



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 26 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9345.1-12

MEMORANDUM

SUBJECT: Releasability of HRS Documents under FOIA

FROM: Henry L. Longest II, Director
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, VIII

Director, Emergency and Remedial Response Division
Region II

Director, Hazardous Waste Management Division
Regions III, VI, IX

Director, Hazardous Waste Division, Region X

PURPOSE:

This memorandum is to provide guidance to the Regions on what Hazard Ranking System (HRS) material is considered releasable under the Freedom of Information Act (FOIA).

BACKGROUND:

The issue of what HRS materials are considered releasable under FOIA has not been addressed consistently by all Regions. A July 9, 1991, memorandum from Allyn Davis of Region VI requested guidance on this issue. In addition, several other Regions have requested guidance from my staff on issues of FOIA releasability for NFRAP (no further remedial action planned) sites and sites being deferred to other authorities. This memorandum responds to those questions.

OBJECTIVE:

The objective is to ensure Regional consistency by providing direction on releasability under FOIA of HRS documents.

DISCUSSION/IMPLEMENTATION:

The Office of General Counsel (OGC) has prepared guidance outlining the Agency's policy regarding the releasability of HRS information (see attachment 1). This OGC memorandum addresses the extent to which materials prepared in the site assessment process may be withheld as "deliberative" in response to FOIA requests. Additional background information on the grounds for refusing disclosure of the contents of the HRS package are discussed in a January 16, 1986, memorandum finalizing the decision on a FOIA appeal (attachment 2). The OGC guidance is summarized in general terms as follows:

- Materials underlying a "no further remedial action planned" (NRAP) decision are releasable.
- Draft HRS scoring sheets may be withheld.
- For sites that are under consideration for the NPL, but not yet proposed, the HRS scoring sheets, documentation record, and factual material need not be disclosed.
- HRS scores for RCRA deferral sites may be withheld.

The OGC guidance addresses our legal obligations, while pointing out (in attachment 1) that the Agency has the flexibility to release documents which we may legally withhold. However, it is Agency policy not to release these documents unless we are required to do so.

This guidance should answer many of the FOIA-related questions that the Regions have. It should be noted that the advice given here is general in nature, and in specific cases it is advisable to consult a regional or OGC FOIA attorney.

cc: Janet Grubbs
George Wyeth
Alan Margolis ✓

Attachments



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

Attachment 1

OCT 17 1991

MEMORANDUM

OFFICE OF
GENERAL COUNSEL

SUBJECT: Treatment under FOIA of Documents Generated in Site Assessment Process

FROM: George B. Wyeth *George B. Wyeth*
Attorney
Solid Waste and Emergency Response Division (LE-132S)

Alan Margolis *Alan Margolis*
Attorney
Grants, Contracts and General Law Division (LE-132G)

TO: Janet Grubbs
Site Assessment Branch
Office of Solid Waste and Emergency Response (OS-230)

At the May 1991 Site Assessment Section Chiefs' meeting, and on a number of occasions more recently, questions have come up regarding the extent to which materials prepared in the site assessment process (particularly preliminary HRS scoring sheets) may be withheld as "deliberative" in response to FOIA requests.¹ This memorandum responds to those questions; it should be noted that the advice given here is general in nature, and in specific cases it is advisable to consult a regional or OGC FOIA attorney. Moreover, this advice is not intended to bind the Agency in connection with final agency determinations on FOIA appeals.

First to be protected under FOIA as deliberative, documents must be (1) predecisional (i.e., prior to the adoption of an agency policy or decision), and (2) deliberative (i.e., making recommendations or expressing opinions on legal or policy matters.) Draft HRS scores would generally fall within this category. A draft that is adapted as final agency policy is no longer protected (however, such scores are made public in the docket at the time a site is proposed for the NPL anyway).

