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September 23, 2004

By Mail and Fax (202.456.0753)

Edward A. Boling, CEQ FOIA Appeals Officer
Executive Office of the President
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Re: Freedom of Information Act Appeal of Request Regarding the *U.S. Climate Action Report 2002*

Dear Mr. Boling:

On July 15, 2003, the Commonwealth of Massachusetts and the States of Connecticut and Maine requested the following documents from the Council on Environmental Quality (CEQ) pursuant to Freedom of Information Act (FOIA) :

> All records of, or concerning, communications by or to CEQ in 2002 or 2003 concerning either the *U.S. Climate Action Report 2002*, which was submitted to the United Nations in May 2002 (Climate Action Report), or drafts or revisions of the Climate Action Report.

By letter dated August 9, 2004 from Dinah Bear, General Counsel, CEQ sent us its final response to our request. In that response, CEQ provided a total of 62 documents and withheld 90 documents in whole or in part (15 documents comprising an undisclosed number of pages were not provided at all; 75 documents totaling 358 pages were provided with redactions, many of which were very substantial). We are writing today to appeal the withholding of these documents and of documents withheld through an earlier CEQ response to this FOIA request.[1]

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[1]In a preliminary response dated November 1, 2003, CEQ withheld portions of 29 documents. An appeal of this earlier response is proper at this time given that it was identified as a "preliminary" response and given that we only now learned of the troubling conduct the agency demonstrated in its final response and through an "oversight" the agency just disclosed in a related FOIA request discussed below.

As discussed below, CEQ not only has failed to provide an adequate justification for its withholding, but its responses reveal numerous apparent substantive violations of FOIA. In fact, CEQ's inadvertent disclosure of certain material that it tried to redact unequivocally demonstrates that the agency has tried to skirt its statutory obligations. In addition, with regard to a separate FOIA request that Massachusetts filed on climate change issues, CEQ just last week conceded that through "an oversight," the agency's previously-submitted "final response" to that request failed to identify 69 CEQ documents (totaling 890 pages) that it had withheld without providing any justification or even letting us know such documents were at issue. *See,* letter dated September 15, 2004, from Edward A. Boling, CEQ Deputy General Counsel (copy attached). Together, these examples show that CEQ repeatedly withheld from the public eye documents that the agency has a legal duty to disclose.

Legal Background.

In enacting FOIA, Congress intended to implement a "general philosophy of full agency disclosure," manifest in a presumption in favor of disclosure. *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). The exemptions outlined in 5 U.S.C. § 552(b) are to be narrowly construed. *Fine v. US DOE*, 830 F. Supp. 570, 576 (D. N.M. 1993). Furthermore, the burden is on the agency to prove the validity of the rationale stipulated when documents are withheld. 5 U.S.C. § 552(a)(4)(B).

Here, CEQ largely seeks to rely on "Exemption 5" set forth in 5 U.S.C. § 552(b)(5). Under Exemption 5, CEQ may "exempt those documents, and only those documents normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002). To the extent that CEQ may claim that documents or portions of documents withheld fall within Exemption 5's deliberative process privilege, CEQ has the burden of showing that exempt information is both *pre-decisional* (antecedent to the adoption of an agency policy) and *deliberative* (reflective of the give-and-take of the consultative process, when considering the nature of the decision making authority vested in the author and the relative position in the agency's chain of command of the recipient). *See e.g., Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980); *USDOJ Freedom of Information Act Guide*, May 2004. Explanations or interpretations of agency action are not covered by the deliberative process exemption. *See e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-54 (1975); *Ryan v. Department of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980)(Exemption 5 does not apply to statements that constitute a statement of a final opinion or policy of an agency or that explain actions that an agency has already taken). Also, factual information, such as, for example, the names of authors of a document with protected contents, are not covered by the deliberative process exemption. *Gregory v. Board of Governors of the Federal Reserve System*, 496 F.Supp. 342, 343 (D. D.C. 1980). To be protected from disclosure as a direct part of the deliberative process privilege, the information must also be an "inter-agency or intra-agency" document. *See e.g., USDOJ Freedom of*

Information Act Guide, May 2004. CEQ retains the burden to show that withheld information in fact meets these criteria and that the general policy matters to which the deliberative process privilege caters would actually be harmed. *See Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865-66 (D.C. Cir. 1980).

