

THE KINGS POINT SENTRY

WATCHING OVER AND SAFEGUARDING THE U.S. MERCHANT MARINE ACADEMY

www.KingsPointSentry.com

April 28, 2017

Via email: FOIA.Marad@dot.gov

Maritime Administration
Freedom of Information Act Appeal
1200 New Jersey Ave, SE,
Second Floor, West Building
Room W24-220, Mailstop #4
Washington, DC 20590

RE: Control No. 17-0048-FOIA

Dear Sir or Madam:

This is an appeal under the Freedom of Information Act.

On March 27, 2017, I requested documents under the Freedom of Information Act. My request was assigned Control No. 17-0048-FOIA. On April 21, 2017, I received a response to my request in a letter signed by T. Mitchell Hudson, Jr. I appeal from the decision to withhold portions of the response to my request based upon the Deliberative Process Privilege. A copy of my FOIA request and the agency determination which is the subject of this appeal is attached for your convenience.

There are several reasons why the Deliberative Process Privilege does not apply to the requested document for the following reasons:

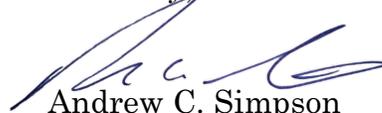
1. The withheld sections do not fall within the narrow confines of 5 U.S.C. § 552(b)(5) (which is the statutory source for the deliberative process privilege) because it is not an inter-agency or intra-agency memorandum or letter. To the contrary, the entire document was submitted to a private entity (the Middle States Commission on Higher Education) and therefore, to the extent that the claim of privilege is valid, the privilege was waived. Waiver can occur when communications are disclosed to private individuals or nonfederal agencies. *See, e.g., Shell Oil Co. v. I.R.S.*, 772 F. Supp. 202, 207 (D. Del. 1991) (holding that if “the prior disclosure is voluntary and is made to a third party, the deliberative process privilege is waived, even where the third party had promised not to disclose the information further”); *Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728 (D.C. Cir. 2008); *Dow Jones & Co.*,

Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990); *Mead Data Central, Inc. v. Dept. of Air Force*, 566 F.2d 242, 253 (D.C.Cir.1977); *North Dakota v. Andrus*, 581 F.2d 177 (8th Cir.1978), *Education Instruction, Inc. v. Dept. of Housing and Urban Dev.*, 471 F.Supp. 1074, 1081 (D.Mass.1979), *aff'd*, 649 F.2d 4 (1st Cir. 1981). Exemption 5 “is to be construed ‘as narrowly as consistent with efficient Government operation.’” *Wolfe v. Dep’t of Health and Human Services*, 839 F.2d 768, 773–74 (D.C.Cir.1988) (citation omitted).

2. Even though much information is redacted, the context of the unredacted portions of the document makes it clear that the withheld information does not reflect the “deliberative process” and instead reflects final agency action. For example, in the section of the document entitled “Summary of Compliance by Standard”¹ the unredacted paragraph at the top of page 1 states, “This section of the report outlines the requirements as stated in the Visiting Team’s Report and a brief summary of the *actions taken* to restore compliance with the Standards.” (Emphasis added.) The portions that are redacted from this Summary are the “Actions Taken.” See pp. 1, 2, 3, 4, 5 and 6. Similarly, in the introduction to the document (beginning on p.7), the sections that are redacted are the summaries of compliance with each Standard. This is evident from the unredacted statements that appear in this section; for example, see p.11 (“Summary of Compliance with Standard 4”) and p.18 (“Summary of Compliance with Standard 5”). “[C]ommunications made after an agency decision and designed to explain it” do not fall within this exemption. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151–52 (1975).
3. The invocation of the deliberative privilege is insufficient since it fails to adequately describe the basis for believing that the privilege applies. See, e.g., *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (stating that FOIA “requires an agency in possession of material it considers exempt from FOIA to provide the requestor with a description of each document being withheld, and an explanation of the reason for the agency's nondisclosure”).

Thank you for your attention to this appeal.

Sincerely,



Andrew C. Simpson
Webmaster of, and Attorney for,
www.KingsPointSentry.com
2191 Church St., Ste. 5
Christiansted, VI 00820
340.719.3900

enclosures

¹ “Standards” refer to standards established by the Middle States Commission on Higher Education.



