

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAVEMENT COATINGS TECHNOLOGY)	
COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	No. 1:14-CV-01200 (KBJ)
)	
UNITED STATES GEOLOGICAL)	
SURVEY,)	
)	
Defendant.)	

DECLARATION OF BRIAN MAY

I, Brian May, declare as follows:

1. I am the Freedom of Information Act (FOIA) Officer, in the Office of Information and Investment Management (OIIM) in the Office of Enterprise Information (OEI) of the U.S. Geological Survey (USGS or agency) in Reston, Virginia. My current duty station is the Maryland-Delaware-D.C. Water Science Center, in Baltimore, MD. I have held this position since July 14, 2014. In this position, I am responsible for and manage the USGS FOIA Program, which includes processing FOIA requests according to 5 U.S.C. § 552, the FOIA; the Department of Interior’s (DOI) FOIA regulations, 43 C.F.R. Subtitle A, Part 2; DOI’s Manual, 383 Department Manual (DM) 15; DOI’s FOIA Handbook, 383 DM 15; the USGS’s Survey Manual (SM) 318.1; and relevant case law. I routinely coordinate record searches with agency employees; answer questions about the scope of FOIA requests; work with FOIA requesters to clarify or narrow the scope of their request; approve or deny requests for fee waivers and expedited processing; review records for release; and determine if any FOIA exemption apply to

responsive records. Additionally, I coordinate legal reviews on all USGS requests that invoke a FOIA exemption, provide guidance to the agency on all FOIA-related matters, develop and conduct FOIA training for the agency, review and revise the USGS FOIA reference materials, assist the agency on any other FOIA-related matter, and maintain the agency's FOIA webpages. In coordination with DOI's Office of the Solicitor, I routinely conduct legal research of complex FOIA-related matters and assess the implications of case law on our program and the USGS FOIA policies and practices.

2. In November 2015, my chain of command designated me as a supervisor and I now supervise three subordinate Government Information Specialists (GIS). The FOIA Team consists of me, three Government Information Specialists, and one designated non-GIS individual who processes FOIA requests for the Water Mission Area. Prior to November 2015, I was the lone designated FOIA professional for the agency; two employees supported the USGS FOIA Program as an extra duty on a part-time basis. Prior to my arrival, the USGS FOIA Officer's position was vacant for approximately 8 months. Historically, USGS has only had one designated full-time employee (FTE) processing FOIA requests and a few people supporting the FOIA Program on a part-time basis; however, that changed in 2015 and now USGS has four dedicated FTE working on FOIA requests. In Fiscal Year 2015, the USGS experienced a record year of FOIA work. We received 194 FOIA requests and processed 191 FOIA requests. We ended FY 2015 with 29 backlogged FOIA requests. The increased FOIA Program staff is directly related to the increased workload. We continue to evaluate our FOIA Program and our personnel needs.

3. Prior to joining the USGS, I worked at the Social Security Administration (SSA) as a Government Information Specialist, 0306 series, from September 2012 to July 2014. I processed complex FOIA requests, hybrid FOIA and Privacy Act requests, assisted with record productions to answer Congressional inquiries. I also trained junior staff members, reviewed co-worker's FOIA/Privacy Act cases for quality control, conducted legal research and assisted the Division Chief with release determinations. Prior to working at the SSA, I worked as a Paralegal Specialist/FOIA Officer, 0950 series, at the U.S. Army's Research, Engineering and Development Command (RDECOM), from July 2009 to September 2012. My role at RDECOM was very similar to my current role. Prior to working with the U.S. Army, I worked as a U.S. Air Force Judge Advocate General's Corps (TJAGC) as a Paralegal from May 1996 until November 2008. I continue to serve in the U.S. Air Force Reserves as a paralegal in the TJAGC. In 2010, I earned my Bachelor's Degree in Legal Studies from the University of Maryland University College.

4. Due to the nature of my official duties, I am familiar with the procedures followed in responding to FOIA requests made to the USGS. The USGS received a copy of the plaintiff's complaint on August 5, 2014. Upon receiving the complaint, I reviewed the electronic FOIA case file and relevant email correspondence between the USGS and the requester to familiarize myself with the background and the history of the plaintiff's FOIA request, USGS-2011-00093, how the request was processed and the records that were released and withheld. The statements I make in this declaration are based on my review of the official USGS FOIA files and records of the USGS FOIA Program, OIIM/OEI, my personal knowledge, and/or information acquired by me through the performance of my official duties.

OVERVIEW OF USGS FOIA PROCESSING

5. While the USGS FOIA Program must follow the policies and procedures established by the DOI FOIA Program, the USGS FOIA Program operates as a part of the USGS. I report directly to the Chief, OIIM who reports directly to the Director, OEI, who reports directly to the Deputy Director of the USGS.

6. I head the USGS FOIA Program and have modified our FOIA processes since joining the USGS in July 2014. I cannot attest to the processes in place in April 2011 nor while the USGS processed the plaintiff's FOIA request, USGS-2011-00093. The process that was in place when I arrived differed from the process that was in place when the USGS processed the original request. Since my arrival, I continue to modify the USGS FOIA Program and internal processes. As of July 2014, when the USGS receives a FOIA request, a member of the FOIA Team reviews the request to determine if the requester has provided us with enough information to log the request into the DOI's Electronic FOIA Tracking System (EFTS). If the requester provided the FOIA Program with enough information, the FOIA Team member will log the request into the DOI EFTS system, and the EFTS will create the FOIA Tracking Number. Once the FOIA Team member obtains the FOIA Tracking Number, he/she will prepare an Acknowledgement using the DOI's approved template language and modifying the Acknowledged based on the request that the USGS received and send it to the FOIA requester. If necessary, the FOIA Team member will address any matters that we need to clarify, narrow the scope of the request, fee related matters, or requests for expedited processing. Subsequently, the FOIA Team member will email or mail the Acknowledgement to the requester. After sending the Acknowledgement to the FOIA requester, the FOIA Team member will prepare a

Notification of New FOIA request to send to the appropriate USGS records owner to search for responsive records.

