STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

NEW MEXICO ENVIRONMENT DEPARTMENT,

Plaintiff,

vs.

No. D0101 CV 200702626

CITIZEN ACTION NEW MEXICO,
a New Mexico organization,

Defendant.

DEPARTMENT'S RESPONSE TO
ATTORNEY GENERAL'S MOTION TO INTERVENE

Plaintiff, the New Mexico Environment Department ("Department"), responds to the Attorney General's Motion to Intervene as follows:

1. The Department does not object to the Attorney General's intervention in this matter pursuant to Rule 1-024.B NMRA in order for the Attorney General's Office to put forward its position on the merits of this case.

2. The Department objects, however, to the Attorney General filing its Complaint in Intervention prior to receiving permission from the Court to intervene. Under Rule 1-024.C of the Rules of Civil Procedure, the motion to intervene "must be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Instead of attaching its proposed complaint to the Motion to Intervene, the Attorney General separately filed its Complaint in Intervention. The Department will answer the Complaint in Intervention if and when the Court grants the Motion to Intervene and the Complaint in Intervention is properly filed.

3. The Department disagrees with the Attorney General's characterization of the Department's actions in its Motion and Complaint in Intervention and its claim that the

Department is not entitled to seek resolution of the dispute in the courts. The issue in this matter is whether a preliminary technical review prepared by a contractor to the Department must be disclosed under the Inspection of Public Records Act ("IPRA" or "Act"). The Attorney General claims that the Department should have disclosed the document at issue once the Attorney General issued its determination letter finding the document was subject to disclosure under IPRA, and that the Department is not entitled to seek guidance from the Court under the Declaratory Judgment Act as to whether the document must be disclosed. The Attorney General's Office, however, misapprehends its authority. While IPRA authorizes the Attorney General to enforce its provisions, the Act does not prohibit a state agency from seeking guidance from the courts nor does it affirmatively require state agencies to follow the Attorney General's informal determinations as to whether a document must be disclosed under the Act. *See* NMSA 1978, § 14-2-12.A. The Attorney General's Office as well misconstrues the scope of remedies available to state agencies to resolve address disputes arising under the Act. While the Attorney General's Office has the authority to enforce the Act, there is no basis in law to conclude that its role is the exclusive avenue for resolving disputes and that an executive agency has no other choice but to wait to be sued by the Attorney General or the requestor of the documents if the agency disagrees with the Attorney General's position..

4. The Department in addition takes issue with the Attorney General's characterization of the Department as being uncooperative and acting in disregard of the Attorney General's determination. The Department has not simply refused to produce the document. Rather, prior to initially denying disclosure of the preliminary technical review to Citizen Action, the Department sought the advice of the Attorney General's Office, and was informed by its attorney that the document did not have to be disclosed under IPRA. After

Citizen Action filed a complaint with the Attorney General's Office, the Department responded with a considered analysis as why the document was not subject to disclosure. Thereafter, the Attorney General's Office changed its position, and issued a determination to disclose the preliminary technical review. The Department then immediately sought and received permission from the Attorney General to withhold the document pending a request for reconsideration by the Department to the Attorney General. Within the time line approved by the Attorney General, the Department put forward to the Attorney General extensive legal research and analysis on the issue. *See* Sept. 28, 2007 ltr. from T. Hughes, NMED, to E. Glenn, AGO. [Exhibit A attached.] After receiving the Attorney General's response, which acknowledged that the Department's analysis had been "well researched and presented" but nonetheless summarily denied the Department's request for reconsideration, the Department immediately sought guidance from the Court as to whether the document was exempt from disclosure under IPRA. The Department thereby acted in good faith by promptly seeking a resolution to the disagreement through the court system. The Department's request to the Court is similar to the petition for a declaration filed by the county in *Board of Comm'rs of Dona Ana Co. v. Las Cruces Sun-News,* 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36 (2003) when the local newspaper sought documents under IPRA that the county believed did not need to be disclosed.

5. The Department's filing of an action does not, as the Attorney General contends, chill the exercise of legitimate requests under IPRA. If a state agency denies a request for public records under IPRA, the requestor must obtain relief from the courts in any event. Allowing a state agency to first institute suit has no detrimental or chilling effect on a requestor. In all cases of disagreement, the parties must seek guidance from the courts to resolve the dispute. In point of fact, Citizen Action has exercised its rights and has filed a counterclaim in this action, and

therefore Citizen Action has not been chilled in the exercise of its rights. The Department's suit represents a legitimate exercise of the Department's right under the Declaratory Judgment Act and a responsible course of action to obtain the Court's guidance to resolve a disagreement with Citizen Action and the Attorney General.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

T S Fox

Tannis L. Fox
Assistant General Counsel/
Special Assistant Attorney General
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-1603

Attorney for Plaintiff New Mexico Environment Department

Certificate of Service

I certify that on January 10, 2008 a copy of the foregoing pleading was mailed to Nancy L. Simmons, 120 Girard SE, Albuquerque, New Mexico 87106; David McCoy, Citizen Action New Mexico, Post Office Box 4276, Albuquerque, New Mexico 87916-4276; and David K. Thomson and Scott Fuqua, Assistant Attorneys General, New Mexico Attorney General's Office, P.O. Drawer 1508, New Mexico 87504.