¹ Documents that are not protected under FOIA are commonly referred to as "releasable." It should not be inferred that the Agency must always exercise its right to withhold documents; exercise of a FOIA exemption is a matter of Agency discretion. The Agency may choose to release deliberative or other privileged documents; it simply need not do so. In general, however, the Agency's practice has been not to release draft HRS scoring sheets, for policy reasons.

Factual material in the agency's possession is not deliberative and must generally be released.

One question raised at the Section Chiefs' meeting had to do with releasing information after a site is assigned "no further action" status ("NFRAPed"), based on its HRS score. A NFRAP determination is neither predecisional nor deliberative and may not therefore be withheld pursuant to the deliberative process prong of FOIA exemption 5. Therefore, materials underlying the NFRAP decision are not withholdable under the deliberative process privilege or other FOIA exemptions (e.g., the final score and supporting scoring sheets), and are considered releasable.² Draft scoring sheets would, however, not be releasable.

A related question had to do with the status of preliminary HRS scoring sheets -- that is, sheets other than the ones that formed the basis for a final decision (either to list or to NFRAP). Often, preliminary HRS scores are calculated which are superseded as the analysis is refined or new data is obtained. To the extent these are retained, they remain deliberative and need not be disclosed. This is true even after a final score has been determined. This is to ensure that staff feel free preparing tentative scores based on a partial analysis, without having to fear that the preliminary scores will be used against the Agency later.

A third FOIA-related question recently came from one of the regions. Since the answer may be of more general interest, we thought we would include it here. The region had received a request for all documents contained in the HRS scoring package for a site that is being considered for proposal to the NPL, but has not yet been proposed. The HRS scoring sheets, including the documentation record, are clearly deliberative at this stage, and need not be disclosed. In addition, factual material in the package (i.e., factual references) need not be released. While factual material in the Agency's files is normally releasable, releasing materials in response to a request for "the HRS package" necessarily identifies particular factual material as being contained in a draft HRS package and thus sheds light on the nature of the Agency's analysis. Therefore, the contents of

² Other grounds for denying release include FOIA exemptions (b)(7)(A), which covers enforcement-sensitive documents and (b)(5), which, in addition to the deliberative process privilege, also incorporates the attorney-client privilege and the attorney work product privilege (i.e., materials prepared in, or in anticipation of, litigation). These exemptions (aside from the deliberative process application of (b)(5)) would not appear to be generally applicable to site assessment materials, although they might be applicable in particular cases.

the package need not be disclosed.³ (Of course, if the site is later proposed, the scoring package and supporting materials would become releasable, but they would then be made public in the docket anyway.)

The relationship between EPA and states raises significant FOIA questions as well. Communications from states that are deliberative in nature (i.e., communicating advice or opinions regarding the potential listing of a site) appear to be protected. Although there is only limited case law on this point, at least one court has held that material from state agencies sent to a federal agency for the purpose of giving the federal agency advice on a matter under consideration is generally privileged.

Agency staff should bear in mind that during a rulemaking (i.e., after a site has been proposed in the Federal Register and before it goes final), communications from states, especially communications outside the normal course of implementing a cooperative agreement, may present a more complex issue. Communications in rulemaking will be discussed in a separate memorandum.

Agency staff should also keep in mind that documents originating at EPA and sent to states are subject to state FOIA-equivalent laws. Such laws may vary in the degree of confidentiality allowed. Regions may have to discuss with the state agencies they deal with what the rules are in those states before sending material that they may not want to have disclosed.

Finally, a question came up recently about whether HRS scores for sites that have been deferred to RCRA may be withheld. If the score is in fact a preliminary draft (which is generally the status of any HRS score for a site that has not been either proposed for listing or NFRAPed based on the score), it need not be released. This is not affected by the fact that the site is no longer being considered for listing, if the reason it is no longer being considered is deferral to RCRA rather than its HRS score. In short, HRS scoresheets for sites that have been deferred to RCRA remain deliberative and need not be released.

I hope that this helps to answer the questions you raised. If you have any further questions, please do not hesitate to contact us.