7. Each USGS component that receives a Notification is responsible for searching for and providing any responsive documents to the USGS FOIA Program, along with the record owner's recommendations regarding the applicability of any of the FOIA exemptions to the particular documents. If the USGS component believes that the request is overly broad or if they are uncertain of the records requested, the USGS component will contact the FOIA Program to discuss the request. If necessary, the FOIA Program may contact the requester and ask for clarification, to narrow the scope of the request, or specific search terms to assist with the record search. Once the scope of the request is finalized, the appropriate USGS component will search for any records responsive to the request or amended request. After the appropriate USGS component completes their record search, the USGS component will notify the FOIA Program or the assigned FOIA specialist that the USGS component located records responsive to the request and ask how to transmit those records to the FOIA Program to review and respond to the FOIA request.

8. The assigned FOIA specialist reviews the collected records, evaluates whether they are responsive, reviews any recommendations made by the record owner, whether any withholdings or redactions may be warranted. If the responsive records will be released in full, the FOIA specialist will prepare the response, either a formal letter or an email, and send the records to the requester, unredacted. In most instances, I do not review the records that my subordinates release in full prior to releasing those records. The records that we release in full do not require a review by the DOI Office of Solicitor (SOL). If necessary, the FOIA specialist will

try to convert the responsive records to a PDF and identify information with a proposed FOIA exemption code, prepare a proposed response including a cover letter, and route the case file to myself. I will review the records and the proposed redactions, make any corrections to the response letter, clarify any unclear matters with the FOIA specialist/record owner, and then share the electronic case file with the DOI SOL to conduct a legal review according to the DOI FOIA regulation. The reviewing attorney reviews the proposed response including any potential withholdings or redactions, and makes any adjustments to the proposed response as warranted or identifies any legal matters that the USGS needs to resolve prior to approving USGS's response and redactions. If necessary, the USGS will resolve any outstanding matters and provide any additional information to the DOI SOL attorney.

9. The DOI SOL attorney will notify me when the response and proposed redactions are approved for release. If I processed the request, then I will respond to the FOIA requester and close the request in EFTS. If one of my subordinates processed the request, I will forward the DOI SOL attorney's email to the FOIA specialists and ask them to respond to the requester, send the redacted records to the requester, and close the request in EFTS.

PLAINTIFF'S FOIA REQUEST

10. On April 25, 2011, USGS received a FOIA request, dated April 25, 2011, from Mr. Leonard S. Kurfurst of Wildman, Harrold, Allen, and Dixon LLP, representing the Pavement Coatings Technology Council (PCTC), although not explicitly stated in the request, seeking the following records:

- All communications, including correspondence, emails, notes, reports and memoranda regarding coal tar sealant and asphalt research conducted by

USGS or any employee, agent or contractor of USGS between January 1, 2003 and the present.

- All correspondence, emails, notes, reports and memoranda regarding Society of Environmental Toxicology and Chemistry ("SETAC"), meetings, conferences, sessions and presentations related to coal tar sealants attended, sponsored or coordinated by USGS or any employee, agent or contractor of USGS during 2008, 2009, 2010 and 2011.
- All USGS communications, including correspondence, emails, notes, reports and memoranda that in any way reference the Pavement Coating and Technology Council ("PCTC") dated between January 1, 2003 and the present.
- All communications, including correspondence, e-mails, notes, reports and memoranda related to coal tar sealants authored by, received by or copied to Peter VanMetre, Barbara Mahler, Jennifer T. Wilson, T.L. Burbank, M. Scoggins and/or P.A. Hamilton dated between January 1, 2003 and the present.
- All documents constituting, referring or relating to studies or publications related to coal tar sealants conducted by, authored by, co-authored by or edited by Peter VanMetre, Barbara Mahler, Jennifer T. Wilson, T.L. Burbank, M. Scoggins and/or P.A. Hamilton including but not limited to notes, drafts, correspondence, e-mails, galley prints, edits, raw data, field notes, QNQC documentation and chain of custody reports.

- All communications, including correspondence, emails, notes, reports and memoranda between, among or including Peter VanMetre of the USGS, Judy Crane of the Minnesota Pollution Control Agency and/or Alison Watts of the University of New Hampshire regarding coal tar sealants and/or asphalt coatings.
- All communications, including correspondence, emails, notes, report; and memoranda between, among and/or including any employee, agent or contractor of USGS and any employee, agent or contractor of a law firm, corporation, publication or other third party regarding coal tar and/or asphalt sealants and their alleged impact on the environment or human health. Please note that this request is not seeking law firm documents generated as part of an attorney/client relationship.
- All lab data, field notes, chain of custody and QA/QC reports in the possession, custody or control of USGS related to any research, study or evaluation of coal tar or asphalt sealants or the alleged effect of coal tar or asphalt sealants on human health, aquatic organisms or the environment dated between January 1, 2003 and the present.
- All lab data, field notes, chain of custody and QA/QC reports in the possession, custody or control of USGS generated as a result of any research, study or evaluation of soil, dust, water and/or sediment purportedly impacted by coal tar or asphalt sealants.

- All USGS communications, including correspondence, e-mails, notes, reports or memoranda between or among any USGS employees, agents or contractors regarding trade associations that promote asphalt sealants, dated between January 1, 2003 and the present.
- Copies of all photographs taken as part of or in connection with any research, study or evaluation regarding the alleged environmental impact of coal tar or asphalt sealants.
- All communications, including correspondence, emails, notes, reports, memoranda and budgets regarding expenditures made and approved by USGS for coal tar and asphalt sealant research, studies or evaluations dated between January 1, 2003 and the present. (*See Exhibit 1.*)

11. By written letter, dated April 27, 2011, Mr. David Newman, then-USGS FOIA Officer, acknowledged receipt of Mr. Kurfirst's FOIA request, which was assigned FOIA number USGS-2011-00093, and placed the requester in the "Commercial Use" FOIA fee category.

