

Save the River, 409 Riverside Drive, Clayton, New York 13624
FOIA Appeal

Collister Johnson, Jr.
Administrator
Saint Lawrence Seaway Development Corporation
1200 New Jersey Avenue, S.E.
Suite W32-300
Washington, D.C. 20590

May 2, 2008

FREEDOM OF INFORMATION ACT APPEAL
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Dear Administrator Johnson:

This is an administrative appeal under the Freedom of Information Act, pursuant to 5 U.S.C. §552(a)(6). Please find enclosed the original and a copy of "SAVE THE RIVER'S FREEDOM OF INFORMATION ACT APPEAL TO THE SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION, U.S. DEPARTMENT OF TRANSPORTATION" in this cause.

Please file this document using the file stamp date of May 2, 2008, and return a file-stamped copy of the document in the enclosed self-addressed stamped envelope.

Thank you.

Stephanie Weiss
Assistant Director
Save the River
409 Riverside Drive
Clayton, New York 13624

Enclosures

Sent via Certified Mail No.7008 0150 0000 5615 1188

RETURN RECEIPT REQUESTED

**SAVE THE RIVER'S FREEDOM OF INFORMATION ACT APPEAL TO THE SAINT
LAWRENCE SEAWAY DEVELOPMENT CORPORATION, U.S. DEPARTMENT OF
TRANSPORTATION
May 4, 2008**

INTRODUCTION

Save the River has long sought from the Saint Lawrence Seaway Development Corporation ("SLSDC") information on how the agency sets the yearly opening date for commercial navigation on the Saint Lawrence Seaway ("Seaway"). The numerous letters exchanged between the SLSDC and Save the River, members of Congress, and the New York Department of Environmental Conservation have uncovered some of the factors the SLSDC purportedly considers when setting the opening date. However, the full set of factors and criteria considered, the established process by which these factors or criteria are evaluated, and the policies and interpretations underlying the evaluation and decision remain secret.

Save the River has most recently resorted to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, in an attempt to open the SLSDC's yearly opening-date decision to the light of public scrutiny. The SLSDC's response to Save the River's December 12, 2007 FOIA request, however, is deficient. Save the River brings this FOIA appeal to remedy those deficiencies.

FACTUAL BACKGROUND

On December 12, 2007, Save the River requested, via e-mail, information from the SLSDC pursuant to FOIA. Save the River requested the following:

1. A copy of the specific written criteria used to set the 2005, 2006, 2007 and 2008 Seaway opening dates;
2. Documents that relate to the decision making process for setting the 2005, 2006, 2007 and 2008 Seaway opening dates;
3. All documents related to coordination between US and Canadian Seaway Authorities in regards to setting opening dates, also for the years 2005, 2006, 2007 and 2008.

See Exhibit A. In a letter dated December 27, 2007, the SLSDC stated that it had received the request and assigned it identification number FOIA FY 2008-4. *See Exhibit B.* No indication was given in this letter as to whether or when the request would be filled. After 45 working days had elapsed with no further contact from the SLSDC, Save the River reiterated its FOIA request described above in a subsequent e-mail dated February 20, 2008. *See Exhibit C.*

In a letter dated April 2, 2008 (the date of which violated FOIA's 20-day response deadline in 5 U.S.C. §552(a)(6)(A)(i) and 49 CFR 7.31), the SLSDC responded to Save the River's FOIA request in two parts. First, the SLSDC withheld a document entitled "Saint Lawrence Seaway Pre-Opening Meeting," in its entirety, "pursuant to the deliberative process privilege of Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5)." According to the SLSDC, the document was "prepared for a pre-opening meeting with the St. Regis Mohawk Tribe as required by an agreement that settled the lawsuit, *St. Regis Mohawk Tribe v. Albert S. Jacquez, et al.*, Civil No. 04-CV-0305 (N.D.N.Y.)." Second, the SLSDC attached documents including the outlook for ice conditions in the relevant years, various weather and ice related charts and photos, and prior correspondence between the SLSDC and members of Congress, the New York Department of Environmental Conservation, and Save the River. *See Exhibit D.*

REQUEST FOR RELIEF ON APPEAL

Save the River now timely appeals the SLSDC's FOIA response pursuant to 5 U.S.C. §552(a)(6) and 49 CFR 7.21(c). Save the River contends that the SLSDC has not conducted a reasonable and adequate search for all materials relating to the decision to set the yearly opening date for the Seaway. Save the River further contends that the "Saint Lawrence Seaway Pre-Opening Meeting" document ("Pre-Opening Document") is not exempt from disclosure, at least not in its entirety.