In making such a showing, CEQ must focus on the effect of the materials' release, specifically whether doing so: 1) discourages candid discussions on matters of policy, 2) causes premature disclosure of proposed policies before final adoption or 3) prematurely discloses policy rationale that actually was not the ultimate grounds for the agency's action, thus confusing and misleading the public. *See USDOJ Freedom of Information Act Guide*, May 2004. The policies and potential detriments of releasing the information are not to be given "talismanic effect," but require careful consideration. *See Mead Data Central, Inc. v. US Dep't of the Air Force*, 402 F. Supp. 460, 464 (D. D.C. 1975). Conclusory statements are not sufficient to meet the agency's high burden (*see Bristol-Meyers Co. v. FTC*, 598 F.2d 18 (D.C. Cir. 1978)), and loosely characterized rationales without reasonable specificity are also inadequate. *Bernson v. ICC*, 625 F. Supp. 13, 16 (D. Mass. 1985). Because of the taxation on judicial energy and manpower that would otherwise result, "[t]he burden has been placed specifically by statute on the Government" and not just to "aver that the factual nature of the information is such that it falls under one of the exemptions" – in this way, to "gain an advantage by claiming overbroad exemptions." *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973).

CEQ also seeks to relies on "Exemption 6" set forth in 5 U.S.C. § 552(b)(6) for redactions it made in up to 29 documents provided with its November 1, 2003 response. Exemption 6 protects disclosures of those "personnel and medical files and similar files" that would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 requires a Court to balance an individual's right of privacy against the basic policy of opening agency action to the public scrutiny. *Department of State v. Ray*, 502 U.S. 164, 175 (1991). "The Supreme Court has rejected the position that disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals on the list." *Washington Post Co. v. United States Department of Agriculture*, 943 F.Supp. 31, 34 (D.C. Cir. 1996)(internal quotation omitted). Rather, disclosure of names that pose only a *de minimis* threat to personal privacy are not protected. *Id.* "[U]nless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail. . . . FOIA's basic policy . . . focuses on the citizens' right to be informed about what their government is up to." *Department of State v. Ray*, at 177-78 (citations and internal quotations omitted).

Inadequacies in CEQ's Responses.

In the face of these heavy burdens and presumptions to narrowly construe the exemptions, CEQ has provided only conclusory assertions that the withheld documents or redacted information are either nonresponsive or are exempt under 5 U.S.C. § 552(b)(5) and § 552(b)(6). CEQ has provided no factual basis or rationale to support such conclusory

statements. CEQ has provided no information at all regarding what the withheld documents or redacted portions of documents actually are or why or how it alleges they meet the requirements of the alleged exemptions. Indeed, CEQ has not even identified which privilege it claims applies under Exemption 5 (i.e., deliberative process privilege, attorney work product, etc.) and, for the 29 redacted documents provided November 1, 2003, CEQ has not even identified which exemption – Exemption 5 or 6 or both – that it contends applies to each of those.

CEQ's own regulations require that a full or partial denial of a FOIA request must include "the reasons for any denial" and "the names of any other individuals who participated in the decision" in addition to the FOIA officer who signs the letter. 40 C.F.R. § 1515.5(c)(3). The conclusory reliance on Exemption 5 and Exemption 6 without providing reasons how or why information allegedly withheld or redacted is in the scope of that exemption fails to comport with CEQ's own regulations. Moreover, CEQ admits to having consulted with other agencies or departments yet failed to identify "the names of any other individuals who participated in the decision," which also violates CEQ's regulations.

To carry its burden regarding the partial denial of our request, CEQ must show that withheld documents and redacted portions or documents are in fact exempt under 5 U.S.C. § 522(b)(5), and it must identify by name any individual who participated in the decision. CEQ must provide information detailing the documents withheld and how the asserted rationales apply to them. CEQ bears the burden to demonstrate that it disclosed all reasonably segregable, nonexempt information, and conclusory statements are again not sufficient. *Davin v. USDOJ*, 60 F.3d 1043, 1052 (3d Cir. 1995). For CEQ to fulfill its obligations, we request that it provide a full *Vaughn* index that provides an adequate rationale for each document or portion of each document that CEQ claims is exempt. *See St. Andrews Park, Inc. v. US Dep't of Army Corps of Eng'rs*, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003):

> A true Vaughn index identifies discrete portions of documents and identifies the exemption pertaining to each portion of the document. In most cases, such an index provides the date, source, recipient, subject matter and nature of each document in sufficient detail to permit the requesting party to argue effectively against the claimed exemptions and for the court to assess the applicability of the claimed exemptions.

CEQ's Inadvertent Disclosure of Material It Improperly Tried to Withhold.

Our review of the August 9th final response revealed several instances of CEQ trying to withhold material that is plainly not protected by any exemption. Three examples follow.

1. On July 17, 2002, 11 Attorneys General sent a letter to President Bush urging him to adopt a comprehensive policy to regulate greenhouse gases to better protect public health and welfare and the American economy from impacts of global warming. As disclosed in a document identified as "ARMS 305," Kenneth L.