12. By email dated April 27, 2011, Mr. Newman notified Mr. Peter VanMetre, Research Hydrologist and Ms. Barbara Mahler, Research Hydrologist that USGS received a FOIA request and attached a copy of the FOIA request to his email. By email dated April 27, 2011, Mr. VanMetre forwarded the FOIA request to members of his team. By email dated May 3, 2011, Ms. Sonja R. Abney, Supervisory Chemist, National Water Quality Laboratory, provided Mr. VanMetre with a fee estimate.

13. By letter dated May 25, 2011, Mr. Newman, sent a letter to requester providing them with a \$28,193.00 fee estimate. Mr. Newman informed the requester that the USGS would not begin processing their request until payment is received.

14. By email dated June 6, 2011, the requester acknowledged receipt of the FOIA fee estimate and stated that he was reviewing the estimates to determine if he needed to amend the scope of the FOIA request.

15. By email dated June 16, 2011, the requester emailed Mr. Newman and requested an extension to provide his decision about the scope of the request. The requester asked Mr. Newman if he could respond by July 15, 2011.

16. By email dated July 17, 2011, the requester emailed Mr. Newman and requested to move forward with the full scope of his original FOIA request. The requester asked if the fee estimate that Mr. Newman provided him on May 25, 2011 was still valid. By email dated July 20, 2011, Mr. Newman stated that he would verify the FOIA processing with the appropriate office. By email dated July 27, 2011, Mr. Newman informed the requester that the FOIA processing fees were still accurate and that the USGS would need the requester to pay the full amount of the FOIA processing fees. Mr. Newman informed the requester that it would take the USGS several months to process the request, given the complexity of the request.

17. By email dated August 16, 2011, the requester agreed to pay the \$28,193.00 FOIA processing fees and stated that he was having a check made out to cover collection and reproduction expenses and would mail the check to Mr. Newman. The requester asked if the USGS could provide interim/batch releases.

18. By email dated August 25, 2011, Mr. Newman notified the science team that he received the requester's check paying the FOIA processing fees and that USGS needed to proceed with processing the request.

19. By email dated August 26, 2011, Mr. VanMetre informed his team that the requester agreed to pay the FOIA processing fees and requested USGS process the full request.

20. By email dated September 14, 2011, Mr. Newman assigned the request to Ms. Cearley to process.

21. By email dated October 5, 2011, the requester emailed Mr. Newman and asked if he received the requester's check to cover the FOIA processing fees. By email dated October 5, 2011, Ms. Cearley notified the requester that the USGS received their check paying the FOIA processing fees and that they should receive the first batch of records by October 12, 2011.

22. By letter dated October 11, 2011, Ms. Cearley issued an interim response ("Batch 1") and mailed by Federal Express ("FedEx") one 16-pound box of responsive documents to the requester. The documents were released in full. Ms. Cearley estimates that the box she sent contained between 800 and 1,500 pages of paper records.

23. By letter dated November 3, 2011, Ms. Cearley issued a second interim response ("Batch 2") and mailed by FedEx one Compact Disc Read-Only Memory ("CD-ROM"), consisting of 10 electronic files totaling approximately 24.8 MB and 78 pages. The documents were released in full.

24. For this and future electronic productions, Ms. Cearley estimated the page count using the following method. For Microsoft Word (MS Word), Microsoft PowerPoint (MS PPT), and Adobe PDF files, she used the page counts provided by the software in its normal display.

For MS Excel files, the page count was obtained by using the “print preview” feature and noting the total number of pages to be printed. For Notepad/Text files that are otherwise unpaginated, Ms. Cearley estimated conservatively. If the Notepad/text file had a small amount of text in body, she estimated 1 page, if it had large amount of text in body, she estimated 3 pages.

25. By letter dated November 17, 2011, Ms. Cearley issued a third interim response (“Batch 3”) and mailed by FedEx one CD-ROM, consisting of 412 electronic files totaling approximately 569 MB and 2,682 pages to the requester. The documents were released in full.

26. By letter dated December 29, 2011, Ms. Cearley issued a fourth interim response (“Batch 4”) and mailed by FedEx one CD-ROM, consisting of 371 electronic files, totaling approximately 282 MB and 388 pages. This included 18-pages of emails. The documents were released in full.

27. By letter dated December 30, 2011, Ms. Cearley issued an interim response (“Batch 5”) and mailed by FedEx one CD-ROM, consisting of 251 electronic files, 202 MB, approximately 1,816 pages released in full to the requester.

28. By letter dated March 1, 2012, Ms. Cearley issued an interim response (“Batch 6”) and mailed by FedEx one Digital Versatile Disc (“DVD”), consisting of 583 electronic files, 1.67 GB, approximately 7,636 pages, and one 24-pound box of paper records, approximately 1,811 released in full to the requester.

29. By letter dated March 6, 2012, Ms. Cearley issued an interim response (“Batch 7”) and mailed by FedEx one DVD, consisting of 160 electronic files, 929 MB, approximately 1,334 pages released in full to the requester.

30. By letter dated May 21, 2012, Ms. Cearley issued an interim response (“Batch 8”) and mailed by FedEx one CD-ROM, consisting of 345 electronic files, 230 MB, approximately 2,591 pages released in full to the requester.

31. By letter dated May 22, 2012, Ms. Cearley issued an interim response (“Batch 9”) and mailed by FedEx one CD-ROM, consisting of 81 electronic files, 69.2 MB, approximately 813 pages released in full to the requester.

32. By letter dated June 4, 2012, Ms. Cearley issued an interim response (“Batch 10”) and mailed by FedEx one CD-ROM, consisting of 81 electronic files, 34.7 MB, approximately 809 pages released in full to the requester.

33. By letter dated July 27, 2012, Ms. Cearley issued an interim response (“Batch 11”) and mailed by FedEx five 20-pound boxes of paper records, approximately 7,500 pages released in full to the requester.

34. By letter dated August 10, 2012, Ms. Cearley issued an interim response (“Batch 12”) and mailed by FedEx one CD-ROM, consisting of 78 electronic files, 11.7 MB, approximately 2,602 pages released in full to the requester.