³This is discussed further in a final determination of a FOIA appeal that was issued on January 16, 1986. A copy of that determination is enclosed herewith.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

NFRAP question

Attachment 2

JAN 16 1986

Janet S. Hathaway, Esq.
Public Citizen
215 Pennsylvania Ave. S.E.
Washington, D.C. 20003

RE: Freedom of Information Act Appeals
RIN 385A-85
RIN(5) 185A-85 (Region V)
RIN(4) 204A-85 (Region IV)
RIN(8) 75A-85 (Region VIII)
RIN(1) 93A-85 (Region I)

Dear Ms. Hathaway:

This letter represents a consolidated response to your five Freedom of Information Act (FOIA) appeals. Set forth below is a description of each of your FOIA requests.

1. RIN 385A-85. By letter dated January 28, 1985, you requested copies of the list of all hazardous waste sites for which a Superfund Hazardous Ranking System score ("HRS score") had been calculated, along with the scores assigned to those sites. You requested scores for sites which had been included on the Superfund National Priorities List ("NPL"), both final and proposed, as well as sites which the Agency had not included on the NPL. Specifically, for each site, you requested the following scores:

- 1) Potential for harm to humans or the environment from migration of hazardous substances (Sm);
- 2) Groundwater route (Sgw);
- 3) Surfacewater route (Saw);
- 4) Air route (Sa);
- 5) Potential for harm from substances that can explode or cause fires (Sfe); and
- 6) Potential for harm from direct contact with hazardous substances (Sdc).

You also requested the worksheets used to calculate the HRS, if available, for any site with an HRS score above 20.

EPA responded to this request by letter from Walter W. Kovalick, Jr., Deputy Director, Office of Emergency and Remedial Response, on February 15, 1985. In that letter, you were informed that you were receiving a list of all HRS scores that had been reported to EPA, except the names and draft scores of sites then being considered for inclusion in an upcoming revision to the NPL. You were informed that the EPA was withholding the latter information under the deliberative process privilege of 5 U.S.C. §552(b)(5). Mr. Kovalick noted that you had additional conversations with Steve Caldwell of EPA regarding your request for HRS worksheets for sites scoring above 20, and that you had agreed to defer requests for copies of HRS worksheets until after you received the list of scores. Mr. Kovalick's letter also noted that you had a conversation with Steve Caldwell concerning the fact that you would receive only HRS total scores (Sm) for 486 sites because these sites had been scored but not submitted to Headquarters as candidates for the NPL. Accordingly, EPA Headquarters did not have information on the individual pathway scores for those sites.

You appealed EPA's partial denial of your request by letter of March 5, 1985, appealing only the denial of access to the HRS and pathway scores of sites under consideration for inclusion in the upcoming revision to the NPL.

2. (5)RIN 185A-85. By letter dated March 5, 1985, to Region V, you requested copies of HRS worksheets, Documentation Records, EPA Form 2070-13, and Narrative Summaries for sites listed in that letter. You requested that EPA indicate which of the listed sites were proposed for listing on the NPL and you requested pathway scores for each site. You also requested documents explaining the reasons for not including sites with HRS scores above 28.5 on the NPL.

EPA Region V responded to your request in a July 10, 1985, letter from Basil G. Constantelos, Director, Waste Management Division. With this letter you received HRS scoring documents for 24 of the requested sites, as well as two additional sites which were withdrawn from consideration as NPL candidates. You did not receive any documents for six sites which were not being considered for inclusion on the NPL at this time but were being addressed under the Resource Conservation and Recovery Act ("RCRA").

These sites were:

- 1) Texaco Refinery, Lawrenceville, IL;
- 2) Conservation Chemical, Gary, IN;
- 3) Bendix Corporation, South Bend, IN;
- 4) DuPont, E.I., East Chicago, IN;
- 5) Union Oil a/k/a Ramp Creek, Ashland Oil, Heath, OH; and
- 6) Wayne Disposal, Inc. Site #2, Belleville, MI.