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Accordingly, Save the River asks the Administrator to do the following:

1. reverse the decision to withhold the Pre-Opening Document, or in the alternative, release segregable non-exempt information in the Pre-Opening Document;
2. order a supplemental search for records responsive to Save the River's FOIA request, including e-mails;
3. order the release of all responsive records not included in the SLSDC's April 2, 2008 response;
4. describe any withheld or redacted materials in detail;
5. allow any portions of documents that may be properly exempt under 5 U.S.C. §552(b)(5) to be released under the Administrator's discretionary powers; and
6. waive any fees.

ARGUMENT

The objective of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Although there are nine exceptions from compelled disclosure, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* FOIA's statutory exemptions are to be construed as narrowly as possible to provide the maximum access to agency information consonant with the overall purpose of the Act. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

The SLSDC's response to Save the River's FOIA request is deficient in two respects. First, given the SLSDC's own characterization of its yearly decision setting the opening date for commercial navigation on the Seaway, the SLSDC's search for information related to the

decision is inadequate. Second, the SLSDC's claim of a §552(b)(5) exemption for the entire Pre-Opening Document is unwarranted.

A. The SLSDC's Own Characterizations of the Opening-Date Decision Indicate an Unreasonable and Inadequate FOIA Search

The SLSDC's search for records in response to Save the River's FOIA request must be "reasonably calculated to uncover all relevant documents" responsive to the request. *Weisberg v. U.S. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Adamowicz v. IRS*, 2008 U.S. Dist. LEXIS 31497, *11 (S.D.N.Y. March 31, 2008). The SLSDC has characterized its opening-date decision as an "elaborate process" involving consideration of several factors ranging from projected ice conditions to projected shipping demand, as well as involving intergovernmental consultation and coordination. This characterization is inconsistent with the SLSDC's list of documents in its response to Save the River's FOIA request.

1. Statements within the Documents in the SLSDC's FOIA Response Indicate a Deficient Search

The SLSDC's FOIA response consists of two types of documents: documents related to the outlook for break-up of ice on the Seaway and Lake Ontario for each year from 2005 to 2008, and correspondence between the SLSDC and members of Congress, the New York Department of Environmental Conservation, and Save the River. The following passages from this correspondence allude to a complex and multi-factor decisionmaking process to set the yearly opening date for the Seaway:

Among the significant factors considered in establishing an opening date for the navigation season are weather and water (i.e., ice) conditions, the completion of lock infrastructure maintenance, and the anticipated demand for the Seaway's services. We track closely the water and air temperatures for the St. Lawrence River and Lake Ontario and have a long historical record to draw upon.

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See Exhibit E (Letter from Albert Jacquez, past SLSDC Administrator, to John McHugh, U.S. House of Representatives, dated February 17, 2005, page 2). See also Exhibit C (pages 6-7, 14-15 in SLSDC's Brief in *St. Regis Mohawk Tribe v. Jacquez*, Case No. 04-cv-0305).

You also requested that the SLSDC identify specific criteria used in determining the opening date. As I previously explained to former Commissioner Crotty, the significant factors considered in establishing an opening date are weather and water/ice conditions[.]

See Exhibit F (Letter from Albert Jacquez, past SLSDC Administrator, to Denise Sheehan, Acting Commissioner NY Dept. Environ. Conservation, dated March 24, 2005, page 1).

The timing and scope of the ice breaking has been based on climatic and meteorological information peculiar to each annual weather cycle. The scheduling and implementation of such activities on those bases have remained part of the SLSDC's standard operating conditions and procedures since before the effective date of the National Environmental Policy Act (NEPA).

See Exhibit G (Letter from Albert Jacquez, past SLSDC Administrator, to Karen Nadder Lago, Assistant Director, Save the River, dated April 26, 2006).

