

**From:** Cory L. Hitchcock [\[mailto:Cory@sonosky.net\]](mailto:Cory@sonosky.net) **On Behalf Of** Lloyd B. Miller  
**Sent:** Friday, April 06, 2012 6:01 PM  
**Subject:** NTCSCC: Disclosure of CSC Data from IHS and BIA

Members of the National Tribal Contract Support Cost Coalition:

As the week draws to a close, I thought I would share an update on our efforts to force the disclosure of CSC data from IHS and the BIA.

You will recall that we submitted a Freedom of Information Act (FOIA) request to IHS on behalf of the Northwest Portland Area Indian Health Board. We submitted a separate request to the BIA in the name of your Coalition. Both agencies denied the request and we have now taken appeals.

IHS took the position that the CSC data was protected from disclosure until the overall CSC report had been formally cleared through the Secretary's office. That process, as you know, can take years. Our appeal (which is enclosed) challenges IHS's assertion and shows that the data can easily be separated from the balance of the annual congressional report.

The BIA simply responded that it had no documents as described in our FOIA request. Our appeal challenges this assertion, directs the BIA to search a particular office, and demands a detailed statement from the head of the BIA regarding the efforts made to locate the data. A copy of that appeal is also enclosed.

Our best information is that the agencies are particularly resistant to disclosing data while the Supreme Court litigation is underway in the *Ramah* and *Arctic Slope* cases. Hopefully the agencies will be more cooperative after the appeals are decided. If not, the only option left may be to commence litigation which would enforce upon the agencies the requirements of the Freedom of Information Act. However, a second option we will continue pursuing is to request the addition of new statutory language to the pending FY 2013 Appropriations Act. (We will, of course, not file any litigation without first thoroughly consulting with you and receiving your authorization.)

Lloyd

P.S. In order to keep these enclosures relatively small we have excluded the documents which were attached to the appeals. If you would like a complete copy of the appeals, please contact my assistant at [cory@sonosky.net](mailto:cory@sonosky.net).

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# NATIONAL TRIBAL CONTRACT SUPPORT COST COALITION

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April 6, 2012

## VIA U.S. MAIL CERTIFIED RETURN RECEIPT REQUESTED

Ms. Darrell Strayhorn  
Freedom of Information Act Appeals Officer  
Department of the Interior  
Office of the Solicitor  
1849 C Street, NW, MS 6556 MIB  
Washington, DC 20240

Re: FREEDOM OF INFORMATION APPEAL  
No. BIA-2012-00638

Dear Ms. Strayhorn:

This letter constitutes an administrative appeal of the response dated March 15, 2012 to FOIA Request No. BIA-2012-00638. The request was made to the Bureau of Indian Affairs by letter on February 16, 2012 on behalf of the National Tribal Contract Support Cost Coalition (NTCSCC) seeking the following:

(1) The 12 documents showing the final Area Office compilation of CSC data for every Region and Self-Governance Tribe and tribal organization, for FY 2011, as required to be developed by November 15 of each year by the Department's standing National Policy Memorandum NPM-SELFD-1 (May 2006) (titled "Contract Support Cost") (hereinafter "BIA CSC Policy");

(2) The consolidated Region and Self-Governance reports showing CSC data, by Tribe and tribal organization, for FY 2011, as prepared by the BIA Central Office as required to be issued by the BIA CSC Policy;

(3) For FY 2011, the document showing the initial calculation of contract support cost allocation of the FY 2011 appropriation by Region and Self-Governance grouping and by Tribe and tribal organization, in the approximate amount of \$53,560,000, as prepared in BIA Central Office;

ALASKA NATIVE TRIBAL HEALTH CONSORTIUM  
ARCTIC SLOPE NATIVE ASSOCIATION, LTD.  
CENTRAL COUNCIL OF THE TLINGIT & HAIDA INDIAN TRIBES  
CHEROKEE NATION  
CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION  
CHOCTAW NATION  
CONFEDERATED SALISH AND KOOTENAI TRIBES  
COPPER RIVER NATIVE ASSOCIATION  
FOREST COUNTY POTAWATOMI COMMUNITY  
KODIAK AREA NATIVE ASSOCIATION