You were also denied access to HRS documents on seven additional sites which were being considered for inclusion on an NPL update. These documents were withheld pursuant to 5 U.S.C. §552(b)(5) as predecisional, deliberative documents.

Since the date your appeal was filed, two of these sites, Columbus Old Municipal Landfill #1, Columbus, IN, and Hagen Farm, Stoughton, WI, were proposed for the NPL. Documents pertaining to those sites have been released to you. The remaining five sites for which documents were withheld are:

- 1) Carpentersville, Carpentersville, IL;
- 2) Joe Boaz Property, Columbus, IN;
- 3) Energy Cooperative, Inc., East Chicago, IN;
- 4) NorthEast Gravel, Grand Rapids, MI; and
- 5) Sanford Dump, Rives Junction, MI.

The withheld documents for each site consisted of HRS worksheets, Documentation Records and Reference Documents. No Narrative Summaries were prepared for any of the sites. You appealed this partial denial of your request by your letter of July 29, 1985. In this letter you appealed the denial of access to all of the withheld records, which at this time consist of the eleven sites set forth above.

3. (4) RIN 204A-85. On March 5, 1985, you requested from Region IV the same type of HRS documents and information as requested in #2 above, but for specific hazardous waste sites in Region IV. The EPA responded by letter of April 9, 1985, from Charles Jeeter, Regional Administrator. With that letter you received copies of the scoring documents for most of the sites listed in your request. You were informed that the EPA could not locate scoring documents for two sites in Alabama: Uniroyal Chemical, Bay Minette, AL, and 3M Corp., Decatur, AL; as well as the Seaboard Coast Line Railroad site, Wilmington, North Carolina, and SouthChem site, Durham, North Carolina. You were informed that you were being denied access to the documents on four other sites because the quality assurance checks had not been completed on those sites, rendering the documents predecisional and deliberative under 5 U.S.C. §552(b)(5). The withheld documents included HRS worksheets, Documentation Records, and Reference Documents; there were no Narrative Summaries prepared for the sites.

You appealed this partial denial by letter of May 3, 1985. In that letter you appealed the denial of access to the withheld documents regarding the following four sites:

- 1) Highland's Aviation, Avon Park, Fl;
- 2) Beulah Landfill, Pensacola, FL;
- 3) Yoder Brothers, Fort Myers, Fl; and
- 4) Vero Beach Wellfield, Vero Beach, FL.

Since the date your appeal was filed, records relating to the Uniroyal Chemical, 3M Corporation and Seaboard Coast Line Railroad sites have been located. Since the Agency has decided not to consider these sites for listing on the NPL at this time these documents will be released to you directly by the Regional Office.

Documents pertaining to the SouthChem, Beulah Landfill Yoder Bothers, Vero Beach Wellfield, and Highland's Aviation sites are currently being considered for listing on the NPL in a future update. Accordingly, documents pertaining to these sites are being withheld under 5 U.S.C. §552(b)(5).

4. (8) RIN 75A-85. By letter dated March 5, 1985, you requested from Region VIII the same type of HRS documents and information as described in request numbers 2 and 3 above, but for specific sites located in Region VIII. EPA responded to your request by letter of April 10, 1985, from John G. Welles Regional Administrator. In that letter you were informed that you would have access to records relating to three sites, but that records for the following three sites would be withheld pursuant to the deliberative process privilege of 5 U.S.C. §552(b)(5):

- 1) Hendricks Mill (Allied Chemical);
- 2) North Dakota Uraniferous Lignite Mines; and
- 3) Silver Creek Tailings.

The withheld records included HRS worksheets, Documentation Records and Reference Documents; there were no Narrative Summaries prepared for the sites. You appealed this partial denial by your letter of April 24, 1985, in which you requested access to the withheld documents.

Since the filing of your appeal, the Agency has made a final decision not to consider the Hendricks Mill and North Dakota Uraniferous Lignite Mines sites for listing on the NPL at this time. The Silver Creek Tailings site was proposed for the NPL in Update #4, September, 1985. Since a final decision has been reached on all three sites, the site documents will no longer be withheld and will be sent to you directly

from the Regional Office.