T S Fox

Tannis L. Fox

NEW MEXICO
ENVIRONMENT DEPARTMENT

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BILL RICHARDSON
Governor
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Lieutenant Governor

RON CURRY
Secretary
CINDY PADILLA
Deputy Secretary

September 28, 2007

By hand delivery

Elizabeth A. Glenn
Director, Civil Division
Office of the Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Re: NMED Request for Reconsideration of AGO Determination of Inspection of Public Records Act Complaint

Dear Ms. Glenn:

This letter is to request the Attorney General's Office ("AGO") to reconsider its determination that a preliminary technical review conducted by TechLaw, Inc. ("Techlaw") under contract with the New Mexico Environment Department ("NMED") is a public record subject to disclosure under the Inspection of Public Records Act ("IPRA"). The TechLaw preliminary review provided technical comments on and evaluation of a fate and transport model developed by Sandia National Laboratories ("SNL") for the Mixed Waste Landfill ("MWL") at that facility. NMED appreciates the AGO allowing NMED to seek reconsideration of this matter and extending the date to release the TechLaw document to the requestor, David McCoy of Citizen Action.

NMED bases this request for reconsideration on well-established federal case law under the federal IPRA analogue, the Freedom of Information Act ("FOIA"), holding that documents prepared by consultants under contract with a government agency may be exempt from disclosure under the "deliberative process" exemption. *See, e.g., Hoover v. U.S. Dep't of Interior,* 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Lead Industries Ass'n v. OSHA,* 610 F.2d 70, 83 (2nd Cir. 1979); *Soucie v. David,* 448 F.2d 1067, 1076 (D.C. Cir. 1971); *see also U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 9-10 (recognizing the exemption for government consultants). We believe the rationale underlying these cases applies with equal force to IPRA, and that this doctrine falls within the countervailing public policy exception under IPRA as articulated by the New Mexico courts. *See State ex rel. Newsome v. Alarid,* 90 N.M.

EXHIBIT
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790, 568 P.2d 1236 (1977).

Background

At the outset, NMED would like to make clear that it supports a liberal interpretation of IPRA in order to fulfill the statute's purpose of disclosure to the public of the workings of government. A fundamental operating value of NMED is transparency to the public and, toward that goal NMED strives to comply with all substantive and procedural requirements of IPRA. In that regard, we would like to note, as we have previously, that Mr. McCoy has sent numerous document and information requests to NMED regarding the MWL and other facilities regulated by NMED, and that NMED has consistently followed the requirements of IPRA, having made hundreds of pages of public records available to Mr. McCoy. We enclose an updated chart, which we had previously provided to your office, setting forth the IPRA requests sent by Mr. McCoy, the date of the request, and the nature of the request, as well as the date of the Department's response(s). The chart demonstrates the Department's strict compliance with IPRA.

As to the particular IPRA request in question: By letter dated January 27, 2007 to NMED, Mr. McCoy requested a number of documents from NMED including the TechLaw preliminary review. The preliminary review was prepared by TechLaw under contract with NMED. On November 3, 2005, SNL submitted to NMED for approval a proposed Corrective Measures Implementation Plan ("CMI Plan") for the MWL. Appendix E of the CMI Plan, entitled "Probabilistic Performance-Assessment Modeling of the Mixed Waste Landfill at the Sandia National Laboratories," proposed a fate and transport model of contaminants from the MWL. NMED was to review the proposed CMI Plan and provide a written evaluation of SNL's proposal. NMED technical staff reviewed the entire CMI Plan, including Appendix E, the proposed fate and transport model. TechLaw assisted NMED in the review, and specifically conducted a preliminary technical review of Appendix E. On January 31, 2006, TechLaw submitted its technical review and comments on the fate and transport model to NMED. On November 20, 2006, NMED sent a Notice of Disapproval ("NOD") to SNL identifying deficiencies that needed to be corrected in SNL's proposed CMI Plan. The NOD is attached, and included NMED's final evaluation of the SNL's proposed fate and transport model in Part 2 of the letter, pages 4 through 8. A side by side comparison between TechLaw's preliminary review and NMED's final evaluation of the fate and transport model, as reflected in the NOD, shows that NMED accepted some of TechLaw's comments, modified some of TechLaw's comments, did not include some of TechLaw's comments, and added comments of its own. Subsequently, on December 15, 2006 and January 19, 2007, SNL submitted responses to the NOD. SNL's responses are presently under review by NMED. NMED has made available to Mr. McCoy on a number of occasions SNL's proposed CMI Plan, NMED's NOD, and SNL's two responses, and all these documents appear on NMED's website at http://www.nmenv.state.nm.us/hwb/snlperm, the link for the MWL.