35. By letter dated November 1, 2012, Ms. Cearley issued an interim response (“Batch 13”) and mailed by FedEx four 20-pound boxes of paper records, approximately 6,000 pages released in full to the requester.

36. By letter dated November 2, 2012, Ms. Cearley issued an interim response (“Batch 14”) and mailed by FedEx five 20-pound boxes of paper records, approximately 7,500 pages released in full to the requester.

37. By letter dated November 27, 2012, Ms. Cearley issued an interim response (“Batch 15”) and mailed by FedEx one 20-pound box of paper records, approximately 1,500 pages released in full to the requester.

38. By letter dated April 25, 2013, Ms. Cearley issued an interim response (“Batch 16”) and mailed by FedEx one CD-ROM, consisting of two electronic files, 84.5 KB, seven pages released in full to the requester.

39. By letter dated May 31, 2013, Ms. Cearley issued an interim response (“Batch 17”) and mailed by FedEx one CD-ROM, consisting of seven electronic files, 5.29 MB, released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in full and in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley’s letter did not list the number of pages that were withheld in full; however, Ms. Cearley provided the requester with a separate Index which listed each record withheld in full and a page count if the page count was available (some records required specialized software to open and Ms. Cearley could not determine the record’s page count). The letter also informed the requester that they could appeal USGS’s determination within 30 days to the DOI FOIA Appeals Officer.

40. By letter dated June 14, 2013, Ms. Cearley issued an interim response (“Batch 18”) and mailed by FedEx one CD-ROM, consisting of four electronic files, 3.48 MB, released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in full and in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley’s letter did not list the number of pages that were withheld in full; however, Ms. Cearley provided the requester with a separate Index which

listed each record withheld in full and the page count. The letter also informed the requester that they could appeal USGS's determination within 30 workdays to the DOI FOIA Appeals Officer.

41. By letter dated July 8, 2013, Ms. Cearley issued an interim response ("Batch 19") and mailed by FedEx one CD-ROM, consisting of five electronic files, 10.9 MB, including two electronic records released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley's letter did not list the number of pages that were withheld in part. No records were withheld in full in Batch 19. The letter also informed the requester that they could appeal USGS's determination within 30 days to the DOI FOIA Appeals Officer.

42. By letter dated July 25, 2013, Ms. Cearley issued an interim response ("Batch 20") and mailed by FedEx one CD-ROM, consisting of two electronic files, 52.6 KB, released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in full and in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley's letter did not list the number of pages that were withheld in full; however, Ms. Cearley provided the requester with a separate Index which listed each record withheld in full and the page count. The letter also informed the requester that they could appeal USGS's determination within 30 days to the DOI FOIA Appeals Officer.

43. By letter dated July 29, 2013, Ms. Cearley issued an interim response ("Batch 21") and mailed by FedEx one CD-ROM, consisting of seven electronic files, 3.64 MB, released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in full and in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and

Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley provided the requester with four separate Indices which listed each record withheld in full and a page count if the page count was available (some records required specialized software to open and Ms. Cearley could not determine the record's page count). The letter also informed the requester that they could appeal USGS's determination within 30 days to the DOI FOIA Appeals Officer.

44. By letter dated August 22, 2013, Ms. Cearley issued an interim response ("Batch 22") and mailed by FedEx one CD-ROM, consisting of 151 electronic files, 180 MB, two electronic records released in full to the requester. Ms. Cearley informed the requester that the USGS was withholding information in full and in part pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5) and Exemption 6, 5 U.S.C. §552(b)(6). Ms. Cearley's letter did not list the number of pages that were withheld in full; however, Ms. Cearley provided the requester with a separate Index which listed each record withheld in full and the page count. The letter also informed the requester that they could appeal USGS's determination within 30 days to the DOI FOIA Appeals Officer.

45. We collectively re-reviewed the records associated Batch 17 through 22 and identified additional records for discretionary releases. While performing this re-review, we located 32 Microsoft Excel workbooks that were never provided to the requester with our original response. On January 30, 2015, I released the 32 workbooks to the plaintiff in full.

46. By letter dated January 30, 2015, I issued a Discretionary Release associated with Batches 17 and 19. I mailed by FedEx one CD-ROM that included 64 Batch 17 electronic records, 20.4 MB, two pages released in full to the requester that were previously withheld in full; and, 11 individual PDFs that are excerpts of the emails from the Batch 19 records, 956 KB.

This release included three email pages released to the plaintiff in full that were previously withheld in full.

47. By letter dated February 6, 2015, I issued a Discretionary Release associated with Batch 22 and emailed the plaintiff the letter and attached two electronic records, 5.95 MB that were previously withheld in full.

48. By letter dated February 20, 2015, I issued a Discretionary Release associated with Batches 17 and 18. I mailed by FedEx one CD-ROM that included of 42 electronic Batch 17 records, 21.5 MB, 97 pages released in full to the plaintiff that were previously withheld in full; and, 18 electronic Batch 18 records, 6.95 MB, one electronic workbook released in full to the plaintiff that was previously withheld in full.

49. By letter dated March 20, 2015, I issued a Discretionary Release associated with Batch 20 and mailed by FedEx one CD-ROM that included 56 electronic Batch 20 records, 15.8 MB, six electronic workbooks, one “.ai” file, and 38 pages released in full to the plaintiff that were previously withheld in full.

50. By letter dated April 24, 2015, I issued an additional Discretionary Release associated with Batches 20 and 21. I mailed by FedEx one CD-ROM that included of 162 electronic Batch 20 records, 235 MB, 11 electronic workbooks and approximately 344 pages released in full to the plaintiff that were previously withheld in full; and, included 99 electronic Batch 21 records, 235 MB, 11 electronic workbooks and approximately 77 pages released in full to the plaintiff that were previously withheld in full.