The above correspondence identifies at least four factors considered by the SLSDC when setting the navigation opening date: (1) weather conditions, (2) projected ice conditions, (3) the completion of lock infrastructure maintenance, and (4) the anticipated demand for the Seaway's services. Save the River requested in its FOIA letter "documents that relate to the decision making process for setting the 2005, 2006, 2007, and 2008 Seaway opening dates." The SLSDC's response contained factual information on weather and ice conditions. However, the SLSDC provided no response pertaining to the latter two factors: lock infrastructure maintenance and anticipated demand for the Seaway's services. Given that the SLSDC claims that it considers these factors in its opening-date decision, such information is responsive to Save the River's FOIA request, and it is highly likely that such information exists in the SLSDC's control. The SLSDC must disclose the information on lock infrastructure maintenance and anticipated demand for the Seaway's services that it uses to determine the yearly opening date.

2. The SLSDC's FOIA Response is Inconsistent with the Agency's Representations of the Opening-Date Decisionmaking Process

In its opposing brief in *St. Regis Mohawk Tribe v. Jacquez*, the SLSDC stated: “Each year, the SLSDC selects a date upon which to open the system to commercial navigation. This *ad hoc* date selection decision is the culmination of an elaborate process that includes: 1) close coordination with its Canadian counterpart, the SLSMC; 2) consultation with the U.S. and Canadian coast guards; and 3) careful review of weather information provided by Environment Canada and the [NOAA].” *See Exhibit H* (Response in Opposition to Plaintiff's Motion for a Preliminary Injunction and Temporary Restraining Order, dated March 24, 2004, page 6, Case No. 04-cv-0305).

This representation is inconsistent with the SLSDC's FOIA response. For example, the SLSDC represented that it coordinates and consults with Canada on the opening-date decision. Save the River requested in its FOIA letter “all documents related to coordination between US and Canadian Seaway Authorities in regards to setting opening dates, also for the years 2005, 2006, 2007 and 2008.” Yet nothing in the SLSDC's FOIA response pertains to such intergovernmental coordination. It is highly likely that intergovernmental coordination and consultation has generated at least some record in the form of letters, memos, e-mails, or other documents. Even if the SLSDC claims that such materials are partly or fully exempt from disclosure, the materials must be described in the FOIA response, unless the fact of the existence or non-existence of the record would cause harm cognizable under a FOIA exception. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

Furthermore, the SLSDC represented in its *St. Regis Mohawk Tribe* brief that the opening-date decision is an “*ad hoc* date selection decision” that is “the culmination of an

elaborate process.”¹ The term “*ad hoc*” means “for a particular purpose,” that is, without general application. Black’s Law Dictionary (8th ed. 2004). Although the determination of an opening date and the data upon which the decision is based are applicable to the current year only, the “elaborate process” of decisionmaking that leads to the yearly decision is unlikely to be entirely unplanned and without general application across years. Application of a new and untested decisionmaking “process” each year would likely lead to arbitrary decisions. A more likely explanation is that the data on which the opening-date decision is based changes between years, but the “process” of making the decision – *e.g.*, the method for evaluating the relevant factors, their relative weights, and how the SLSDC accounts for weather and ice conditions on the opening date that differ from those projected at the time of the decision – is fairly consistent from year to year. The SLSDC must make available to the public any policy, interpretations, or instructions to staff which have been adopted by the agency. 5 U.S.C. §552(a)(2); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971). The SLSDC’s own characterization of the decisionmaking process indicates that the agency applies interpretations and methods to each year’s opening-date decision. Any materials that reveal such interpretations or methods must be disclosed as responsive to Save the River’s FOIA request.

B. The Pre-Opening Document Cannot be Withheld in its Entirety Pursuant to the Exception in §552(b)(5).

The SLSDC withheld the Pre-Opening Document based on the “deliberative process privilege” under 5 U.S.C. §552(b)(5) (“Exception 5”). *See Exhibit D*, p. 1. Exception 5 exempts “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.” The provision applies to materials normally protected in the civil discovery context under the attorney-client privilege, the attorney

¹ This “elaborate process” is hidden from the public and is unavailable in the form of published rule or guidance.

work product privilege, and the deliberative process privilege. *Peay v. DOJ*, 2007 U.S. Dist. LEXIS 17586, *12 (D.D.C. March 14, 2007).

The Pre-Opening Document, or parts thereof, must be released under FOIA, for three reasons: (1) the SLSDC has waived Exemption 5 if it has released the document to the Mohawk Tribe; (2) Exemption 5 does not apply to the document as a whole if the information sought by Save the River is segregable; and (3) withholding the document does not serve the policy purposes underlying Exemption 5.