5. (1)RIN 93A-85. By letter dated March 5, 1985, you requested from Region I the same type of HRS documents and information as described in request numbers 2, 3 and 4 above, but for specific sites located in Region I. EPA responded to your request by letter of September 16, 1985, from Merrill S. Hohman, Director, Waste Management Division. In that letter you were informed that you would receive records relating to two sites, but that HRS worksheets and Documentation Records for three sites would be withheld. These three sites were Andrews Road Landfill, Biddeford, Maine; Winter Harbor Town Dump, Winter Harbor, Maine; and Brown's Septage Pit, Petersborough, New Hampshire. These three sites are still under consideration for listing on the NPL. However, you did receive EPA Form 2070-13 (Site Inspection Report) for each of the three sites and you were informed that no Narrative Summaries had been prepared on those sites. You appealed this partial denial of your request by your letter of September 30, 1985, in which you requested access to the withheld documents.

Final Determination

The documents withheld in your appeals consist of HRS worksheets, Documentation Records, and Reference Documents. These records comprise the Proposed Rule HRS Package.

I have carefully reviewed each initial denial decision and have concluded that the documents still being withheld are exempt from mandatory disclosure under the deliberative process privilege of 5 U.S.C. §552(b)(5). This privilege exempts from disclosure predecisional and deliberative inter and intra-agency documents. HRS Packages meet these criteria.

HRS Packages consist entirely of intra-agency documents. This term includes documents generated at the Government's request by outside parties. Ryan v. Department of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980). HRS Packages are produced by the States and Regional EPA offices and their respective contractors. The materials are then forwarded to Headquarters where they undergo quality assurance.

HRS Packages are also predecisional and deliberative. Predecisional documents are those written prior to the adoption of an agency decision. Deliberative documents are those directly related to the process by which agency decisions are made and which reflect this decisionmaking process. HRS Packages are predecisional and deliberative in that packaging of HRS documents occurs midstream in the ongoing deliberative process.

Candidate sites are first evaluated by State and Regional EPA offices, whose site recommendations are then forwarded to Headquarters for quality assurance and review. There is no final decision to propose a site until rulemaking is initiated by the Assistant Administrator. The decisions made by the State and Regional EPA offices represent interim steps in the deliberative process. HRS scores are considered preliminary until final agency action, and thus they retain protected status until this time. Prior to final agency action, for instance, during the quality assurance process, there may be insufficient information which to base a final HRS score, and the site proposal will be returned to the Regional EPA office or State agency for additional research to document HRS scores. The decision to list a site may also be deferred pending the site's consideration under another statute, such as RCRA. During this time the site may still be a candidate for the NPL and the documents retain their predecisional status. If the Agency decides to take no action under either CERCLA or RCRA, site documents may be made public.

The States and Regions lack the authority to reach a final decision. A State recommendation for a site listing may constitute the last step in the Hazardous Ranking System for the State, but the recommendation and supporting documents must still be reviewed by higher authorities. Courts have protected such interim steps in a deliberative process. Renegotiation Board v. Grumman Aircraft Eng. Corp., 421 U.S. 168, 184 (1975) (divisional and regional reports, though not final opinion, were the kind of predecisional deliberative recommendations contemplated by Exemption 5); Murphy v. TVA, 571 F. Supp. 502, 505 (D.C. Cir. 1983) (protection allowed for interim decisions which the agency retained the option of changing). Most importantly, the HRS Package documents are drafts, which may undergo a series of changes and amendments before being consolidated into a final Agency position.

HRS package documents are predecisional and deliberative even though they contain scientific, factual analyses. Such analyses reveal the Agency's deliberative process in that they are subject to change in the Headquarter's quality assurance review. See Professional Review Organization of Florida v. HHS, 607 F. Supp. 423 (D.D.C. 1985). Further, in this instance the analyses represent the opinions of Agency experts during the Agency's deliberative process. See Chemical Manufacturer's Association v. Consumer Product Safety Commission, No. 84-1852, slip op. (D.D.C. Dec. 24, 1984).

