

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

COLUMBIA SNAKE RIVER IRRIGATORS  
ASSOCIATION,

Plaintiff,

v.

D. ROBERT LOHN, in his official capacity as  
Regional Director of the NATIONAL MARINE  
FISHERIES SERVICE, the NATIONAL  
MARINE FISHERIES SERVICE, and the  
UNITED STATES DEPARTMENT OF  
COMMERCE,

Defendants.

Case No. C07-1388MJP

ORDER FOLLOWING IN  
CAMERA REVIEW OF  
WITHHELD DOCUMENTS

On March 18, 2008, the Court directed Defendants to submit a number of withheld documents to the Court for in camera review. (Dkt. No. 23.) On April 22, 2008, Defendants delivered those documents and a supplemental brief. (Dkt. No. 28.) After reviewing the documents, the brief, and all other attachments, the Court finds that documents 3(a), 3(b), 7, 8(a), 14(a), 14(b), 15(b), 17(b), 18(a), 18(b), 21(a), 21(b), and 24(b) are properly withheld under exemption 5 of the Freedom of Information Act.<sup>1</sup>

**Background<sup>2</sup>**

In November 2001, the Recovery Science Review Panel (“RSRP”) released a report that

---

<sup>1</sup>On May 1, 2008, the Court received a letter from Plaintiff’s counsel, James Buchal. This letter represents an inappropriate form of communication with the Court and has not been considered in the Court’s decision. (See C06-1462RSL, Dkt. No. 46.)

<sup>2</sup>A complete background is set forth in the Court’s March 18, 2008 Order. (Dkt. No. 23.)

1 generated significant controversy by criticizing National Marine Fisheries Service (“NMFS”)  
2 policy on the harvesting of endangered salmon. (2d Lockhart Decl. at ¶ 8.) NMFS published its  
3 response to the report in a letter to the RSRP’s Chair, Dr. Robert Paine, and in two letters to Jeff  
4 Koenings, Director of the Washington Department of Fish and Wildlife, and Billy Frank,  
5 Chairman of the Northwest Indian Fisheries Commission. (*Id.* at ¶¶ 10-12.) The Agency initially  
6 planned to draft two Agency reports that would address the criticisms contained in the RSRP  
7 report, but later decided against distributing the response reports. (*Id.* at ¶¶ 19-20.)

8 In June 2005, Plaintiff made a request under the Freedom of Information Act (“FOIA”)  
9 for “any determination by NOAA Fisheries to adopt any recommendations of the [RSRP] Report  
10 in any biological opinion issued by NOAA Fisheries in connection with a consultation concerning  
11 harvest of listed salmonids conducted pursuant to § 7 of the Endangered Species Act.” (Dkt. No.  
12 4, Ex. 5 at 2.) After exhaustion of the administrative process, Plaintiff brought this action  
13 challenging the withheld documents. The Court ruled on the parties’ motions for summary  
14 judgment on March 18, 2008 and ordered in camera review of nineteen documents. Defendants  
15 have voluntarily produced six of those documents to Plaintiff. The Court now finds that the  
16 remaining thirteen documents are properly withheld under FOIA exemption five.

### 17 Analysis

18 FOIA requires agencies to disclose requested documents unless those documents fall  
19 within a statutory exemption. 5 U.S.C. § 552(b). Exemption five includes a “deliberative  
20 process” privilege, which safeguards an agency’s ability to “explore possibilities, engage in  
21 internal debates, or play devil’s advocate without fear of public scrutiny.” Assembly of State of  
22 Cal. v. U.S. Dep’t of Commerce, 968 F.2d 916, 920 (9th Cir. 1992). Application of the  
23 exemption “turns on whether disclosure of the requested information would reveal anything about  
24 the agency’s decisional process.” Carter v. United States DOC, 307 F.3d 1084, 1088 (9th Cir.  
25 2002). To fall within the exemption, the withheld document must be both “pre-decisional” and  
26 “deliberative.” Assembly, 968 F.2d at 920.

1 The privilege protects only expressions of opinion or recommendations, not purely factual  
2 material. In re Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 577, 581 (E.D.N.Y. 1979).  
3 However, factual content alone is insufficient to preclude the privilege. When expressions of  
4 expert opinion relate to the exercise of policy-oriented judgment, exemption five applies. See  
5 Nat'l Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988)  
6 (undercutting the factual/deliberative dichotomy, "the scope of the deliberative process privilege  
7 should not turn on whether we label the contents of a document 'factual' as opposed to  
8 'deliberative'").