1. Exception 5 is Waived if the Pre-Opening Document has been Released

Assuming the Pre-Opening Document has already been released to the Akwesasne Mohawks, the document must be released to Save the River. FOIA does not permit selective disclosure of information only to certain parties. *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1082, 1088 (9th Cir. 1997) (“[O]nce the information is disclosed [to one party], it must also be made available to all members of the public who request it.”); see also *United States v. Metropolitan St. Louis Sewer District*, 952 F.2d 1040, 1045 (8th Cir. 1992) (“[T]he policy objectives of the section 552(b)(5) exemption are not relevant when the government voluntarily has chosen to disclose otherwise exempted material on a selective basis.”). The May 29, 2006 Memorandum of Understanding between the Akwesasne Mohawks, the SLSDC, and Canada, which arose from the *St. Regis Mohawk Tribe v. Jacquez* litigation, does not require the Pre-Opening Document to be kept confidential. The Pre-Opening Document is in fact not referenced in the MOU.

Furthermore, the deliberative process privilege of Exemption 5 applies only to inter- or intra-agency records. In *Merit Energy Co. v. Dep’t of Interior*, 180 F.Supp.2d 1184 (D.D.C. 2001), the court rejected the agency’s argument that information shared between the agency and

the Jicarilla Apache Tribe under a cooperative agreement was covered by Exception 5. *Id.* at 1191. The court held that for the purposes of Exception 5, the Tribe, unlike an independent outside consultant, was advocating its own interests, and thus the records at issue did not meet the inter- or intra-agency test. *Id.* Similarly, the St. Regis Mohawk Tribe is advocating its own interests in its dealings with the SLSDC, and if the Mohawk Tribe contributed information to Pre-Opening Document, that involvement extinguishes the privilege under Exception 5.

2. The Information Sought by Save the River is Likely to be Segregable from the Exempted Material

Even if parts of the Pre-Opening Document meet Exemption 5, only those particular parts may be withheld. Under §552(b) of FOIA, “any reasonably segregable portion of a record” must be released after appropriate analysis of the statutory exemptions and deletion of exempt portions. “The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). In order to justify withholding documents in their entirety, an agency must demonstrate that the “exempt and nonexempt information are inextricably intertwined, such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value.” *Peay*, 2007 U.S. Dist. LEXIS 17586 at *22 (citations omitted). See also *Vaughn*, 484 F.2d at 827 (“In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt.”); *Center for Intern. Environmental Law v. Office of U.S. Trade Representative*, 505 F. Supp.2d 150, 159 (D.D.C. 2007) (holding that agency not entitled to summary judgment on plaintiff’s FOIA action because agency did not explain whether withheld documents contained segregable material). The SLSDC must justify withholding the entire Pre-Opening Document, but has not.

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Moreover, the Pre-Opening Document may contain segregable material. The “deliberative process” privilege of Exception 5 covers information reflecting the give-and-take of advisory opinions, recommendations, and deliberations that are part of a process by which government decisions and policies are formulated. *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 2 (2001); see also Ann K. Wooster, *What Are Interagency or Intra-agency Memorandums or Letters Exempt from Disclosure under Freedom of Information Act* (5 U.S.C.A. § 552(b)(5)), 168 A.L.R. Fed. 143 (Originally published in 2001). The D.C. Circuit has explained:

In deciding whether a document should be protected by the [deliberative process] privilege we look to whether the document is “predecisional” whether it was generated before the adoption of an agency policy and whether the document is “deliberative” whether it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency. . . . We also ask whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

On the other hand, Exception 5 does not cover other related materials likely to appear in documents with exempted materials. First, material that contains the final rationale and grounds for an agency decision is not exempt and must be disclosed. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 706-08 (D.C. Cir. 1971). Second, any statements of policy or interpretations which have been adopted by the agency and not published in the Federal Register are not exempt. 5

U.S.C. §552(a)(2). “Even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Coastal States*, 617 F.2d at 866. Third, factual information is not exempt unless it is inextricably intertwined with deliberative materials or its disclosure would reveal deliberative material. *Trentadue v. Integrity Committee*, 501 F.3d 1215, 1229 (10th Cir. 2007).