There are also strong policy reasons for withholding HRS Package documents under Exemption 5. The premature disclosure

of HRS documents prior to final decision regarding a site could adversely affect the Agency's deliberative process. With untimely release the EPA could be besieged with complaints of wrongful consideration or disagreements with scores during time which the Agency needs to revise and finalize its work product. Ample opportunity is provided to challenge the Agency's analysis of a site after a proposed rule is published in the Federal Register. The rationale behind this policy was reiterated recently in Chemical Manufacturer's Association where the Court noted that withholding scientific factual documents crucial to an agency's deliberative process "would prevent interference with the [Agency's] experts before their opinions are fully and finally formed." Slip op. at 9.

Exemption 5 also protects against confusing and misleading the public by the release of documents which suggest reasons for a decision which are not in fact the ultimate reasons. Russell v. Dept. of the Air Force, 682 F.2d. 1045, 1048-9 (D.C. Cir. 1982). The EPA is not seeking exemption because the public may not understand the documents, but because these documents may suggest reasons for Agency action which are modified or rejected in the quality assurance review process. Disclosure of HRS documents at the point of rulemaking will not confuse the public with distorted information and will not interfere with the preparatory internal deliberations of the Agency.

Finally, there has been no waiver of Exemption 5 privilege for HRS Package documents merely because other documents concerning a site, such as the Preliminary Assessments and Site Inspection reports, are made public. These documents are released at the discretion of the Agency. The fact that some information on a site being considered for rulemaking has been released does not justify disclosure of HRS documents being used during the internal deliberations of the Agency. See Murphy v. TVA, 571 F. Supp. at 505. Information on sites listed or deleted from the NPL may be disclosed because a final decision has been made. Candidate sites returned to a Regional EPA Office or State are still candidates for NPL listing and documents concerning them should be protected.

You also requested the reasoning behind the policy of not listing some sites with HRS Scores of 28.5 or above. I believe your question was related to a computer printout you obtained that indicated several sites had HRS scores above 28.50, yet were not included on the NPL. I understand that you met with Harold Snyder, Chief of the Discovery and Investigation Branch, to discuss this issue on April 12, 1984. As Mr. Snyder explained, some of the site HRS scores were preliminary and had not been finalized. A normal part of the Agency's quality assurance program is to require EPA Regional Offices to revise scores to be consistent with the proper application

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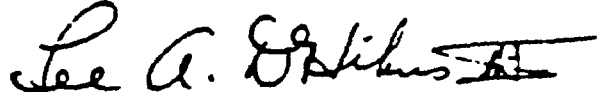
of the HRS and/or provide additional information to document existing scores.

Mr. Snyder also explained to you CERCLA restricts EPA's authority to respond to the release of certain substances into the environment and explicitly excludes some substances from the definition of a release. In addition, as a matter of policy, EPA may choose not to respond to certain types of releases under CERCLA because existing regulatory or other authority under other Federal Statutes provides for an appropriate response. Consequently, sites which meet EPA's HRS criteria for listing may not meet these other eligibility policies and therefore would not be included on the NPL.

In accordance with EPA regulations (40 CFR 2.115) Jennifer Joy Manson, Assistant Administrator for External Affairs, has determined that the release of the exempt information would not be in the public interest. Therefore, the exempt information will not be released to you.

This letter constitutes EPA's final Agency Determination on your appeals. Pursuant to 5 U.S.C. §552(a)(4) you may obtain de novo judicial review of this final EPA denial by complaint filed in the United States District Court for the district in which you reside or have your principal place of business, for the district in which the records are located, or for the District of Columbia.

Sincerely,



Lee A. DeHihns, III
Associate General Counsel
Grants, Contracts, and
General Law Division