



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

RECEIVED
01-18-12
District 1

IN REPLY REFER TO:

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F12037
Ser 14/087
January 3, 2012

Ms. Kim Wigington
Monroe County Board of County Commissioners
Office of Mayor Pro Tem Kim Wigington
500 Whitehead Street, Suite 102
Key West, Florida 33040

Dear Ms. Wigington:

SUBJECT: YOUR FREEDOM OF INFORMATION ACT (FOIA) APPEAL F12037

This responds to your letter of November 28, 2011, in which you appeal the decision of the Commander, Navy Region Southeast to partially deny your FOIA request under 5 U.S.C. § 552(b)(5). In particular, you appeal the denial of your request for the "Pre-Release Environmental Assessment for Fleet Support and Infrastructure Improvements" relating to the introduction of the F/A-18E/F Super Hornet at Naval Air Station Key West. You have also interpreted the command's reply letter as a denial of your request for all documents and other information generated or gathered by the Department of Defense Inspector General and by other agencies that reported to the DoDIG regarding the same Environmental Assessment.

Your appeal is a request for a final determination under the FOIA. I thoroughly reviewed your letter and the circumstances surrounding your appeal. For the following reasons, your appeal is granted in part.

Your request for the "Pre-Release Environmental Assessment" was interpreted by the Navy to mean that you are seeking copies of drafts of the environmental assessment that existed prior to the final version of the environmental assessment that was publicly released. The Commander, Navy Region Southeast partially denied your request for these documents based on FOIA Exemption (b)(5). Exemption (b)(5) provides for the protection of certain records or information, specifically 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). The Supreme Court has made clear that the coverage of Exemption (b)(5) is quite broad and encompasses both statutory privileges and those recognized by common law, including the deliberative process privilege. See *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800

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(1984). Draft documents are a category of documents particularly likely to be found exempt under the deliberative process privilege, and many courts have found that the very process by which drafts evolve into final documents can itself constitute a deliberative process warranting protection.

While I find that Exemption (b)(5) applies to the document held by Navy Region Southeast that is responsive to your request, I am remanding your FOIA request back to the Commander, Navy Region Southeast with instructions for the command to conduct a segregability determination and a foreseeable harm analysis as required by current FOIA policy. The purpose of this analysis is to determine whether a discretionary disclosure of the document is possible despite the applicability of Exemption (b)(5). After the command's reconsideration, you will be entitled to appeal the decision to this office.

With respect to your request for DoDIG documents and information, I find that the Commander, Navy Region Southeast properly referred your request to the DoDIG as a matter under that office's cognizance. I do not have the authority to adjudicate a FOIA appeal for the Department of Defense. For further information regarding this portion of your request, you may contact the Department of Defense, Office of the Inspector General, Office of Communications and Congressional Liaison, ATTN: Mr. John R. Crane, Suite 15F25, 4800 Mark Center Drive, Alexandria, VA 22350-1500.

As the Secretary of the Navy's designee, I am responsible for this decision. You may seek judicial review of this decision. Should you have any questions or concerns, please contact Major James Valentine at 202-685-5476 or james.d.valentine@navy.mil.

Sincerely,



G. E. LATTIN
Deputy Assistant Judge Advocate General
General Litigation Division

Copy to:
CNRSE
DNS-36