51. By letter dated June 26, 2015, I issued an additional Discretionary Release associated with Batch 21 and mailed by FedEx one CD-ROM that included of 162 electronic

Batch 21 records, 37.8 MB, 15 electronic workbooks, 14 “.ai” files, and approximately 485 pages released in full to the plaintiff that were previously withheld in full.

52. By letter dated July 15, 2015, I issued an additional Discretionary Release associated with Batches 20 and 21. I mailed by FedEx one CD-ROM that included of two electronic Batch 20 records, 58 KB, 4 pages released in full to the plaintiff that were previously withheld in full; and, 26 electronic Batch 21 records, 104 MB, seven electronic workbooks, one “.ai” file, three “.sta” files, one “.exe” file, and 256 pages released in full to the plaintiff that were previously withheld in full.

53. By letter dated July 21, 2015, I issued an additional Discretionary Release associated with Batch 21 and mailed by FedEx one CD-ROM that included 21 electronic Batch 21 records, 7.57 MB that were previously withheld in full.

54. By letter dated January 28, 2016, I issued an additional Discretionary Release associated with Batches 18, 20, and 21. I mailed by FedEx one CD-ROM that included one Batch 18 electronic workbook, with two worksheets that were previously withheld in part; 11 electronic Batch 20 records, 1.74 MB, and nine pages released in full to the plaintiff that were previously withheld in full; and 53 electronic Batch 21 records, 5.80 MB, 49 workbooks and 64 pages that were previously withheld in full or in part. Ms. Cearley spent over 204 hours processing the request and released approximately 46,022 pages of records. After litigation commenced, we released 759 records, consisting of approximately 6,691 pages, through good-faith discretionary releases. We have released over 52,000 pages of records to the requester the requester, in full or in part. Using Ms. Cearley’s estimate of 1,500 pages per box, we will have released the equivalent of 35 boxes of paper records to the requester. The records at issue in this

litigation comprise of less than 10% of the entire scope of records that we found responsive and provided to the requester.

FOIA Appeals

55. By letter dated June 27, 2013, the requester appealed to the DOI FOIA Appeals Officer about USGS's Batch 17 response.

56. By unsigned and undated memorandum, on March 6, 2014, Ms. Cearley provided the DOI FOIA Appeals Office with the USGS's foreseeable harm statements and the records that the DOI FOIA Appeals Office requested on February 24, 2014.

57. By letter dated September 5, 2013, the requester appealed to the DOI FOIA Appeals Officer about USGS's Batch 20 response.

58. By unsigned and undated memorandum, on March 6, 2014, Ms. Cearley provided the DOI FOIA Appeals Office with the USGS's foreseeable harm statements and the records that the DOI FOIA Appeals Office requested on February 24, 2014.

59. By letter dated September 29, 2013, the requester appealed to the DOI FOIA Appeals Officer about USGS's Batch 21 response.

60. By unsigned and undated memorandum, on March 6, 2014, Ms. Cearley provided the DOI FOIA Appeals Office with the USGS's foreseeable harm statements and the records that the DOI FOIA Appeals Office requested on February 24, 2014.

61. By letter dated October 3, 2013, the requester appealed to the DOI FOIA Appeals Officer about USGS's Batch 22 response.

62. By letter dated October 3, 2013, the requester appealed to the DOI FOIA Appeals Officer about USGS's Batch 22 response.

REVIEW OF RESPONSIVE DOCUMENTS

63. After the Scientists conducted their searches, the scientists and the National Water Quality Laboratory (NWQL) provided Ms. Cearley with the potentially responsive records. The scientists provided Ms. Cearley with an Index with each batch of records that they provided to her and in this index the scientists provided their opinion about the releasability of the records. In some instances, the scientists identified information that they wanted to redact in the body of the records. Ms. Cearley then reviewed the index and the records to determine what the agency would or would not release. Ms. Cearley released the records that did not require redaction directly to the requester. For those records for which redactions were proposed, Ms. Cearley coordinated a legal review with Ms. Deborah Bardwick, an SOL attorney in the San Francisco regional office.

64. The documents identified as responsive to Mr. Kurfirst's FOIA request fall into eight categories. We have identified these eight categories in Column H of each batch worksheet in the Vaughn Index and described the categories below.

JUSTIFICATION FOR WITHHOLDING RESPONSIVE DOCUMENTS
UNDER EXEMPTION 5 OF THE FOIA

65. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This has been interpreted by the Supreme Court to exempt those documents "that are normally privileged in the civil discovery context." *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). This includes the deliberative process privilege, applicable to

the records associated with the original FOIA request and Plaintiff's Complaint. The information withheld from the plaintiff under Exemption 5 are inter- or intra-agency communications exchanged only among USGS staff or their consultants; or drafts, notes, or comments created by USGS staff or their consultants. The information withheld or redacted on the basis of the deliberative process privilege in large part falls into six categories, described below. We have identified the records that fall under Exemption 5 in Column J in each batch worksheet in the Vaughn Index.

Deliberative Process Privilege

66. The first category ("Category 1") includes notes from the scientists, described in Column H of the Vaughn Index as "Notes." The scientists drafted notes to themselves about the studies. The notes were not shared with anyone outside of the team conducting the study and writing the report(s) or USGS products. The records were withheld in part or in full. The notes were not shared with anyone outside of the team conducting the study. Withheld portions of or the entire record are pre-decisional because they were created while preparing to draft a document. The notes contain the author's thoughts about draft documents, responding to a question, or hypothetical situations, and preliminary analyses and notes of preliminary test results. The withheld portions or the entire withheld record reflect the thoughts, ideas and opinions of the author about draft documents still in development. The withheld information was created before the USGS made a final decision regarding the final records associated with the notes. Releasing this information would have a chilling effect on USGS's scientists' ability

to freely draft their initial thoughts and ideas or to record their analyses and thoughts about test methods or preliminary results. Release would cause harm in that it would inhibit the future free exchange of initial ideas among colleagues, causing significant harm to the scientific process, which involves freely exchanging and testing ideas, methods, and analyzing preliminary results. Release could also cause public confusion by disclosing thoughts, ideas, analyses, reasons, rationales, and conclusions that were not ultimately the position of the USGS or the U.S. Government.

