



**Department of Energy**  
Washington, DC 20585

July 10, 2015

Mr. Cecil D. Andrus  
1280 East Candleridge Drive  
Boise, ID 83712-6504

Re: HQ-2015-00734-F

Dear Mr. Andrus:

This is in 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:

“[C]opies of all communication between any officials of the [DOE] and any official in the state of Idaho that is in any way related to a ‘waiver’ of the state of Idaho’s 1995 settlement agreement (the so called Batt Agreement) with the [DOE].

It is also my intent to include in this request any communication – email, letters, facsimile transmissions, etc. – from any DOE official at the department’s headquarters or at its Idaho Operations Office. I also respectfully request any communication related to this matter from DOE contractors in Idaho or elsewhere. Furthermore, I formally request any communication from private commercial utilities to the department, its contractors or the state of Idaho that relates in any way to the request for a ‘waiver’ or exception to the 1995 settlement agreement.

I further request any supporting materials from the department, its contractors or from private commercial utilities related to the ‘waiver’ request, including but not necessarily limited to memorandums, talking points, press statements, written or electronic presentations such as PowerPoint or overhead slides or any other material that deals with the request for a ‘waiver.’ Please include any legal memorandum that addresses the department’s interpretation of the 1995 settlement agreement with the state of Idaho and any department, contractor or private commercial utility analysis of whether the action the department contemplates under the ‘waiver’ is covered by the requirements of the National Environmental Policy Act (NEPA). Finally, I respectfully request any communication originated by the department or directed to the department regarding the planned or anticipated transportation of



commercial spent nuclear fuel (SNF) from any private commercial utility to the Idaho National Laboratory.”

In a March 18, 2015, letter sent via email to Ms. Shonda Humphrey of my office, Mr. Laurence Lucas on your behalf clarified that “all categories of documents sought in the FOIA relate to the December 2014 request from the [DOE] to current Idaho Governor ‘Butch’ Otter and Attorney General Lawrence Wasden for a ‘waiver’ of paragraph D.2.e of the 1995 Settlement Agreement between DOE and the State of Idaho regarding storage and cleanup of nuclear materials at the Idaho National Laboratory (INL).” Mr. Lucas stated that “[a]ll categories of documents sought in the FOIA relate to this ‘waiver’ request, and may be read in that limited context.”

In an April 28, 2015, email confirmation to Ms. Humphrey, Mr. Lucas, on your behalf, agreed that the search for responsive documents would be from January 1, 2012, to January 22, 2015.

Your request was assigned to the DOE’s Office of the General Counsel (GC), Office of Nuclear Energy (NE), Office of the Executive Secretariat (ES), Office of Congressional and Intergovernmental Affairs (CI), and Idaho Office of Operations (ID) to conduct a search of their files for responsive documents. The cutoff date for responsive documents is January 22, 2015. This letter will serve as a final response for ES, ID, CI, and NE. GC will respond under separate cover.

ES has completed its search, but did not locate any documents responsive to your request. Therefore, pursuant to Title 10, Code of Federal Regulations (C.F.R.), § 1004.4(d), I am unable to provide any responsive documents to your request from ES. Pursuant to 10 C.F.R. § 1004.7(b)(2), I am responsible for the determination that no responsive records exist in ES.

ID, NE, and CI have completed their searches for documents responsive to your request. ID has identified two (2) documents. NE has identified twenty-nine (29) documents and CI has identified ten (10) documents.

Upon review, DOE has determined that certain information contained within the documents should be withheld pursuant to Exemptions 4, 5, and 6 of the FOIA, 5 U.S.C. § 552(b)(4), (b)(5), and (b)(6). Information is also being withheld as nonresponsive to your request. The documents are being provided to you as described in the accompanying index.

Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption is intended to protect the interests of both the Government and submitters of information. This exemption affords protection to submitters who provide trade secrets, or commercial or financial information to the Government by safeguarding them from the competitive disadvantages that could result from disclosure. The exemption covers two broad categories of information in Federal agency records: 1) trade secrets, and 2)

information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

In *Critical Mass*, the court drew a distinction between information that was voluntarily submitted to a federal agency versus an involuntary submission of information. *Critical Mass v. NRC*, 974 F.2d 871 (D.C. Cir. 1992). Under *Critical Mass*, voluntarily submitted information is categorically protected as “confidential information” provided it is information that is not “customarily disclosed” to the general public by the submitter. In this case, news reporting companies submitted reporting and analysis to DOE on a voluntary basis. This information was analyzed pursuant to the voluntary prong of the *Critical Mass* test.

The information withheld under Exemption 4 consists of propriety information that is maintained in confidence by the submitter companies, and that is not customarily released to the general public. The information consists of reporting and analysis that is only available to subscribing members via a subscription within the appropriate news reporting company. Specifically, the Weapons Complex Morning Briefing requires an individual to subscribe to its service via a payment plan (monthly or yearly), which enables the individual to view the briefing. For the reasons stated above, the part of the Weapons Complex Morning Briefing relating to your request that is accessible only by subscription is being withheld under Exemption 4 of the FOIA.

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

The deliberative process protects advice, recommendations, and opinions that are pre-decisional and part of the decision-making process of the Government. This privilege protects not merely the documents, but also the integrity of the deliberative process itself where the exposure of that process, or an element thereof, would result in harm.

The material being withheld under Exemption 5 includes deliberations that reflect DOE’s internal, deliberative policies concerning proposed shipments of commercial spent nuclear fuel to the Idaho National Laboratory. The information consists of possible action plans, policy concerns, and other deliberative communications pertaining to this ongoing and evolving process. It is reasonably foreseeable that release of such information could cause the harm of chilling open and frank discussions, limit government personnel’s range of options to consider, and thus detract from the quality of Agency decisions.

Additionally, we are withholding information in the records that contains confidential attorney-client communications and legal advice provided by DOE attorneys. The attorney-client privilege protects a client’s disclosure to an attorney and extends to an attorney’s opinion based on those disclosures, and to communications between attorneys that reflect client-supplied information.

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.

We are also withholding information in the records that contains communications involving DOE attorneys under the attorney work-product. The information in these documents includes deliberations of litigation strategy and information prepared by attorneys in anticipation of litigation. Thus, DOE has determined that discretionary disclosure of the records containing attorney work-product is not in the public interest because foreseeable harm could result from such disclosure. For these reasons, information is being withheld under Exemption 5 of the FOIA.

Exemption 6 is generally referred to as the “personal privacy” exemption; it provides that the disclosure requirements of FOIA do not apply to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). In applying Exemption 6, DOE considered: 1) whether a significant privacy interest would be invaded; 2) whether the release of the information would further the public interest by shedding light on the operations or activities of the Government; and 3) whether in balancing the privacy interests against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy.

The information withheld under Exemption 6 consists of mobile telephone numbers, a business telephone number, an individual’s name, and information relating to an individual’s personal matters. This information qualifies as “similar files” because it is information in which an individual has a privacy interest. Moreover, releasing the information could subject the individuals to unwarranted or unsolicited communications. Since no public interest would be served by disclosing this information, and since there is a viable privacy interest that would be threatened by such disclosure, Exemption 6 authorizes withholding the information. Therefore, we have determined that the public interest in releasing this information does not outweigh the overriding privacy interests in keeping this information confidential.

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](mailto: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 April 2, 2015, letter, you were advised that your request was placed in the “other” category for fee purposes, which provides for two free hours of search time and 100 free pages. On April 9, 2015, Mr. Lucas on your behalf sent a letter via email to Ms. Humphrey, requesting a waiver of fees associated with processing of the request. In an April 28, 2015, letter, we informed you that your fee waiver request was granted. Thus, you will not be charged any fees for processing this request.

GC is continuing to process your request. If you have any questions about this letter, you may contact Ms. Shonda Humphrey or me at:

MA-90/ Forrestal Building  
1000 Independence Avenue, SW  
Washington, DC 20585  
(202)586-5955

I appreciate the opportunity to assist you with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Morris", with a long, sweeping flourish extending to the right.

