

National Aeronautics and Space Administration
Headquarters
Washington, DC 20546-0001



July 26, 2007

Reply to Attn of:

Office of the General Counsel

Mr. Mitchell Anderson
P.O. Box 4551
Vancouver, British Columbia
V6B 4A3
Canada

Dear Mr. Anderson:

This is in response to your letter dated May 9, 2007, which arrived at NASA Headquarters on May 29, 2009, appealing the initial determination under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, issued on April 12, 2007, by Ms. Kellie N. Robinson, NASA FOIA Officer at NASA Headquarters. Your FOIA request of May 12, 2006, sought “access to and copies of all records, reports, correspondence, emails, memos, minutes or other documents whatsoever touching on, or relating to: the cancellation of the Deep Space Climate Observatory (DSCOVR) mission, from the period July 1, 2005 to the present, in the possession of NASA Deputy Associate Administrator Dr. Mary L. Cleave.”

In response to a conversation with Ms. Robinson on or about June 7, 2006, you agreed to narrow the scope of your request to “any documents relating to the decision making process and the final decision to cancel the [DSCOVR] mission, to include documents regarding any correspondence from the science community.”

As part of the initial determination letter, Ms. Robinson provided you with a number of NASA records responsive to your request. Release of additional NASA records responsive to your request was denied pursuant to 5 U.S.C. § 552 (b)(5), which exempts from release “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.” This exemption is meant to guard against the chilling effect that disclosure might have on frank and open discussions within the government as decisions such as the conduct of the DSCOVR mission are considered. This “deliberative process privilege” protects from release those records that are predecisional and a direct part of the process by which governmental decisions and policies are made. See Coastal States Gas v. Department of Energy, 617.F.2d 854, 866 (D.C. Cir. 1980).

In your appeal, you --

1. Request a further review by NASA of the withheld documents to determine whether there is additional “factual” information that should be released; and
2. Question the applicability of the “deliberative process privilege” to the withheld records because “NASA has concluded its review of the DSCVR mission.” Therefore, the “very policy development activities for which deliberative process protection has been claimed are now completed.” You argue that exemption five only protects deliberative material during the deliberative process and that since the deliberative process is completed, there is no “deliberative rationale” remaining to properly withhold this material.

Your request has been reviewed and processed pursuant to NASA FOIA regulations, 14 CFR Part 1206. This review has involved examination of the initial determination, relevant case law, the records in question, consultation with the Headquarters FOIA Office, and examination of the grounds for reversal cited in your appeal letter. Based on this review, I will affirm the initial determination regarding NASA records.

First, we have thoroughly reviewed each of the documents Ms. Robinson withheld to see whether any could be redacted. I have concluded that none of them are releasable. Either they contained, in their entirety, material subject to Exemption (5), or the material was so inextricably intertwined to the communication that redacting the documents would leave only essentially meaningless words and phrases. Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981). Thus Ms. Robinson correctly withheld these records in their entirety.

Second, as indicated under Exemption (5) of the FOIA, the Agency can withhold documents or parts of documents that are predecisional, defined as “antecedent to the adoption of an agency policy” and deliberative, i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters,” Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866, (D.C. Cir. 1980). The following three policy purposes consistently have been held to constitute the basis for this privilege: (1) to encourage open, frank discussion on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and, (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not, in fact, ultimately the grounds of the Agency’s action. See Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The predecisional character of these documents is not altered by the fact that a final decision was released – nor is it altered by the passage of time in general. Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979). Therefore, the fact that an ultimate decision has been made with regard to the conduct of the DSCOVER mission is not relevant to the application of Exemption (5).

Therefore, I am affirming the initial determination as it applies to NASA records. This is a final determination and is subject to review under the provisions of 5 U.S.C. § 552 (a)(4), a copy of which is enclosed.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Luedtke", is written over a light gray rectangular background.

Thomas S. Luedtke
Associate Administrator
for Institutions and Management

Enclosure

cc:
HQ/Ms. Robinson