67. USGS previously released in part four documents to the plaintiff and withheld in full four documents from Category 1. On January 30, 2015 and March 20, 2015, USGS provided the plaintiff with Discretionary Releases of notes prepared by Dr. Peter VanMetre. The records were released in part: USGS redacted six pages from the documents pursuant to Exemption 5, deliberative process privilege.

68. The second category (“Category 2”) includes exploratory analysis of data which allowed the scientists to educate themselves about the data and evaluate different techniques. Documents in Category 2 are described in Column H of the Vaughn Index as “Exploratory Analysis.” The data and results of the exploratory analysis were not used in the final study. The data and results of the exploratory analysis that were withheld in part or in full were not used in the final decision (for example a published manuscript). The documents in Category 2 include modeling runs and the data resulting from those modeling runs. The documents in Category 2 reflect the scientist’s analysis of various parameters and factors to determine the results of data sets applied to various models. As part of the internal deliberative process, the scientists calibrated and selected the data to determine whether it should be used as part of the final

document (for example a published manuscript). This category does not include raw data. The exploratory analysis is pre-decisional because the scientists determined the suitability of the data to publish in the final product. Release of the exploratory analysis would inhibit the ability to freely explore and analyze data without concern for external criticism. Release would cause public confusion about the scientific approach and the published conclusions because the preliminary and exploratory information not used in the final decision may not reflect the final position of the USGS or the U.S. Government.

69. The third category (“Category 3”) includes working papers, draft manuscripts, draft journal articles, draft proposals, draft abstracts, draft presentations, draft figures, draft reports, draft letters, draft press releases, draft documents of published or final papers, and draft documents that never resulted in a final document, such as a published article. Documents in Category 3 are described in Column H of the Vaughn Index as “Drafts” or “Draft Presentations” (collectively, “Drafts”). The drafts were withheld in part or in full. We withheld portions of the record, or the entire record, which are pre-decisional because they were created while preparing to draft a document. In most instances, the scientists shared these records with each other throughout the deliberative process of selecting the data and information they wanted to convey while drafting the various documents for review and eventual publication or presentation. The internal discussions are deliberative because they reflect internal advice, analyses, suggestions, and recommendations concerning the content of the draft product and do not reflect final decisions regarding published or final products. Releasing this information would have a chilling effect on the USGS’s ability to have open and frank discussions among its staff concerning USGS’s published products. Releasing this information would interfere with staff’s

ability to draft products and present information that may not ultimately be selected for publication. Release could cause public confusion by disclosing analyses, reasons, rationales, and conclusions that were not ultimately the position of the USGS or the U.S. Government and not presented in the published product.

70. The fourth category (“Category 4”) includes USGS-internal colleague reviews, described in Column H of the Vaughn Index as “Colleague Review.” The Category 4 documents withheld in part or in full reflect the USGS-internal colleague reviews. The records were withheld in part or in full. The scientists asked their peers within the USGS to review their draft products, following the established USGS Fundamental Science Practices (“FSP”). Category 4 documents include the internal discussions and candid feedback from colleague reviewers about the research findings, the data, and the results presented in the various documents. Additionally, the Category 4 documents include the reviewer’s feedback about changes to make to the document prior to publication and whether and how to seek publication of the document. The Category 4 documents comprise the USGS deliberative process and follow the FSPs in order to publish USGS products, findings, and results. The internal discussions are deliberative because they reflect internal advice, analyses, suggestions, and recommendations concerning the content of the draft product and do not reflect final decisions regarding published or final products. Releasing this information would interfere with the scientists’ ability to have frank and open discussions about their draft products with their colleagues. Releasing the information would have a chilling effect on a colleague reviewer’s willingness and ability to candidly and openly provide sufficient feedback to the author about the quality of the draft product and their proposed findings and results. Releasing the information would diminish the quality of the final product

and harm the reputation of the agency. Release could cause public confusion by disclosing thoughts, ideas, analyses, reasons, rationales, and conclusions that were not ultimately the position of the USGS or the U.S. Government and not presented in the published product.

71. The fifth category (“Category 5”) includes external anonymous scientific peer reviews by a scientific journal, described in Column H of the Vaughn Index as “Peer Review.” The Category 5 documents were withheld in part or in full. The scientists submitted their draft documents in Category 5 to scientific journals for the required peer reviewer to review the draft documents to determine if the draft document met the appropriate standards for publication in the scientific journal. By doing so, the scientists followed the established USGS FSPs covering publishing the scientist’s findings and results. These Category 5 documents comprise the USGS deliberative process and follow the FSPs in order to publish USGS findings and results. Category 5 includes the internal discussions and candid feedback from anonymous peer reviewers at the selected scientific journal. Additionally, these documents include the reviewer’s feedback about changes to make so the draft document would meet the scientific journal’s strict publication standards. The peer reviewers provided their opinion about the research findings, the data, and the results presented in the various documents. Releasing the Category 5 documents would interfere with the scientists’ ability to have frank and open discussions about their draft products with professional peers in their scientific field. Releasing the information would have a chilling effect on a peer reviewer’s willingness and ability to candidly and openly provide sufficient feedback to the author about the quality of the draft product and their proposed findings and results. Release could have a detrimental effect on the quality of USGS products because the anonymous peer reviewers would not fully participate in the peer review process,

ultimately harming the reputation of the USGS. Release could cause public confusion by disclosing thoughts, ideas, analyses, reasons, rationales, and conclusions that were not ultimately the position of the USGS or the U.S. Government and not presented in the published product.