Alexander C. Morris  
FOIA Officer  
Office of Information Resources

CC: Laird Lucas

## INDEX

Request No.: HQ-2015-00734-F

**Final response for ES, ID, NE, and CI to the request from Mr. Cecil Andrus for the following:**

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ID has completed its search and identified two (2) documents responsive to your request.

- One (1) document is being released in its entirety.
- One (1) document *is being withheld in part pursuant to Exemption (b)(6)*. Exemption 6 information consists of an individual’s name.

NE has completed its search and identified twenty-nine (29) documents responsive to your request.

- Five (5) documents are being released in their entirety.
  - For NE document 1, the attachments are as follows:
    - One attachment is publicly available and can be found at the following hyperlink: <http://snakeriveralliance.org/snake-river-alliance-responds-to-governors-nuclear-commission/>.
    - One attachment is publicly available and can be found at the following hyperlink: <http://www.localnews8.com/blob/view/-/17919438/data/2/-/amxnv9z/-/snake-river-alliance-s-response-pdf.pdf>.
- One (1) document is *being withheld in part pursuant to Exemption (b)(4)*. Exemption 4 information consists of propriety reporting and analysis that is only available to subscribing members via a subscription within the appropriate news reporting company. Information is also being withheld as nonresponsive to your request.
- Thirteen (13) documents *are being withheld in part pursuant to Exemption (b)(5)*. Exemption 5 information consists of deliberative process privilege information, attorney-client communications, and attorney work-product. Information is also being withheld as nonresponsive to your request.
  - For NE document 25, the attachment is publicly available and can be found at the following hyperlink:  
<http://gov.idaho.gov/mediacenter/press/pr2015/pdf/Secretary%20Moniz%20LetteL%201082015.pdf>.



- Eight (8) documents *are being withheld in part pursuant to Exemptions (b)(5) and (b)(6)*. Exemption 5 information consists of deliberative process privilege information, attorney-client communications, and attorney work-product. Exemption 6 information consists of mobile telephone numbers, a business telephone number and information relating to an individual's personal matters. Information is also being withheld as nonresponsive to your request.
  - For NE document 7, the attachments are as follows:
    - One attachment is publicly available and can be found at the following hyperlink: [https://www.deq.idaho.gov/media/550338-1995\\_Settlement\\_Agreement.pdf](https://www.deq.idaho.gov/media/550338-1995_Settlement_Agreement.pdf).
    - One attachment is publicly available and can be found at the following hyperlink: [https://www.deq.idaho.gov/media/550236-commercial\\_fuels\\_agreement\\_2011.pdf](https://www.deq.idaho.gov/media/550236-commercial_fuels_agreement_2011.pdf).
    - One attachment is being withheld in part pursuant to Exemption 5.
    - One attachment is a duplicate of the above-referenced attachment that is being withheld in part pursuant to Exemption 5.
- Two (2) documents *are being withheld in part pursuant to Exemption (b)(6)*. Exemption 6 information consists of a mobile telephone number.

CI has completed its search and identified ten (10) documents responsive to your request.

- One (1) document is being released in its entirety.
- Eight (8) documents *are being withheld in part pursuant to Exemption (b)(5)*. Exemption 5 information consists of deliberative process privilege information, attorney-client communications, and attorney work-product. Information is also being withheld as nonresponsive to your request.
  - For CI document 3, the attachments are as follows:
    - One attachment is a duplicate of the publicly available attachment in NE document 25.
    - One attachment is publicly available and can be found at the following hyperlink:  
<http://gov.idaho.gov/mediacenter/press/pr2015/pdf/Moniz-Otter%2012%2031%2014.pdf>.
  - For CI documents 5 and 10,
    - One attachment is a duplicate of the publicly available attachment in CI doc 3.
    - One attachment is a duplicate of a publicly available attachment in NE document 25.
- One (1) document *is being withheld in part pursuant to Exemptions (b)(5) and (b)(6)*. Exemption 5 information consists of deliberative process privilege information, attorney-client communications, and attorney work-product. Exemption 6 information consists of a mobile telephone number. Information is also being withheld as nonresponsive to your request.