### 9 **The Government's Burden**

10 The government bears the burden and must establish that the deliberative process privilege  
11 applies to each of the withheld documents. 5 U.S.C. § 552(a)(4)(B); Church of Scientology v. U.  
12 S. Dep't of Army, 611 F.2d 738, 742-743 (9th Cir. 1979). Defendants have submitted an  
13 amended "Vaughn index" describing each remaining document and its eligibility for exemption.  
14 Vaughn v. Rosen, 484 F.2d 820 at 826 (D.C.Cir. 1973). After reviewing the index and the  
15 documents submitted, the Court finds that Defendants have met their burden for the reasons  
16 stated below.

#### 17 I. Documents 7 and 8(a)

18 The government has sufficiently supported its claim of exemption for documents 7 and  
19 8(a). These emails include subjective evaluations of the RSRP report and recommendations for  
20 the content of the letters to Robert Paine, Jeff Koenings, and Billy Frank.

#### 21 II. Documents 18(a), 18(b), 21(a), 21(b) and 24(b)

22 Defendants maintain that these documents were part of the Agency's deliberation  
23 concerning a possible response to the RSRP report. Document 18(a) is an email indicating that an  
24 Agency employee's assessment of the RSRP report is attached. Documents 18(b) and 24(b) are  
25 identical and are, presumably, the assessment referred to in document 18(a). The assessment and  
26 its recommendations concern Agency policy and fall squarely within the deliberative process  
27

1 privilege. See Nat'l Wildfire, 861 F.2d at 1120 (“recommendations on how best to deal with a  
2 particular issue are themselves the essence of the deliberative process”).

3 Document 21(a) is an email describing the contents of the attached document and includes  
4 suggestions for implementing RSRP recommendations. Document 21(b) is the attachment and  
5 further evaluates the content of the RSRP report and NMFS policy. The document also offers  
6 recommendations for responding to the RSRP report. While these documents necessarily discuss  
7 factual material, they are protected from disclosure because the authors present and interpret  
8 those facts in the course of offering recommendations of policy. Nat'l Wildfire, 861 F.2d at 1119  
9 (documents that contain factual information may also be deliberative “in the sense that they make  
10 nonbinding recommendations on law or policy”).

### 11 III. Documents 3(a), 3(b), 14(a), 14(b), 15(b) and 17(b)

12 As stated above, the Agency began preparing two formal reports in response to the  
13 criticism and recommendations contained in the RSRP Report. (2d Lockhart Decl. at ¶¶ 20-22.)  
14 The Agency’s decision against issuing the response reports does not change the fact that drafts,  
15 outlines, or other deliberative documents contributing to the proposed reports are exempt from  
16 disclosure. See Judicial Watch v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995) (“The determination  
17 not to issue a policy evaluation might itself be a final decision.”); Assembly, 968 F.2d at 920 (a  
18 predecisional document is “one prepared in order to assist an agency decisionmaker in arriving at  
19 his decision.”) (internal quotes and citation omitted).

20 Documents 3(a) and 3(b) are properly withheld; 3(a) is a request for assistance in drafting  
21 the described reports and 3(b) contains a proposed outline. Document 14(a) is the cover letter to  
22 a report draft and describes the Agency’s drafting strategy. Documents 14(b), 15(b), and 17(b)  
23 are drafts of the proposed reports and contain subjective evaluations of the RSRP’s criticism as  
24 well as recommendations for responding to that criticism. The Court does not find that these  
25 documents contain any purely factual material that requires disclosure. See Sierra Club v.  
26 Kempthorne, 488 F. Supp. 2d 1188, 1192 (D. Ala. 2007) (“disagreement over factual issues and  
27

1 the strength or weakness of factual underpinnings” reflects “the give-and-take of the consultive  
2 process”) (citing Florida House of Rep. v. U. S. Dep’t of Commerce, 961 F.2d 941, 949 (11th  
3 Cir. 1992)). When an author discusses factual material in the course of offering recommendations  
4 of policy, the documents are properly withheld under the deliberative process privilege. Nat’l  
5 Wildfire, 861 F.2d at 1119.

6 The Court finds that Defendants have properly withheld this group of documents. Each of  
7 these documents contributed to the Agency’s decision not to issue the response reports and  
8 contains material that would reveal the Agency’s decisional process if disclosed. Carter, 307 F.3d  
9 at 1088 (application of the exemption “turns on whether disclosure of the requested information  
10 would reveal anything about the agency’s decisional process”).

11 **Conclusion**

12 The Court finds that the Government has met its burden and the deliberative process  
13 privilege applies to the remaining withheld documents. This decision leaves no further issue for  
14 the Court’s review and the case is hereby dismissed.

15 The Clerk is directed to send a copy of this order to all counsel of record.

16 Dated: June 9, 2008

17 

18  
19 Marsha J. Pechman

20 U.S. District Judge  
21  
22  
23  
24  
25  
26  
27