LITTLE RIVER BAND OF OTTAWA INDIANS  
NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD  
PUEBLO OF ZUNI  
RIVERSIDE - SAN BERNARDINO COUNTY INDIAN HEALTH  
SHOSHONE BANNOCK TRIBES  
SHOSHONE-PAIUTE TRIBES  
SOUTHEAST ALASKA REGIONAL HEALTH CONSORTIUM  
SPIRIT LAKE TRIBE  
TANANA CHIEFS CONFERENCE  
YUKON-KUSKOKWIM HEALTH CORPORATION

(4) For FY 2011, the document showing the supplemental allocation of the FY 2011 appropriation, by Region and Self-Governance grouping, and by Tribe and tribal organization, as prepared in BIA Central Office on February 14, 2012, and in the approximate amount of \$4.5 million; and

(5) For FY 2011, the document showing for each Tribe or tribal organization, the amount by which that Tribe or tribal organization was overpaid for contract support costs in FY 2011.

BIA's final response claims that "[a] complete search was conducted and no records were located" and nothing was disclosed. A copy of the original FOIA request and the agency's response, as well all relevant correspondence, are attached to this letter. Exhibit A. This appeal is directed to the adequacy of the search conducted by the agency. 43 C.F.R. § 2.28(2).

Based on the legal standards set forth by federal courts, BIA did not conduct an adequate search. BIA is obligated to undertake a search that is "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)); *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The burden is on the agency to demonstrate that it has made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The Attorney General's FOIA Guide states that agencies in litigation typically submit a declaration "that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched." Dept. of Justice, DOJ Guide to the Freedom of Information Act (2009) at 759. *See, e.g., Tarzia v. Clinton*, 2012 WL 335668, at \*9-10 (S.D.N.Y. 2012) (holding that agency search was inadequate based on agency employee's detailed declaration); *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (same).

At this juncture, we have no information about the search that was conducted except for BIA's one-sentence conclusion that no records were found. This result is highly implausible given that the BIA has formalized a CSC Policy that requires the agency to maintain detailed annual records of CSC data from each Tribe in order to prepare the BIA CSC Shortfall Report. *See* BIA CSC Policy, at 17-18 (attached as Exhibit B). The CSC data requested should be readily available at the BIA Office of Self-Governance, which collects such data along with other information about self-governance activities from Tribes every year.<sup>1</sup> If the agency conducted an adequate search that included the Office of Self-Governance, the CSC data

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<sup>1</sup> *See* Office of Self-Governance Website: <http://64.58.34.34/osg/default.aspx> (Director Freeman's memorandum requesting Tribes to provide their 2011 Self-Governance activity along with 2012 SG Minimum Data Collection Forms).

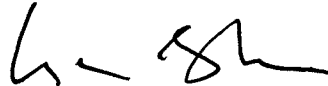
requested would be located and should be disclosed. *Valencia-Lucena*, 180 F. 3d at 327 (“It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden.”) (citations omitted).

The Coalition appeals the final decision of the BIA to disclose no documents at all and asks that the original FOIA request be remanded to the agency with a direction that a new, more careful and comprehensive search be conducted for the requested records. If it is the case that the agency still finds nothing, then we request a specific statement to that effect from an appropriate agency official, as well as the type of detailed declaration that would be required of the agency in defense of litigation challenging this decision. This information will be of material assistance in our evaluation of whether to pursue this matter in court, should this appeal be denied.

Please feel free to contact me if you have any questions regarding this appeal.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP



By: Lloyd B. Miller

Enclosures  
Doc# 100716

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Dori Salcido  
Assistant Secretary for Public Affairs  
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Re: FOIA Appeal, No. 12-024

Dear Ms. Salcido:

This letter constitutes an administrative appeal of the response received on March 15, 2012 to FOIA Request No. 12-024. The request was made to the Indian Health Service by letter dated February 14, 2012, on behalf of the Northwest Portland Area Indian Health Board ("Board") seeking the following:

- (1) For each of three years, the 12 documents showing the final Area Office compilation of CSC data for every Area Tribe and tribal organization, for each of FY 2010, 2011 and 2012, as required to be developed by December 15 of each year by IHS Manual Section 6-3.5B(1);
- (2) For each of three years, the consolidated Area Office reports showing CSC data, by Tribe and tribal organization, for each of FY 2010, 2011 and 2012, as prepared by the IHS Office of Direct Service and Contracting Tribes or the IHS Office of Finance and Accounting and as required to be issued by IHS Manual Section 6-3.5B(2) and (3);

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\*ALASKA BAR  
\*\* ALASKA AND WASHINGTON BAR  
\*\*\* ALASKA AND D.C. BAR

- (3) For each of FY 2010, 2011 and 2012, the document showing the calculation of the contract support cost allocation of that year's appropriation by Area and by Tribe and tribal organization, as prepared by the IHS Office of Direct Service and Contracting Tribes or the IHS Office of Finance and Accounting;
- (4) For each of FY 2010, 2011 and 2012, the document reflecting the final allocation of the CSC appropriation by Area Office and by Tribe and tribal organization, as prepared by the IHS Office of Direct Service and Contracting Tribes or the Office of Finance and Accounting; and
- (5) Copies of all correspondence, including e-mails, letters, memoranda, or other communications made by officers, employees or representatives of the Indian Health Service to Members of Congress or their staffs, relating in whole or in part to contract support costs, between the period January 1, 2011 to the present.

By letter dated March 13, 2012, the IHS sent a final response to this request. The agency claimed that items one through four were exempt from disclosure under 5 U.S.C. § 552(b)(5) and withheld a total number of 44 pages. For item five, the agency stated that it had searched its records and determined that it did not possess the requested documents. A copy of the February 14 request to the IHS and a copy of the IHS final response, as well as all relevant correspondence, are attached to this letter. Exhibit A.

This appeal is directed to the agency's claim that items one through four are properly exempt from disclosure under 5 U.S.C. § 552(b)(5), and to the adequacy of the search conducted for documents requested under item five.

**1. Exemption 5 does not cover purely factual material or raw data that is severable.**

The agency asserts that the data requested in items one through four are exempt from disclosure because such data are contained within the Secretary's CSC Annual Shortfall Reports ("Reports"), which are "predecisional" and "deliberative" because they are still waiting to be cleared for release. As a consequence, the agency released no documents at all and withheld 44 pages. The FY 2010 Report was released recently with the requested CSC data. Exhibits B and C. But the CSC data for the FY 2011 and 2012 Reports must be disclosed as well because courts have consistently held that 5 U.S.C. § 552(b)(5) does not cover raw data or factual information that is severable from its context without compromising the rest of the document.

Exemption 5 protects "inter-agency or intra-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). Examining the scope of this exemption in *EPA v. Mink*, 410 U.S. 72 (1973), the Supreme Court emphasized that this was not a "wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion." *Id.* at 92. Instead, "Exemption 5 contemplates that the public access to internal memoranda will be governed by the same flexible, common-sense

approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies"—*i.e.*, allowing disclosure of “*purely factual material* appearing in [policy] documents in a form that is severable without compromising the private remainder of the documents.” *Id.* (emphasis added). Since *Mink*, courts have followed the rule-of-thumb that factual data that is severable must be disclosed. *Tarzia v. Clinton*, 2012 WL 335668, at \*13-15 (S.D.N.Y. 2012); *Reilly v. EPA*, 429 F. Supp. 2d 335, 341-53 (D. Mass. 2006). As one district court recently explained:

The raw research data is not a recommendation, is not subject to alteration on further review by others in [the] agency, and is not selective. Whatever [agency employees] might subsequently do with the data, the data itself does not expose the deliberative process.

*Southwest Center for Biological Diversity v. U.S.D.A.*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000). Agency regulations echo the same principle. 45 C.F.R. § 5.66 (a) (“We will release purely factual material in a deliberative document unless that material is otherwise exempt.”).