72. The sixth category (“Category 6”) includes USGS-internal editorial reviews by USGS Bureau Approving Officials; documents in this category are described in Column H of the Vaughn Index as “Editorial Review.” The records were withheld in part or in full. The scientists submitted documents in this category to the appropriate USGS Bureau Approving Official for review, following the established USGS FSPs. By doing so, the scientists followed the established USGS FSPs covering the presentation of the scientist’s findings and results. These Category 6 documents comprise the USGS deliberative process and follow the FSPs in order to present USGS findings and results to an outside group. The Category 6 documents include the internal discussions and candid feedback from the Bureau Approving Official about the research findings, the data, and the results presented in the documents. Additionally, these documents include the Bureau Approving Official’s feedback about changes to make to the draft document. The withheld portions or the completely withheld records are deliberative because they reflect the advice and recommendations of the Bureau Approving Officials to the authors working on the draft product. The internal discussions are deliberative because they reflect internal advice, analyses, suggestions, and recommendations concerning the content of the draft product and do not reflect final decisions regarding published or final products. Releasing this Category 6 information would interfere with the scientists’ ability to have frank and open discussions about their draft products with the Bureau Approving Officials. Releasing the information would have a chilling effect on the internal USGS review and quality control process. Releasing the internal

Bureau Approving Official's review will have a chilling effect on the Bureau Approving Official's willingness and ability to candidly and openly provide sufficient feedback to the author about the quality of the draft product and their proposed findings and results. Release could cause public confusion by disclosing thoughts, ideas, analyses, reasons, rationales, and conclusions that were not ultimately the position of the USGS or the U.S. Government and not presented in the published product.

73. Certain of the withheld materials discussed above were prepared in conjunction with or shared with non-federal employees. These include draft documents prepared jointly by USGS and non-USGS authors and documents and peer reviews on those co-authored articles sent to and from scientific journals (Environmental Science & Technology ("ES&T"), Science of Total Environment ("Science"), Ecole Nationale des Travaux Publiques de l'Etat ("Ecole Nationale")). Additionally, these include documents sent to and from the City of Austin, TX and universities (Univ. of Illinois, Urbana-Champaign, Univ. of New Hampshire, Univ. of Lyon, France, Tuebingen Univ., Germany), associated with their own studies and reports. Finally, these documents include records sent to and from private consultants.

74. Documents jointly written and/or transmitted to and from the non-federal entities fall under "consultant corollary", a recognized exception to the "inter-/intra-agency" rule of FOIA Exemption 5. Records that fall under the "consultant corollary" allow USGS to withhold records or portions of records under FOIA Exemption 5. The "consultant corollary" principle applies to all of the non-federal individuals who USGS collaborated with to publish our results or corresponded with because our joint interests support each other and are not adversarial or opposed to each other's interests.

JUSTIFICATION FOR WITHHOLDING RESPONSIVE DOCUMENTS

UNDER EXEMPTION 6 OF THE FOIA

75. Exemption 6 protects “information about individuals in ‘personnel and medical files and similar file’ when disclosure of information would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. (*United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982)).

76. The seventh category (“Category 7”) includes sample sheets. Documents in Category 7 are described in Column H of the Vaughn Index as “Sample Sheets.” The scientists documented the compounds and concentrations located in the samples that they collected from the study volunteers’ residences. The records were withheld in part. The volunteers were told that their personally identifiable information (“PII”) would remain confidential when they agreed to participate in the study. The scientists provided each volunteer with a copy of the sample sheets. The scientists referenced the compounds and concentrations in listed in sample sheets in their final published products. This category includes the name and address of each volunteer. Additionally, this category includes the internal Sample ID which was created by using the home address of the volunteer. Withheld portions of the records reflect the PII of the volunteers and the Sample ID that reflects the volunteer’s address. Releasing this information would have a chilling effect on the agency’s ability to obtain study volunteers who wish to remain anonymous. Release would constitute a clearly unwarranted invasion of personal privacy. Release would not serve a public interest because the pertinent scientific data associated in this category of records

is already released. Release of this information would not shed light on the USGS's performance of its statutory duty.

77. When Ms. Cearley initially processed the FOIA request, she applied FOIA Exemption 6 to portions of the records withheld in Batches 17, 18, 19, 20, 21 and 22. We have identified the records that fall under Exemption 6 in Column J of the Batch 21 worksheet in the Vaughn Index.

78. After receiving the Complaint, the litigation team decided to re-review all of the records that USGS initially withheld, in full or in part, and determine whether or not USGS could make discretionary releases of records, in full or in part, that were previously withheld and if there were any reasonably segregable portions of the records that USGS could release. As a result of our re-review, we removed certain redactions in the Batch 22 records, as well as within additional workbooks associated with the other batches of records released to the plaintiff. The new production only contains Exemption 6 redactions to PII or information that could lead directly to a volunteer.

79. USGS continues to assert Exemption 6 on the names, addresses, and internal Sample ID of the 2008 household dust study volunteers in 30 workbooks. Releasing the PII and internal Sample IDs would provide no public benefit but would, instead, harm future USGS missions. Prospective volunteers would be less likely to allow the USGS to use their properties to collect samples, not only in PAH studies, but for all of our studies, if they knew that USGS could be compelled to release their PII. Releasing the PII of the volunteers could lead to undue scrutiny and a possible invasion of privacy.

JUSTIFICATION FOR WITHHOLDING NON-AGENCY RECORDS

80. The eighth category (“Category 8”) includes non-agency records (described in Column H of the Vaughn Index as “Non-Agency Record”). Upon our re-review of the records for the discretionary releases, I identified 32 records that are not agency records. The scientists received these documents in their personal capacity or they received them to conduct an external peer review because they were the first to publish their results about PAHs. The scientists did not use these records in their USGS-studies or to further a USGS-specific mission.

81. The Department of Justice Guide to the Freedom of Information Act, Procedural Requirements chapter, provides a two-part test for determining when a “record” constitutes an “agency record” under the FOIA: “Agency records” are records that are (1) either created or obtained by an agency, and (2) under the agency control at the time of the FOIA request. Inasmuch as the “agency record” analysis typically hinges upon whether an agency has “control” over a record, the executive branch must consider four factors when evaluating agency “control” of a record: (1) the intent of the document’s creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; (4) the degree to which the document was integrated into the agency’s record systems or files. (*DOJ v. Tax Analysts*, 492 U.S. 136 (1989) (“*Tax Analysts*”) and *Burka v. HHS*, 87 F.3d 508 (D.C. Cir. 1996) (“*Burka*”).

