



January 24, 2011

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Re: Appeal – FOIA Request 2009-26

Dear Ms. Erickson:

This responds to your undated letter (submitted via email to LSC on January 11, 2011), appealing the response provided to you on October 14, 2010 of your Freedom of Information Act (FOIA) request of July 31, 2009 (reference number 2009-26). Upon review of the record, I am granting your appeal in part and denying your appeal in part.

*Background*

On July 31, 2009, you submitted a FOIA request via email with LSC for “a copy of the Center for Dispute Solutions, Inc. grant proposal evaluation for FY09 WY-4, NWWY-1 and MWY.” Specifically, you requested “the capability assessment review, the report of the independent review panel and staff assessments.”

In a response dated October 14, 2010, you received a response to your request which contained redacted versions of: (1) the Capability Assessment Report for the 2009 Wyoming Competition; (2) Form MA-3 (LSC Staff Final Recommendation Form); (3) Form MA-2 (Review Panel Recommendation Form); and (4) a “Vaughn Index” identifying the pages containing redactions and providing a brief description of the redacted information, along with the basis for the redactions.<sup>1</sup> The Vaughn Index indicated that all of the material redacted from these documents was withheld pursuant to the pre-decisional document privilege under FOIA Exemption 5, 5 U.S.C. §552(b)(5), and LSC’s implementing regulations at 45 CFR §1602.9(a)(4).

On January 11, 2011 you submitted an undated letter via email to James Sandman<sup>2</sup> and Patricia Batie appealing the response to your request. You base your appeal on a claim that the information identified is not entitled to protection from withholding under

<sup>1</sup> Your request 2009-26 was consolidated with another request you filed, 2009-27. The October 14, 2010 response from LSC also responded to that request. Your appeal only refers to information relevant to the documents requested in 2009-26 and I do not understand you to be appealing the response you received in response to the 2009-27 request. Accordingly, this response addresses only the documents within the scope of your appeal.

<sup>2</sup> Although the LSC Board of Directors has announced that James Sandman will be joining LSC as President, Mr. Sandman will not become President of LSC until January 31, 2011.

the deliberative process privilege of FOIA Exemption 5. Specifically, you argue that the material is not subject to the withholding under Exemption 5 because: (1) the material reflects only the application of policy and does not reflect the creation of policy; (2) Exemption 5 does not apply to post-decisional documents; and (3) the deliberative process privilege is inapplicable to purely factual information which must be segregated out and released.”

#### Analysis

The LSC Act reserves to the President of the Corporation the authority to make decisions regarding the awarding of grants for legal assistance. 42 U.S.C. §2996f(e). Two of the documents requested, the Capability Assessment, and Forms MA-3, are documents which were prepared by the staff of the LSC Office of Program Performance while the Form MA-2 was prepared by the members of the independent review panel engaged by LSC for that purpose. As with all Capability Assessments and Forms MA-2 and MA-3, these documents were provided by OPP and the independent review panel to the LSC President for the President’s consideration in making the grant award decisions. As such, they contain the views, assessments and staff and the independent review panel regarding the relative strengths and weaknesses of the applicants (in this case, CDSI and Legal Aid of Wyoming) for the service area. They also contain the recommendations of the documents authors. They do not, however, represent the final decision of the President.

Although you set your first two arguments out separately, they appear to be two facets of the same arguments. You claim that the documents cannot be covered by the deliberative process privilege because the documents do not reflect the “creation” of policy (and, as such, are necessarily post-decisional). Although you do not elaborate on this point in your letter, I take it to mean that you are suggesting that the “policy” decision was the adoption of the grant selection criteria and that selection of an applicant was merely the implementation of policy. Such a narrow interpretation of the application privilege is not warranted, however. The Eighth Circuit Court of Appeals has stated that the “purpose of the privilege is to allow agency freely to explore alternative avenues of action and engage in internal debates without fear of public scrutiny.” *Missouri ex rel. Shorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710 (8<sup>th</sup> Cir. 1998). In the present case, the review of grant applications to determine whether or not an award should be made, particularly (but not only) when there are competing applicants, is not merely an exercise in implementing policy by applying established criteria. Although the final determination must be consistent with the established criteria, the selection of a grantee is not merely a series of yes/no checks off of a list. Rather, the grant selection process admits of alternative courses of action and necessarily involves a deliberative process that results in the exercise of judgment. Thus, the analyses and recommendations of staff and the independent review panel cannot reasonably be described as the mere post-decisional implementation of policy and outside the purview of the deliberative process privilege.

As such, your second argument, that none of the information in the documents are subject to withholding under Exemption 5 because that exemption does not apply to post-decisional documents, is inapposite. Although it is true that Exemption 5 does not apply to post decisional documents, the documents you requested are not post-decisional documents. Rather, as noted above, they are documents prepared by persons without the authority to make a final decision and contain the analysis and recommendation of the authors, with which the final decisionmaker may or may not agree. It is established law that the predecisional character of a document is not changed by the fact that a final agency decision has been made. Thus, the fact that the LSC President made a decision to award the grant to LAW does not affect the pre-decisional nature of the assessment and recommendation documents.

Finally, turning to your claim that factual material is not protected and must be segregated out and released, while that is generally true under FOIA, it is also established law under FOIA that factual material in an otherwise deliberative document may also be withheld under two circumstances. One of these is when the author of a document selects specific facts out of a group of facts as part of the authors review and analysis because this very process is deliberative in nature and reflects the exercise of judgment by agency personnel. The second circumstance is when the factual information is so interwoven with the deliberative material that its disclosure would be tantamount to the revealing the agency's deliberations. In the current situation, the staff and review panel must review a considerable amount of factual information and choose which pieces of factual information are relevant to the review criteria and in what manner and to what effect. Thus, the process by which much of the factual information is selected and captured in the documents, does indeed reflect a deliberative process. Moreover, as the assessments, analyses and recommendations are based directly upon the facts, releasing the factual information would have the effect of revealing the deliberative process and considerations.

Notwithstanding the above, in my review of the documents in connection with your appeal, I have determined that in fact there is some additional factual information in each document which was segregable and which could have been released without revealing the deliberations otherwise contained in those documents. To that end, I am granting that part of your appeal as applies to such information. You are herewith being provided revised versions of the Capability Assessment,<sup>3</sup> Form MA-3 and Form MA-2, with the segregable and releasable information which had previously been redacted now available to you. A revised "Vaughn Index" is also enclosed with this letter. The appeal as regards the remaining information is denied.

If you believe that this determination is in error you may seek judicial review of this decision in the district court of the United States as provided in 5 U.S.C. §552(a)(4).

Sincerely,



Victor M. Fortuno  
President

Enclosures

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<sup>3</sup> Please note that in the October response the Vaughn Index erroneously identified the Capability Assessment as being 66 pages in length because the PDF actually contained two identical copies of the Capability Assessment. The Capability Assessment is really only 33 pages long. The updated Vaughn Index corrects this error. I apologize for any confusion this may have caused.