If the Pre-Opening Document contains segregable factual information, information used by the agency in its dealings with the public, or information adopted formally or informally in the final decision, this information must be disclosed. Such information would include the factors or criteria considered by the SLSDC in setting the Seaway opening date as well as the process or method of evaluating those factors or criteria.

3. Withholding the Document does not further the Policy of Exception 5

Withholding the records that Save the River has requested does not serve the three policy purposes underlying the deliberative process privilege: (1) to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; (2) to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and (3) to protect against public confusion that might result from disclosing reasons for decisions that were not the ultimate grounds for agency action. *Coastal States*, 617 F.2d at 866. “Congress adopted [Exception 5] in recognition of the merits of arguments from the executive branch that the quality of administrative decision-making would be seriously undermined if agencies were forced to ‘operate in a fishbowl’ because the full and frank exchange of ideas on legal or policy matters would be impossible. A decision that certain information falls within

exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.” *Mead Data Central*, 566 F.2d at 256. See also *Ashley v. Dep’t of Labor*, 589 F. Supp. 901, 907 (D.D.C. 1983) (“In adopting this ‘deliberative process’ privilege, Congress recognized that full and frank exchange of ideas, recommendations, and personal opinions between agency personnel would be inhibited if agencies were forced to operate in a fishbowl.”).

Save the River does not seek the personal opinions of agency personnel or consultants, proposals for methods or policies that have not yet been applied, or advice and recommendations that not the ultimate grounds for the opening-date decisions. Rather, Save the River seeks records that reveal the factors and criteria that the SLSDC considers to determine the yearly opening date of the Seaway as well as any methods or policies used for evaluating such factors or criteria. Congress did not intend Exception 5 to exempt such information from disclosure under FOIA.

C. Discretionary Disclosure

FOIA’s exemptions are discretionary. Save the River urges the Administrator to release any records that are covered by exemption 5 based on the public interest in such information. Under 7 CFR 1.17(b), disclosing records is “considered in the public interest if the benefit to the public in releasing the document outweighs any harm likely to result from disclosure.” The public has no information on how the “elaborate process” of setting the Saint Lawrence Seaway opening date actually occurs. The public has an interest in such information for environmental, safety, and economic reasons, which outweigh any harm to the SLSDC from disclosure.

CONCLUSION

Based on the arguments above, Save the River respectfully requests that the Administrator order a supplemental search for materials responsive to Save the River's FOIA request, justify any withholding of relevant materials, and release the Pre-Opening Document as well as any additional non-disclosed documents relevant to the FOIA request.

APPENDIX I: EXHIBITS

- EXHIBIT A. Letter via e-mail from Stephanie Weiss, Assistant Director, Save the River, to Edward Margosian, Senior FOIA Official, SLSDC, dated December 12, 2007.
- EXHIBIT B. Letter from Edward Margosian, Senior FOIA Official, SLSDC, to Stephanie Weiss, Assistant Director, Save the River, dated December 27, 2007.
- EXHIBIT C. Letter via e-mail from Stephanie Weiss, Assistant Director, Save the River, to Edward Margosian, Senior FOIA Official, SLSDC, dated December 12, 2007, dated February 20, 2008.
- EXHIBIT D. Letter from Edward Margosian, Senior FOIA Official, SLSDC, to Stephanie Weiss, Assistant Director, Save the River, dated April 2, 2008.
- EXHIBIT E. Letter from Albert Jacquez, past SLSDC Administrator, to John McHugh, U.S. House of Representatives, dated February 17, 2005, page 2.
- EXHIBIT F. Letter from Albert Jacquez, past SLSDC Administrator, to Denise Sheehan, Acting Commissioner NY Dept. Environ. Conservation, dated March 24, 2005, page 1.
- EXHIBIT G. Letter from Albert Jacquez, past SLSDC Administrator, to Karen Nadder Lago, Assistant Director, Save the River, dated April 26, 2006.
- EXHIBIT H. Response in Opposition to Plaintiff's Motion for a Preliminary Injunction and Temporary Restraining Order, dated March 24, 2004, page 6, Case No. 04-cv-0305.

Respectfully,

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Disclosure of attorney involvement: Save the River was assisted in the writing of this appeal by attorneys at the Conservation Law Center, 116 S. Indiana Ave., Suite 4, Bloomington, Indiana 47408. Ph. 812.856.0229; Fax 812.855.1828.