In response to Mr. McCoy's January 27, 2007 IPRA request, NMED by letter dated February 12,

2007 made various documents requested by Mr. McCoy available, but did not make the TechLaw preliminary review available because it represented a draft document. NMED made the determination not to disclose the TechLaw preliminary review based on guidance from the Attorney General's Compliance Guide on IPRA and from advice from the AGO. The TechLaw preliminary review represented a draft technical review and not a final agency technical review. The Compliance Guide provides that preliminary materials may not be "public records" under IPRA because they "do not share the degree of finality suggested by the terms . . . in the definition of public records," and "like information protected by the executive privilege . . ., dissemination could easily lead to misinformation or false conclusions about the public entity's business." *The Inspection of Public Records Act: A Compliance Guide for New Mexico Public Offices and Citizens,* p. 30 (4th ed. Jan. 2004) ("Compliance Guide").[1] NMED understood that this principle applied to draft documents prepared by consultants to NMED as well as to employees of NMED based on advice given to NMED from the AGO in 2005 after an IPRA complaint was filed with the AGO against NMED seeking emails between NMED and a contractor relating to a draft report prepared by the contractor.[2] As well, prior to sending the

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[1] The Compliance Guidance provides:

> Notes and other materials prepared or collected by public employees solely for their own use may not be public records .... These preliminary materials do not share the degree of finality suggested by the terms "documents," "papers" and "letters" in the definition of public records, and generally are not intended to perpetuate, formalize or communicate information for or on behalf of the public agency. Moreover, like information protected by the executive privilege . . . , dissemination could easily lead to misinformation or false conclusions about he public entity's business. Anticipation of disclosure could unnecessarily hamper a public employee's ability to do his or her job by discouraging or tempering the employee's taking of notes, keeping research materials or experimenting with creative ideas in preliminary drafts of memoranda and letters. An agency's effectiveness would be significantly undermined if its employees, worried that every scrap of paper recording their own impression or notes could be disclosed publicly, limited what they wrote down in the course of perform their duties. Thus, such materials generally will not be considered public records, provided employees create or use them solely for their own convenience and unless the materials are expressly referenced in or attached to a clearly public document, such as a final report.

The Inspection of Public Records Act: A Compliance Guide for New Mexico Public Offices and Citizens, p. 30 (4th ed. Jan. 2004).

[2] In June 2005, a complaint under IPRA was filed against NMED with your office. The complainant sought, among other documents, emails between NMED and one of its contractors (Gradient) regarding a draft report prepared by the contractor. In responding to that complaint, Assistant Attorney General Corliss Thalley advised me that the emails between NMED and the contractor could be withheld, but emails that included employees from the Department of Health and the contractor could not be withheld. Consistent with that advice, in a July 20, 2005 letter to Ms. Thalley, I stated that NMED would withhold the emails between NMED and the contractor because they were drafts and therefore not public records and because they were subject to executive privilege as an expression of agency thought processes. July 20, 2005 ltr. from T. Hughes, NMED, to C. Thalley, AGO (attached). The AGO did not take any further action on the complaint or require NMED to disclose the emails between NMED and the contractor.

February 12, 2007 letter, NMED contacted the AGO for advice as to whether the TechLaw preliminary review could be withheld under IPRA to make sure that the AGO still considered draft documents from contractors similar to draft documents from agency employees, and was advised by the AGO that NMED could withhold the TechLaw preliminary review.[3]

By letter dated March 15, 2007, Mr. McCoy filed a complaint under IPRA with the AGO claiming that NMED had improperly withheld certain documents from disclosure. NMED responded to the complaint in a letter dated June 1, 2007.

On September 14, 2007, NMED received the determination from your office (dated August 2, 2007) that NMED had complied with IPRA except with respect to withholding the TechLaw preliminary report.

On September 19, 2007, I requested an extension from your office to provide the document to Mr. McCoy so that NMED could seek reconsideration of this matter because of its importance to NMED and to other state agencies. That request was granted by the AGO.

