



Department of Energy

Washington, DC 20585

September 7, 2016

Mr. William T. Miller
McCarter & English, LLP
1015 15th Street NW
12th Floor
Washington, DC 20005

Via email: wmiller@McCarter.com

Re: HQ-2016-00111-F

Dear Mr. Miller:

This is the final response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. §552. You requested a copy of any and all documents that reference or relate to the decision of DOE, DOE staff, or DOE's Office of Energy Efficiency and Renewable Energy in regard to the Joint Request, including the decision:

1. To reopen the period for the public to submit comments on the NODA in Docket No. EERE-2014-BT-STD-0031;
2. To provide additional data in response to the Joint Request;
3. To defer responding to the Joint Request until after the expiration of the original comment deadline of October 14, 2015; and/ or
4. To communicate DOE's intent informally to certain parties other than the requesting parties.

In a December 1, 2015 email, with Ms. Danyele Coffey of my office, you clarified #4 of your request. Specifically, you are requesting internal communications to parties other than the requesting party, such as, but not limited to, American Council for an Energy Efficient Economy, Appliance Standards Awareness Project, and/or Alliance to Save Energy, concerning DOE's intent to extend the deadline.

Your request was assigned to the Office of Energy Efficiency and Renewable Energy (EE) to conduct a search of its files for responsive documents. EE started its search on January 10, 2016, which is the cutoff date for responsive documents. EE completed its search and found seven (7) responsive records. The documents are being released to you as described in the accompanying index.



DOE has determined that certain information should be withheld from the documents pursuant to Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5).

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption has been construed to exempt those documents normally privileged in the civil discovery context, such as attorney-client communications, attorney work-product documents, and deliberative process material.

With respect to the discretionary disclosure of deliberative information, the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public. For this reason, DOE has determined that discretionary disclosure of the deliberative material is not in the public interest because foreseeable harm could result from such disclosure.

Exemption 5 also incorporates the attorney-client privilege, which protects confidential attorney-client communications that relate to a legal matter for which the client has sought professional advice. The privilege usually protects a client’s disclosure to an attorney, but extends to an attorney’s opinion based on those disclosures, and to communications between attorneys that reflect client-supplied information. The material withheld includes information that contains legal advice requested from a DOE attorney.

Release of information exchanged between attorneys and clients would result in less open discussions between them, and attorneys would not be able to adequately advise and represent their clients. Sound legal advice and advocacy serves the public interest and such advice and advocacy depends upon attorneys being fully informed by their clients and being able to communicate with them. Such disclosure could have a chilling effect on the willingness of attorneys to make honest and open evaluations and recommendations in the future. For these reasons, discretionary disclosure of the information withheld under the attorney-client privilege is not being made. Disclosure would be harmful to the integrity of governmental decision-making processes, and could stifle future communications between clients and attorneys.

This satisfies the standard set forth in the Attorney General’s March 19, 2009, memorandum that when a FOIA request is denied, agencies will be defended and justified in not releasing the material on a discretionary basis “if (1) the agency reasonably foresees that disclosure will harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” The Attorney General’s memorandum also provides that whenever full disclosure of a record is not possible, agencies “must consider whether they can make a partial disclosure.” Thus, we have determined that, in certain instances, a partial disclosure is proper. This also satisfies DOE’s regulations at 10 C.F.R. § 1004.1 to make records available which it is authorized to withhold under 5 U.S.C. § 552 when it determines that such disclosure is in the public interest. Accordingly, we will not disclose this information.

Pursuant to 10 C.F.R. § 1004.7(b)(2), I am the individual responsible for the determination to withhold the information described above. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). As a result, a redacted version

of the documents is being released to you in accordance with 10 C.F.R. § 1004.7(b)(3).

This decision, as well as the adequacy of the search, may be appealed within 30 calendar days from your receipt of this letter pursuant to 10 C.F.R. § 1004.8. Appeals should be addressed to Director, Office of Hearings and Appeals, HG-1, L'Enfant Plaza, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-1615. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. You may also submit your appeal by e-mail to OHA_filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. The appeal must contain all the elements required by 10 C.F.R. § 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where DOE's records are situated, or (4) in the District of Columbia.

The FOIA provides for the assessment of fees for the processing of requests. *See* 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). In our December 23, 2015 letter, you were advised that your request was placed in the "commercial" category for fee purposes. Commercial requesters are charged fees for search, review, and duplication associated with the request. Therefore, there will be a charge of \$128.01 for processing costs of your request. This includes \$76.01 for search time (1 hrs @ \$76.01/hr), \$34.34 for review time (1 hr @ \$34.34/hr), and \$17.66 in direct costs (16%). You will receive a separate bill for this amount.

If you have any questions about the processing of the request or this letter, you may contact Ms. Danyele Coffey or me at:

MA-90/Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 287-6831

I appreciate the opportunity to assist you with this matter.

Sincerely,


Alexander C. Morris
FOIA Officer
Office of Information Resources

Enclosures

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Request #: HQ-2016-00111-F

Final response for request from Mr. William Miller for the following correspondence:

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The Office of Energy Efficiency and Renewable Energy (EE) completed its search and located seven (7) documents responsive to request.

- Four (4) documents *are being released in their entirety.*
- Three (3) documents *are being withheld in part pursuant to Exemption (b)(5).* Exemption 5 information consists of pre-decisional deliberative information and reflects deliberations and proposals by agency officials as well as information protected by the attorney-client privilege.

****Please note that the pages that contain gray scaling are not redacted. This is the best quality copy of the document that we could produce.**