



**Department of Energy**  
Washington, DC 20585

September 8, 2015

Mr. Carl Malamud  
President & CEO  
Public.Resource.Org  
1005 Gravenstein Highway North  
Sebastopol, CA 95472

Via email to: [carl@media.org](mailto:carl@media.org)

Re: HQ-2015-01685-F

Dear Mr. Malamud:

This is the final response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You requested the following:

- Legal Advisory LA-13-05 states “it is a best practice for agencies to commit the scope of an employee’s permissible activities to writing in a memoranda of understanding between the agency, the employee and the nonprofit organization.” I am requesting a copy of any such memoranda and supporting documents leading to the issuance of such memoranda. If instead Mr. Davis’ service with ANSI is or was in his individual capacity and not his official capacity, I would request any documents discussing such status and/or any waiver requested or approved.
- Legal Advisory LA-13-05 states “the employee may not receive any supplementation of salary, including personal reimbursement of travel expenses, from the nonprofit organization” and any such reimbursement must come from the nonprofit organization directly to the government. I am requesting records detailing the amounts and nature of such reimbursements from ANSI.
- Legal Advisory LA-13-05 outlines a number of additional limitations, such as “limiting or prohibiting the employee from participating in the development of regulations that could affect the nonprofit organization.” I am requesting any memoranda, email, or other records that discuss instances where Mr. Davis is limited or prohibited from working on matters with the nonprofit organization or has been



recused, limited, or prohibited from working on matters for the government in his official capacity.

Your request was assigned to the Office of the General Counsel (GC) to conduct a search of its files. GC began its search on August 3, 2015, which is the cut-off date for responsive documents.

GC identified one (1) document that is responsive to your request. The document is being released as described in the accompanying index. Upon review, DOE has determined that certain information should be withheld from the document pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5).

Exemption 5 protects “inter-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption has been construed to exempt those documents normally privileged in the civil discovery context, such as attorney-client communications, attorney work-product documents, and deliberative process material.

The information in the document withheld under Exemption 5 is protected by the deliberative process privilege and the attorney-client privilege. Some withheld portions of the document are pre-decisional. They reflect comments, assessments, and proposals. DOE considered these preliminary views as part of the continuing process of agency decision-making. The withheld information does not represent a final agency position, and its release would compromise the deliberative process by which the government makes its decisions.

With respect to the discretionary disclosure of deliberative information, the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public. For this reason, DOE has determined that discretionary disclosure of the deliberative material is not in the public interest because foreseeable harm could result from such disclosure.

In addition, some withheld portions of the document contain communications involving a DOE attorney and are being withheld under the attorney-client privilege. The information in the document contains confidential communications between a DOE attorney and the staff of a program office to which she provided legal advice, as well as summaries of her legal advice. The withheld information includes advice given by the attorney and reflects the attorney’s impressions, understanding of the facts, and legal opinions. Therefore, portions of the document are being withheld in part under Exemption 5 of the FOIA to the extent that they contain attorney-client communications and deliberative process material.

This satisfies the standard set forth in the Attorney General’s March 19, 2009, memorandum that when a FOIA request is denied, agencies will be defended and justified in not releasing the material on a discretionary basis “if (1) the agency reasonably foresees that disclosure will harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” The Attorney General’s memorandum also provides that whenever full disclosure of a record is not possible, agencies “must consider whether they can make a partial disclosure.” Thus, we have determined

that, in certain instances, a partial disclosure is proper. This also satisfies DOE's regulations at 10 C.F.R. § 1004.1 to make records available which it is authorized to withhold under 5 U.S.C. § 552 when it determines that such disclosure is in the public interest. Accordingly, we will not disclose this information.

Pursuant to 10 C.F.R. § 1004.7(b)(2), I am the individual responsible for the determination to withhold the information described above. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt," 5 U.S.C. § 552(b). As a result, a redacted version of the document is being released to you in accordance with 10 C.F.R. § 1004.7(b)(3).

This decision, as well as the adequacy of the search, may be appealed within 30 calendar days from your receipt of this letter pursuant to 10 C.F.R. § 1004.8. Appeals should be addressed to Director, Office of Hearings and Appeals, HG-1, L'Enfant Plaza, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-1615. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. You may also submit your appeal by e-mail to [OHA\\_filings@hq.doe.gov](mailto:OHA_filings@hq.doe.gov), including the phrase "Freedom of Information Appeal" in the subject line. The appeal must contain all the elements required by 10 C.F.R. § 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where DOE's records are situated, or (4) in the District of Columbia.

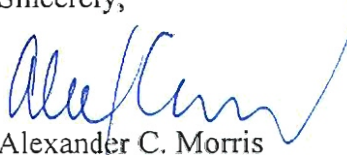
The FOIA provides for the assessment of fees for the processing of requests. *See* 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). Your request was placed in the "other" category for fee purposes, which provides for two free hours of search time. Since DOE did not exceed two hours of search time, no fees will be assessed for processing this request.