Peel, Associate Director for Global Environmental Affairs for CEQ, had an e-mail exchange with Senator Hagel's office regarding the July 17, 2002 letter. CEQ blacked out a portion of the e-mail exchange claiming that it was protected from disclosure by Exemption 5. The portion that CEQ intended to redact comes from an e-mail from Senator Hagel's Office to Mr. Peel. The words under the black-out can actually be read, however, revealing that the deleted sentences state:

> I asked a friend at the GOP AGs association if these are all Dem AGs. He said they're all "communist Democrats."

While we can see why CEQ might desire to avoid disclosing such statements, there is no conceivable basis for the agency asserting that they are protected under Exemption 5, or any other exemption.

2. The second example involves an e-mail from Margot Anderson of the Department of Energy to Phil Cooney, CEQ Chief of Staff. Here, the inadvertent disclosure stems not from an insufficiently dark pen, but from the redactor's missing the fact that the full text of the e-mail was repeated twice in the e-mail (the second time being difficult to read given that it was interspersed with various formatting and other codes). As a result, a sentence that CEQ tried to withhold as privileged again can be read. The full text reads as follows, with the portion CEQ claimed is exempt from disclosure under Section 5 highlighted:

> UNFCCC CAR Review. I believe State has talked to you about the UNFCCC review of the Climate Action Report. We were contacted by State to help out directly (which would involve answering UNFCCC questions about how we derived the information reported in the chapters we had input on). **We urged State to make sure you were aware of the review as there may be sensitivities given the notoriety of the report - the review may open up these issues once again.**

See, e-mail identified by CEQ as "ARMS 528." The sentence that CEQ claims is subject to protection is no more "pre-decisional" or "deliberative" than the beginning of the paragraph. Thus, while this example may not be as colorful as the first, it equally demonstrates that CEQ is seeking to avoid its duties under FOIA.

3. The third example involves an e-mail that Dan Reifsnyder at the Department of State sent to numerous individuals at EPA, NOAA, DOE, USDA, State, and to Phil Cooney and Samuel A. Thernstrom of CEQ with the subject: "U.S. Climate Action Report: Final Press Guidance." Here, the inadvertent disclosure of

material that CEQ improperly tried to withhold stems from the fact that this document appears twice, identified as both "ARMS 187" and "STATE 2." ARMS 187 provides the first sentence of the e-mail text and redacts most of the rest of it. In contrast, "STATE 2" provides the entire text of the e-mail message, which reads as follows (with the portion redacted from ARMS 187 highlighted):

> Attached for your use as appropriate is the final cleared press guidance concerning the U.S. Climate Action Report. **The only change from the version sent to you last night is on page 4 where we deleted the words "by the Environmental Protection Agency" in the 4th full paragraph, line 3, after "would be transmitted electronically" and before "during the week of May 27, 2002." We made this change to make clear that the formal transmittal of the U.S. Climate Action Report to the U.N. Framework Convention secretariat was the responsibility of the Department of State and was undertaken by the Department of State.**

A statement explaining an agency action already taken – such as a final press guidance – is neither "pre-decisional" nor "deliberative" and is not protected from disclosure under Exemption 5. In addition, a final press guidance is not itself a final policy of the agency but rather a description or statement of a previous one. Thus, the e-mail text discussing a change to the final press guidance is also not a "pre-decisional"or "deliberative" document subject to protection from disclosure under Exemption 5.

Other Apparent FOIA Violations.

The examples included above provide incontrovertible evidence that CEQ asserted that documents were subject to exemptions without any legal basis for doing so. Especially given that these examples came to light only through the CEQ's failed attempt to conceal them, we are concerned about what other documents CEQ is withholding without justification. In fact, even based only on the responses to date, our review has uncovered other examples of apparent substantive FOIA violations. Again, three examples follow.

1. Numerous e-mail documents that CEQ disclosed to us include redactions of the identity of one or more of the participants in the communication, as well as other factual, non-deliberative information. Such purely factual information is simply not protected from disclosure.

2. An e-mail exchange between Tom Gibson of EPA and Phil Cooney with the subject line reading "FRO [sic] USE/PREP FOR TODAY: U.S. Climate Action Report: Final Press

Guidance" concerned the authors of the global warming impacts study commonly referred to as the National Assessment, or NAST, which was a foundation of Chapter 6 of the CAR. A large portion of Mr. Cooney's reply to Mr. Gibson has been redacted, in the document identified as "ARMS 553." The subject of this e-mail exchange and Mr. Gibson's inquiry ("Do you recall the makeup of the NAST team & how they got their charge?"), in addition to the timing (well after submittal of the CAR to the UNFCCC), strongly suggest that Mr. Cooney's reply could not possibly be a "*pre-decisional*" and "*deliberative*" communication regarding any ongoing policy then being developed by CEQ.