U.S. Department
of Transportation
**MARITIME
ADMINISTRATION**

1200 New Jersey Avenue, S.E.
Second Floor, West Building
W24-220 Mailstop #4
Washington, D.C. 20590

T. Mitchell Hudson, Jr., FOIA Officer
(202) 366-5320
Ann Herchenrider, FOIA Public Liaison
(202) 366-5165

FOIA Service Center
(202) 366-2666
Facsimile: (202) 366-7485
Toll free: (800) 996-2723, Press "0"
Email address: FOIA.MARAD@dot.gov

VIA EMAIL

April 21, 2017

Mr. Andrew C Simpson
2191 Church St., Ste. 5
Christiansted, VI 00820
andysimpson82@savekingspoint.com

Control No. 17-0048-FOIA

Dear Mr. Simpson:

This is in response to your March 27, 2017 request under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. § 552. You requested a copy of the following records:

The "monitoring report" (or if a monitoring report was not sent, a copy of whatever was submitted in lieu of a monitoring report, including, without limitation, any letters requesting an extension of the deadline for submitting the monitoring report) provided by or on behalf of the U.S. Merchant Marine Academy to the Middle States Commission on Higher Education (MSCHE).

We are now releasing 148 pages of records. This release of records represents the agency's final response to include all records located and determined to be responsive to your request. The redacted content has been determined by this office to be exempt from the FOIA's mandatory disclosure requirements as described immediately below.

FOIA Exemption (b)(5) protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the following privilege(s):

- Deliberative Process Privilege: The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations, included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

You have a right to appeal. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter. The appeal should be sent to foia.marad@dot.gov or mailed to the following address:

Maritime Administration
Freedom of Information Act Appeal
1200 New Jersey Avenue, SE
Second Floor, West Building
Room W24-220, Mailstop #4
Washington, DC 20590

Sincerely,

A handwritten signature in black ink, appearing to read "Mitch Hudson", written in a cursive style.

T. Mitchell Hudson, Jr.
Freedom of Information Act Officer

Enclosure

THE KINGS POINT SENTRY

WATCHING OVER AND SAFEGUARDING THE U.S. MERCHANT MARINE ACADEMY

www.KingsPointSentry.com

March 27, 2017

Via email: FOIA.Marad@dot.gov

Division of Legislation and Regulations
U.S. Department of Transportation
Maritime Administration
Second Floor, West Building
1200 New Jersey Ave, SE, W24-233
Washington, DC 20590

RE: Freedom of Information Act Request – USMMA Response to Middle States Commission on Higher Education

Dear Sir or Madam:

In accordance with the Freedom of Information Act, I am requesting the following document(s):

1. The “monitoring report” (or if a monitoring report was not sent, a copy of whatever was submitted in lieu of a monitoring report, including, without limitation, any letters requesting an extension of the deadline for submitting the monitoring report) provided by or on behalf of the U.S. Merchant Marine Academy to the Middle States Commission on Higher Education (MSCHE). For ease of reference, a copy of a June 26, 2016 letter from MSCHE setting a March 1, 2017 deadline for submission of the monitoring report is attached to this request.

This request is made on behalf of www.KingsPointSentry.com (“KPS”). KPS is a News Media FOIA Requester for calculation of fees under FOIA. It regularly publishes news items of interest to stakeholders of the US Merchant Marine Academy. It uses editorial skills to turn raw information into distinct work and distributes that work to an audience. It’s audience has reached over 21,000 users in the last 9 months with over 130,000 page views (as measured by Google Analytics).

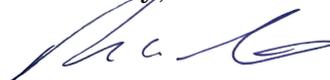
To further minimize costs, we request copies in electronic format whenever possible.

Finally, we ask for expedited processing of this request (and have deliberately made this a narrow request so that it will be easy to provide an expedited response). KPS is primarily engaged in disseminating information to the public and the information is urgently needed to inform the public about the status of the response by USMMA to MSCHE. As indicated on the KPS website, it has now been 270 days since USMMA updated the public about its response to MSCHE. The Academy's potential loss of accreditation has major ramifications for students attending the school. Furthermore, KPS has regularly been attempting to update the public about the status of USMMA's response as can be seen by the following:

- The "MSCHE Update Countdown" timer prominently displayed on KPS's home page (www.kingspointentry.com);
- <http://www.kingspointentry.com/sea-year-stand-down/beyond-ridiculous-ye-t-another-actually-a-continuing-example-of-failed-leadership/>
- <http://www.kingspointentry.com/sea-year-stand-down/this-proves-that-the-administration-does-not-take-accreditation-seriously/>
- <http://www.kingspointentry.com/sea-year-stand-down/fiddling-while-kp-bur-ns-the-deadline-for-meeting-the-requirements-to-maintain-accreditation-is-5-6-days-away/>
- <http://www.kingspointentry.com/sea-year-stand-down/the-deadline-for-mee-ting-the-requirements-to-maintain-accreditation-is-exactly-five-months-away/>

Thank you for your attention to this request.

Sincerely,



Andrew C. Simpson
Webmaster of, and Attorney for,
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340.719.3900