If you have any questions about the processing of your request or this letter, you may contact Ms. I. Cristina Abello or me at:

MA-90/ Forrestal Building  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
(202) 586-5955

I appreciate the opportunity to assist you with this matter.

Sincerely,



Alexander C. Morris  
FOIA Officer  
Office of Information Resources

## INDEX

Request #: HQ-2015-01685-F

Final response for request from Carl Malamud for the following:

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The Office of the General Counsel conducted a search of its files and identified one (1) document responsive to your request.

- One (1) document *is being released in part pursuant to Exemption (b)(5)*. Information withheld under Exemption 5 consists of deliberative process privilege information and attorney-client privilege information.

**From:** [Davis, Patrick](#)  
**To:** [Hymer, Christina](#)  
**Subject:** RE: ANSI board question  
**Date:** Monday, April 28, 2008 9:58:17 AM

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Thanks for you work on this - I appreciate the (b) (5)

I will pick up the binder shortly.

Pat

Patrick B. Davis  
Energy Efficiency and Renewable Energy  
U.S. Department of Energy  
(202) 586-8061

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**From:** Hymer, Christina  
**Sent:** Thursday, April 24, 2008 11:38 AM  
**To:** Davis, Patrick  
**Subject:** FW: ANSI board question

Pat,

Thank you again for providing additional information regarding ANSI and its Board of Directors. After speaking with attorneys in other agencies, I have determined that you may serve on the ANSI Board of Directors in your official capacity. This determination is based upon numerous factors. (b) (5)

(b) (5)

I will leave your ANSI binder in an envelope with your name on the desk in room 6A-211 for you to pick up at your convenience. Please feel free to contact me with any further questions.

Thanks,  
Tina

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**From:** Davis, Patrick  
**Sent:** Thursday, April 03, 2008 9:47 AM  
**To:** Hymer, Christina  
**Subject:** RE: ANSI board question

Christina,

(b) (5)

Hope this helps,

Pat

Patrick B. Davis  
Energy Efficiency and Renewable Energy  
U.S. Department of Energy  
(202) 586-8061

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**From:** Hymer, Christina  
**Sent:** Wednesday, April 02, 2008 2:25 PM  
**To:** Davis, Patrick  
**Subject:** RE: ANSI board question

Pat,

In reviewing your situation, (b) (5)

(b) (5)

Thanks,

Tina

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**From:** Davis, Patrick  
**Sent:** Tuesday, April 01, 2008 10:40 AM  
**To:** Hymer, Christina  
**Subject:** ANSI board question

ANSI has informed me that there is (b) (5) for ANSI Board members - please see the email string below. (b) (5)

(b) (5)

(b) (5)

Please advise,

Pat

Patrick B. Davis  
Energy Efficiency and Renewable Energy  
U.S. Department of Energy  
(202) 586-8061

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**From:** Patricia Griffin [mailto:PGGriffin@ansi.org]  
**Sent:** Thursday, March 27, 2008 3:55 PM  
**To:** Davis, Patrick  
**Cc:** Tricia Power  
**Subject:** RE: Serving on Outside Committees - board service

Dear Pat:

I hope all is well. I'm resending my email to see if there have been any developments. From my end I did speak to Bob and Joe about this and they agree that your counsel should speak to some of the other lawyers representing government Board members (b) (5)

Again, let me know what I can do to help.

Best regards,

Patty

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Dear Pat:

I need to look into this further and speak to Bob Noth about it. (b) (5)  
I wonder if it makes sense for you or your counsel to talk to Mary McKiel, Greg Saunders, Mary Saunders, Colin Church or Belinda Collins (to name just a few) to determine how they and re their legal advisors approach ANSI board membership. (b) (5)

(b) (5)

(b) (5)

Let me know.

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**From:** Davis, Patrick [mailto:Patrick.Davis@ee.doe.gov]  
**Sent:** Thursday, March 13, 2008 8:09 AM  
**To:** Patricia Griffin  
**Subject:** FW: Serving on Outside Committees - board service

Patricia,

Could you please read over the email from my General Counsel (below). (b) (5)

Pat

Patrick B. Davis  
Energy Efficiency and Renewable Energy  
U.S. Department of Energy  
(202) 586-8061

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**From:** Hymer, Christina  
**Sent:** Wednesday, March 12, 2008 6:35 PM  
**To:** Davis, Patrick  
**Subject:** RE: Serving on Outside Committees - board service

Pat,

Thank you for providing this information. (b) (5)

(b) (5)

I will be out of the office tomorrow, but would like to arrange to return your ANSI binder.



Thanks,  
Tina