3. Robert C. McNally, Special Assistant to the President for Economic Policy within the Executive Office of the President, sent an e-mail to John H. Marburger, Director of the Office of Science and Technology, also within the EOP, and copied it to several other individuals in the EOP, including Phil Cooney. The "subject" of this e-mail is listed as: "Testimony." The text of this e-mail, identified as document "ARMS 264," starts as follows:

> Dr. Marburger, I just wanted to say thank you for addressing our concerns in your testimony. After reading it, for the first time I am confident that we will have a chance to correct the misperception about our view of the climate science that surfaced in the media and on the Hill since the CAR report came out.

CEQ blacked-out the remaining three and a half lines of the text that immediately follow. Given the short length of the e-mail, and its subject of "Testimony," it is difficult to imagine that the concluding statement, which is redacted, is either nonresponsive (*i.e.*, not about the CAR), or is somehow a *pre-decisional deliberation* of an official CEQ policy then under development. If the redacted information merely explains or further discusses the substantive policy regarding the already released official report submitted to the United Nations, it is not protected.

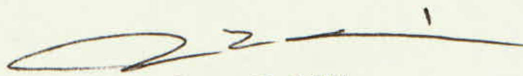
Conclusion:

CEQ violated its obligations under FOIA and under its own regulations in responding to our FOIA request. Regardless of whether such violations are due to an intentional effort to conceal unprotected, but potentially embarrassing comments, or due to simple negligence in the level of care used by CEQ in evaluating responsive documents, such violations call into question the legality of all of CEQ's decisions to withhold documents or information. At a minimum, CEQ must provide a detailed description of the withheld documents and redacted portions of documents, its reasons and factual bases for claiming that they fall within Exemption 5 or Exemption 6, and the names of all individuals that participated in the decisions. CEQ must

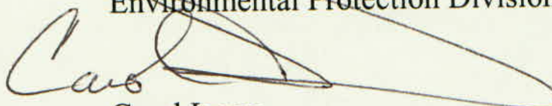
disclose any documents or portions of documents that do not clearly meet the exemption standards. We reserve the right to challenge CEQ's continued withholding once it has completed these steps.

We are submitting these comments on behalf of the Commonwealth of Massachusetts, and the States of Connecticut and Maine.

Sincerely,



James R. Milkey
Assistant Attorney General, Chief
Environmental Protection Division



Carol Iancu
Assistant Attorney General
Environmental Protection Division

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

September 15, 2004

Carol Iancu
Assistant Attorney General
Environmental Protection Division
Commonwealth of Massachusetts
Office of the Attorney General
200 Portland Street
Boston, Massachusetts 02114

Re: Freedom of Information Act request regarding CO2/Fabricant memo

Dear Ms. Iancu:

This is a follow-up to the "final response" of the Council on Environmental Quality ("CEQ") to your December 4, 2003 Freedom of Information Act ("FOIA") request. That letter, dated July 15, 2004, itemized twenty-one (21) documents which had been referred to the Department of Justice ("DOJ") and the Environmental Protection Agency ("EPA") for consultation and recommendations on matters regarding release. These documents were reviewed by Pauline Milius for the Environment and Natural Resources Division of DOJ and Nancy Ketcham-Colwill for EPA's Office of the General Counsel.

Due to an oversight on my part, I neglected to inform you that we are also withholding sixty-nine (69) CEQ documents, totaling eight hundred and ninety (890) pages. These CEQ documents were reviewed by CEQ Chief of Staff, Philip Cooney; Associate Director for Global Environmental Affairs, Kenneth Peel; and Deputy General Counsel and FOIA Officer, Edward Boling. Mr. Cooney participated solely in his capacity as custodian of the records of CEQ Chairman James L. Connaughton. These documents are being withheld as material exempt from disclosure pursuant to title 5 U.S.C. § 552(b)(5).

This completes our response to your request. If you are dissatisfied with our action on this request you may appeal it by writing to the CEQ FOIA Appeals Officer, 722 Jackson Place, N.W., Washington, D.C. 20503, within 45 days of the date of this letter (because of problems with mail transmittal, we suggest that you also fax any such appeal to Dinah Bear at 202-456-0753). Again, I regret the oversight and thank you for your cooperation throughout this process.

Sincerely,

Edward A. Boling
Deputy General Counsel
Freedom of Information Officer