Nothing about the CSC data itself is of a deliberative nature. This data is maintained by each Area Director based on the ISDA negotiations with Tribes, as required by IHS Manual provisions at IHSM 6-3.5(A), and compiled by the Director pursuant to IHS Manual Section 6-3.5(B). CSC data from prior years were regularly disclosed by IHS to the public and to Indian Tribes at meetings attended by the IHS Director and by representatives of the Office of Management and Budget. Furthermore, the Supreme Court has held that exemption five does not extend to documents submitted by Indian Tribes in the course of administrative and adjudicative proceedings with federal agencies. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-16 (2001). Nor does OMB Circular A-11 restrict disclosure of this data; how an agency spent appropriated money is not implicated by OMB Circular A-11 and is not confidential. *Id.* § 22.1. The CSC table itself does not contain information about how much the agency will request in appropriations for the forthcoming year. *See* Exhibit C.

If the CSC Shortfall Report cannot be released prior to clearance because it contains deliberative and predecisional material, the agency fails to explain why the CSC data within the Report cannot be severed and partially disclosed. The cursory assertion that such data is “inextricably intertwined in the reports' contents” is insufficient. Similar blanket statements have been routinely rejected by courts as a basis to exclude the *entire* document. *Tarzia*, 2012 WL 335668, at \*15 (“Department's single, conclusory statement . . . is insufficient to establish that these emails do not contain severable factual information”); *Judicial Watch Inc. v. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (“Conclusory language in agency declarations that does not provide a specific basis for segregability findings by a district court may be found inadequate”); *Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (“[A] blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability.”).

Furthermore, the format in which the 2010 Report was released proves that the requested CSC data is easily severable. The CSC data is essentially an attachment—an excel spreadsheet that is a separate PDF file containing the categories of information required by IHS Manual provisions at IHSM 6-3.5(A). *See* Exhibit C. This table can easily be disclosed on its own, without implicating the narrative portions of the Report which might be arguably deliberative. Reports from previous years have been published in a similar format, with the CSC data table wholly separate from the narrative portions of the Report. The 2010 Report, recently submitted to Congress in two parts, is attached to show how the CSC data can easily be segregated and released on its own. Exhibits B and C.

## **2. Agency's search.**

The agency states that it has searched its records and determined that it has no documents described in item five—correspondence including e-mails, letters, memoranda, or other communication made by IHS officers, employees or representatives to Members of Congress or their staffs relating to CSC between January 1, 2011 to the present.

IHS is obligated to undertake a search that is “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999); *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The burden is on the agency to demonstrate that it has made “a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). In litigation, the agency must show that “the search method was reasonably calculated to uncover all relevant documents.” *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Attorney General’s FOIA Guide states that agencies in litigation typically submit a declaration “that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched.” Dept. of Justice, DOJ Guide to the Freedom of Information Act (2009) at 759. *See, e.g., Tarzia*, 2012 WL 335668, at \*9-10 (holding that agency search was inadequate based on agency employee’s detailed declaration); *Wilderness Soc’y*, 344 F. Supp. 2d at 19 (same).

The agency did not make a thorough search. To the contrary, we enclose a copy of a memorandum that IHS sent to Congress containing statements about CSC data and recent court rulings on the government’s legal obligation to pay the full amount of CSC that it had contractually agreed with Indian Tribes to pay. Exhibit D. We attach this document for your reference. It is hard to believe that no further correspondence of any kind between the agency and Congress has occurred during the past year, or that the agency would not keep a careful record of such correspondence.

Thus, the Board appeals the final decision of the IHS to disclose no documents at all and asks that the original FOIA request be remanded to IHS with a direction that a new, more careful and comprehensive search be conducted for the requested records. In addition, the CSC data requested in items one through four should be severed from the 2011 and 2012 Reports and be

partially disclosed. If it is the case that, upon further review, the agency still arrives at the same conclusions, then we request a specific statement to that effect from an appropriate agency official, as well as the type of detailed declaration that would be required of the agency in defense of litigation challenging such a decision. This information will be of material assistance in our evaluation of whether to pursue this matter in court, should this appeal be denied.

Please feel free to contact me if you have any questions regarding this appeal.

Sincerely,

SONOSKY, CHAMBERS, SACHSE  
MILLER & MUNSION, LLP



By: Lloyd B. Miller

Enclosures

cc: Northwest Portland Area Indian Health Board (by e-mail) (w/ encls.)