BOF AND access  
BOF AND security  
BOF AND guards

If you agree with the proposed method of identifying documents responsive to requests 11 & 12, I anticipate returning responsive documents within 14 days from the date of this letter. For the purposes of estimating costs, I anticipate that running the searches will take approximately 2 hours and the subsequent review process will take 5-10 hours (assuming 500 pages or less) Based on the fee schedule described below, I estimate the costs at approximately \$500. If you do not agree with the method identified above, or the estimated fees, please contact me so that it may be further discussed.

Request 14

14. *All documents, including communications between and among USACE and USASOC and/or 10th SFG, concerning the estimated time for completion of the Project following the termination of Watts' contract.*

The information requested is exempt from release under FOIA Exemption 5.

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The government released the attached email chain between the U.S. Army Corps of Engineers' Project Manager, Jimmy Harding, and Major Biggerstaff from February 28, 2018, which includes the government's initial assumption that the procurement process might take 4-6 months. Information concerning the time for completion of the project once a contract is awarded is a matter subject to negotiation during the procurement process.

Exemption 5 encompasses three privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege. The deliberative process privilege is relevant to this request. The deliberative process privilege serves three purposes: to assure that subordinates with an agency will feel free to provide a decision maker with the uninhibited opinions and recommendations without fear of later public criticism; to protect against premature disclosure of proposed policies before adoption; and to protect against confusing the issues and misleading the public by the dissemination of documents suggesting reasons and rationales for a course of action that were not in fact the ultimate reasons for the agency's actions. American Petroleum Institute v. EPA, 846 F.Supp. 83 (D.D.Cir. 1994). In order to be protected by the deliberative process privilege, documents must be "predecisional" (generated before the adoption of an agency policy) and "deliberative" (reflect the give-and-take of the consultative process). Revealing this information and deliberations would have a chilling effect on the candor of those involved in the decision-making process.

Specific to this request, the Supreme Court has recognized an additional privilege incorporated into Exemption 5 based upon Federal Rule of Civil Procedure 26(c), which provides that "for good cause...commercial information" may be protected from discovery. This qualified privilege is available to the extent that the information is generated leading up to the award of a contract, and expires upon the award of the contract. Federal Open Market Committee v. Merrill, 443 U.S. at 360 (1979).

The government's estimates of the timeframe required to complete the work required by Contract W9128F-14-C-0024 are used to develop the period of performance and cost estimates for the replacement contract. Release of this information prior to contract award provides the details of the government's position and would allow the replacement contractor an advantage in developing price proposals. This could harm the government's ability to negotiate a fair and reasonable price for the replacement contract putting the government at a serious commercial disadvantage. Id.

You requested a Vaughn Index for any documents determined to be exempt, citing Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974). In Vaughn, the DC Circuit required an index to determine the validity of the agency's withholdings in the case. The Vaughn ruling does not require that agencies prepare an itemized index of withheld documents in the context of the administrative process. Your request is denied.

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Since your request has been denied in part with respect to Request No. 14, you are advised of your right to appeal this determination to the Secretary of the Army (ATTN: General Counsel). Your appeal must be postmarked or electronically transmitted within 90 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U.S. Army Engineer District, Omaha, ATTN: CENWO-OC, 1616 Capitol Avenue, Omaha, Nebraska 68102-4901.

For any further assistance and to discuss any aspect of your request, you have the right to contact the U.S. Army Corp of Engineers FOIA Public Liaison. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. Contact information is as follows:

USACE FOIA Public Liaison:

U.S. Army Corps of Engineers  
FOIA Public Liaison  
441 G Street, NW  
ATTN: CECC-G  
Washington, DC 20314-1000  
Email: [foia-liaison@usace.army.mil](mailto:foia-liaison@usace.army.mil)  
Phone: 202-761-4791

OGIS:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road—OGIS  
College Park, MD 20740-6001  
[ogis@nara.gov](mailto:ogis@nara.gov)  
202-741-5770 (phone)  
877-684-6448 (toll free)  
202-741-5769 (fax)  
[Ogis.archives.gov](http://Ogis.archives.gov) (website)

Your request is in the "commercial request" fee category. All commercial requesters are charged \$24.00 per hour for clerical search and review, \$48.00 per hour for professional search and review, \$.15 for each printed side of a duplicated page, and \$52.00 per hour for computer time.

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As you were already charged by USASOC for FOIA Request 18-0081/18-0157, there is no additional charge by USACE. With your concurrence, we will proceed with your Requests 11 & 12. As described above, I estimate the costs for that effort at approximately \$500. Should you require a separate release of the documents provided through discovery pursuant to your requests 1-10 & 13, I will provide an estimate of the costs associated with reviewing the documents for applicable FOIA exceptions and redactions.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. Tracy", with a large, stylized flourish at the end.

Thomas J. Tracy  
District Counsel

Enclosure