Tax Analyst and Burka Factors

82. In most instances a non-federal entity provided the records to the scientists to answer questions about their science or to provide a peer review as an expert in their particular field of science. USGS’s position with regards the non-agency records focuses on the USGS’s control of the document at the time of the FOIA request and *Burka* factor #3, the extent to which

USGS personnel have read or relied upon the document. The USGS scientists may have a copy of the document in their files; however, the document remained the property of the submitter and the submitter retained ownership of the document, its contents, and its distribution. Therefore, the particular scientists that received the records did not widely distribute the records throughout the agency. The non-agency records were not relied on by the scientists or anyone else within the USGS for USGS-specific studies, projects, publications or to fulfill a USGS-specific mission. Based on this analysis, the 32 records are non-agency records and are therefore not subject to the FOIA.

SEGREGABILITY

83. 5 U.S.C. § 552(b) requires that “[a]ny reasonably segregable portions of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.”

84. I have reviewed or caused to be reviewed each record that was withheld in full or in part during the initial processing of the plaintiff’s request. This review was conducted on a line-by-line basis to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied.

85. All documents responsive to plaintiff’s request were processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable, non-exempt information in the responsive records. No reasonably segregable, nonexempt portions have been withheld from plaintiff. Further description of the information withheld,

beyond what is provided in this declaration could identify the actual exempt information that the USGS has protected.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief, and that Exhibit 1 attached is a true and correct copy.

Executed this 2nd day of February, 2016.



Brian A. May
Freedom of Information Act Officer
Office of Information and Investment Management
Office of Enterprise Information
U.S. Geological Survey

US65-2011-00093

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APR 25 2011



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Wildman Harrold
Attorneys and Counselors

April 15, 2011

USGS FOIA Officer
Mail Stop 807
National Center
Reston, VA 20192

Re: Coal Tar Sealants

Dear FOIA Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. §552, I hereby request copies of any documents which constitute, refer to or relate to the following:

1. All communications, including correspondence, emails, notes, reports and memoranda regarding coal tar sealant and asphalt research conducted by USGS or any employee, agent or contractor of USGS between January 1, 2003 and the present.
2. All correspondence, emails, notes, reports and memoranda regarding Society of Environmental Toxicology and Chemistry ("SETAC"), meetings, conferences, sessions and presentations related to coal tar sealants attended, sponsored or coordinated by USGS or any employee, agent or contractor of USGS during 2008, 2009, 2010 and 2011.
3. All USGS communications, including correspondence, emails, notes, reports and memoranda that in any way reference the Pavement Coating and Technology Council ("PCTC") dated between January 1, 2003 and the present.
4. All communications, including correspondence, e-mails, notes, reports and memoranda related to coal tar sealants authored by, received by or copied to Peter Van Metre, Barbara Mahler, Jennifer T. Wilson, T.L. Burbank, M. Scoggins and/or P.A. Hamilton dated between January 1, 2003 and the present.
5. All documents constituting, referring or relating to studies or publications related to coal tar sealants conducted by, authored by, co-authored

Exhibit 1

April 15, 2011

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by or edited by Peter Van Metre, Barbara Mahler, Jennifer T. Wilson, T.L. Burbank, M. Scoggins and/or P.A. Hamilton including but not limited to notes, drafts, correspondence, e-mails, galley prints, edits, raw data, field notes, QA/QC documentation and chain of custody reports.

6. All communications, including correspondence, emails, notes, reports and memoranda between, among or including Peter Van Metre of the USGS, Judy Crane of the Minnesota Pollution Control Agency and/or Alison Watts of the University of New Hampshire regarding coal tar sealants and/or asphalt coatings.

7. All communications, including correspondence, emails, notes, reports and memoranda between, among and/or including any employee, agent or contractor of USGS and any employee, agent or contractor of a law firm, corporation, publication or other third party regarding coal tar and/or asphalt sealants and their alleged impact on the environment or human health. Please note that this request is not seeking law firm documents generated as part of an attorney/client relationship.

8. All lab data, field notes, chain of custody and QA/QC reports in the possession, custody or control of USGS related to any research, study or evaluation of coal tar or asphalt sealants or the alleged effect of coal tar or asphalt sealants on human health, aquatic organisms or the environment dated between January 1, 2003 and the present.

9. All lab data, field notes, chain of custody and QA/QC reports in the possession, custody or control of USGS generated as a result of any research, study or evaluation of soil, dust, water and/or sediment purportedly impacted by coal tar or asphalt sealants.

10. All USGS communications, including correspondence, e-mails, notes, reports or memoranda between or among any USGS employees, agents or contractors regarding trade associations that promote asphalt sealants, dated between January 1, 2003 and the present.

11. Copies of all photographs taken as part of or in connection with any research, study or evaluation regarding the alleged environmental impact of coal tar or asphalt sealants.

12. All communications, including correspondence, emails, notes, reports, memoranda and budgets regarding expenditures made and approved by USGS for coal tar and asphalt sealant research, studies or evaluations dated between January 1, 2003 and the present.

April 15, 2011
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If USGS objects to all or any part of these requests, please alert me as soon as possible so that we may discuss those objections and attempt to resolve them. While any objections are pending, please produce copies of any documents to which USGS does not object. I will pay reasonable copying charges up to \$250. I would kindly ask for an estimate before incurring any copying charges above \$250.

Please call me at (312) 201-2707 to discuss your timeframe for compliance with this request, the format for production (*i.e.*, paper files, electronic files or both) and the cost to copy the documents.

Very truly yours,

WILDMAN, HARROLD, ALLEN & DIXON LLP

A handwritten signature in blue ink, appearing to read 'Leonard S. Kurfirst', written in a cursive style.

Leonard S. Kurfirst

Leonard S. Kurfist



Wildman Harrold
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02/02/2016
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