



U.S. Department  
of Transportation

**THE ADMINISTRATOR**

July 9, 2008



Saint Lawrence  
Seaway Development  
Corporation

Ms. Stephanie Weiss  
Assistant Director  
Save The River  
409 Riverside Drive  
Clayton, New York 13624

Dear Ms. Weiss:

This letter is in further response to your letter dated May 2, 2008 in which Save The River (STR) appealed the SLSDC's FOIA response to its request identified as FOIA FY 2008-4.

In your appeal you specifically requested that the Administrator take the following actions:

- 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.

As noted in my May 28, 2008 letter regarding the appeal, I ordered a supplemental search of records responsive to your December 12, 2007 FOIA request for the following documents:

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.

Based upon the results of the supplemental search and after consultation with our Canadian counterpart, the St. Lawrence Seaway Management Corporation (SLSMC), as required pursuant to 49 C.F.R. § 7.16(b), I have made the following decisions as described below.

First, I am granting your request to waive the fees associated with complying with this FOIA request. Second, after consultation with our Canadian counterpart with whom we prepared the February 6, 2008 "Pre-Opening Document", we are releasing it in its entirety as well as "Pre-Opening Documents" that were prepared for pre-opening meetings in 2006 and 2007 with the St. Regis Mohawk Tribe. The 2006 and 2007 documents were located during the supplemental search.

In its appeal, Save The River asserts that "the SLSDC must make available to the public any policy, interpretations, or instructions to staff which have been adopted by the agency." As has been stated previously, the SLSDC does not possess any documents that provide a "method for evaluating the relevant factors, their relative weights, and how the SLSDC accounts for weather and ice conditions on the opening date". The decision to open the Seaway is done through close and constant consultation with our Canadian counterpart based on numerous factors and considerations, which we have shared with you in the past.

Further, STR specifically requested that the supplemental search include documents regarding winter maintenance projects and projected industry demand. I am including the following documents that resulted from the supplemental search regarding winter maintenance projects:

1. Saint Lawrence Seaway Development Corporation Budget Estimates for Fiscal Years (FY) 2005-2008 Submitted for Use of the Committees on Appropriations. These documents provide a general overview of the anticipated maintenance projects for FY 2005-2008.
2. List of Winter Maintenance Projects for Fiscal Years 2005-2008. The status/timeline of winter maintenance projects is discussed via conference calls and meetings; however, the enclosed documents, including the "Pre-Opening Documents" provide general overviews of the projects.

Regarding documents containing information regarding industry demand, the "Pre-Opening" Documents contain information regarding the actual and projected industry demand for use of Seaway. At the request of our Canadian counterpart, the SLSMC, we are withholding a series of emails between various SLSMC employees to SLSDC employees from years 2005-2008. The emails include specific projections from industry as well as deliberative communications, mostly involving weather data, between the two Seaway Corporations to determine the appropriate opening date. These emails are being withheld pursuant to the deliberative process exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(5), as well as the commercial or business exemption at 5 U.S.C. 552(b)(4). Under exemption 4 of the FOIA, information is protected if it is either "trade

secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). A trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Information is considered to be commercial or financial if the submitter of the information has a "commercial interest" in the information. Washington Post Co. v. HHS, 690 F. 2d 252, 266 (D.C.Cir. 1982). The term "person" includes a wide range of entities such as corporations, state governments, and agencies of foreign governments. Stone v. Export-Import Bank, 552 F.2d 132, 137 (5<sup>th</sup> Cir. 1977).

"In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), the US Court of Appeals for the District of Columbia held that financial or commercial records provided to the government on a voluntary basis are "confidential" for the purposes of exemption 4 if the submitter would not customarily provide such records to the public. On this basis, we are withholding information provided to us by the SLSMC, information that relates to the factors used to determine when to open the Seaway for navigation each season.

The following emails are being withheld:

1. 2005, 8 (eight) emails between SLSMC and SLSDC staff from January 26, 2005 to February 14, 2005 regarding industry traffic projections and weather data;
2. 2006, 3 (three) emails between SLSMC and SLSDC staff from February 13 to February 14, 2006 regarding weather data;
3. 2007, 4 (four) emails between SLSMC and SLSDC staff from January 24, 2007 to February 20, 2007 regarding industry traffic projections and weather data.
4. 2008, 11 (eleven) emails between SLSMC and SLSDC staff from January 31, 2008 and February 19, 2008 regarding industry traffic projections and weather data.

Accordingly, based on the requirements of FOIA, I am granting your appeal in part and denying it in part. This determination constitutes the final administrative action on your appeal. I am the person responsible for this decision. This decision has been concurred in for the General Counsel of the DOT by Robert I. Ross, an attorney on his staff.

You are hereby advised that under the provisions of 5 U.S.C. 552(a)(4)(B), you are entitled to seek judicial review in the U.S. District Court in the district where you reside, the district where you have your principal place of business, the district in which the records are kept, or the District of Columbia.

Sincerely,



Collister Johnson, Jr.