Analysis

As stated in the AGO's Compliance Guide, in New Mexico "the courts have fashioned a 'rule of reason' that protects otherwise public records when there is a countervailing public policy against disclosure. A countervailing public policy will nonetheless justify nondisclosure if the harm to the public interest from allowing inspection outweighs the public's right to know." Compliance Guide, p. 23; *see Alarid,* 90 N.M. at 797-98 (establishing countervailing public policy exception). Under IPRA's predecessor statute, the New Mexico Supreme Court recognized that a state agency's "thought processes" are not "public records" and are not subject to public inspection. *Sanchez v. Bd. of Regents,* 82 N.M. 672, 675, 486 P.2d 608 (1971) (holding that list of proposed salaries submitted to faculty members are not public records). The principle that an agency's thought processes are not subject to public disclosure is well established in the doctrine of executive privilege. Furthermore, as the Compliance Guide points out, "it is likely that the reasons underlying executive privilege and other evidentiary privileges would constitute a sufficient countervailing public policy to justify denying public access to records covered by those privileges." Compliance Guide, p. 23. The New Mexico Supreme Court has held that executive privilege is required under the state constitution. *State ex rel. Attorney General v. First Jud. Dist. Ct.,* 96 N.M. 254, 258, 629 P.2d 330 (1981). In that case, the court recognized that:

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[3] Immediately before NMED sent the February 12, 2007 letter to Citizen Action stating that the TechLaw preliminary review was not a public record, NMED Deputy General Counsel Tannis Fox contacted the AGO to confirm that draft documents, whether prepared by a contractor or public employee, may not be public records. She spoke by telephone with Assistant Attorney General Mona Valicenti, explained the pending IPRA request before NMED and the TechLaw preliminary review to be withheld, and was advised by Ms. Valicenti that she could withhold the TechLaw preliminary review under IPRA.

> Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure.

Id.

While the New Mexico courts have recognized the evidentiary privilege of executive privilege, the courts have not addressed the issue of whether that privilege extends not only to government consultants as well as government employees.[4] More specifically, the New Mexico courts have not addressed the issues of whether draft reports from consultants or internal communications between state agencies and consultants prior to final agency action are "public records" for purposes of IPRA or whether such documents may be subject to executive privilege and thereby may be withheld under IPRA under the countervailing policy exception.

There is, however, a well-established body of federal case law under FOIA holding that communications between the government and its consultants may be exempt from disclosure under FOIA's "deliberative process" exemption. Exemption 5 under FOIA protects from disclosure "inter-agency or intra-agency memorandums or letter 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). To qualify for the exemption, a document must satisfy two conditions: its source must be from a government agency, and it must fall within a privilege against discovery under judicial standards governing litigation. *Klamath Water Users Protective Ass'n,* 532 U.S. at 8.

With respect to the first condition of Exemption 5, that the materials must be from a government agency, the Supreme Court has recognized "some Courts of Appeals have held in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5." *Id.* at 9 (citing *Hoover,* 611 F.2d at 1137-38; *Lead Industries Ass'n,* 610 F.2d at 83; *Soucie,* 448 F.2d 1067). The Court further recognized that:

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[4] In *State ex rel. Attorney General v. First Jud. Dist. Ct.,* the Attorney General sought to withhold materials gathered during his investigation of 1980 state prison riot. The investigatory materials included interviews of persons regarding the riot, under promise of confidentiality, and interviews of 133 persons, including guards and inmates. *State ex rel. Attorney General v. First Jud. Dist. Ct.,* 96 N.M. at 258, 629 P.2d at 332. The court held that the investigatory materials obtained by the Attorney General from correction officers and other executive department personnel were protected by executive privilege, but that materials obtained from "members of the public or others not employed in the executive department" were not protected. *Id.* The circumstances and facts in *State ex rel. Attorney General v. First Jud. Dist. Ct.* are completely different than the ones in this matter; an investigation versus a deliberative process. The court's holding in *State ex rel. Attorney General v. First Jud. Dist. Ct.* that investigatory materials obtained from "members of the public and others not employed in the executive department" does not apply to this matter where the materials of consultants to an executive agency are at issue.

> [i]t is textually possible and . . . in accord with the purpose of [Exemption 5], to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency – e.g., in a capacity as employee or *consultant to that agency* . . . .

Id. (quoting *Dep't of Justice v. Julian,* 486 U.S. 1, 18 n.1 (dissenting opinion) (emphasis added)). The three Courts of Appeals cited by the Court in *Klamath Water Users* each considered whether documents prepared by outside consultants or experts to a government agency could be protected as deliberative process materials under Exemption 5. The federal appellate courts all held the exemption extends to communications between government agencies and outside consultants hired by them. *Hoover,* 611 F.2d at 1137-38; *Lead Industries Ass'n,* 610 F.2d at 83; *Soucie,* 448 F.2d 1067. The courts recognize that government agencies may have a "special need for the opinions and recommendations of temporary consultants," *Soucie,* 448 F.2d at 1078 n.44, and that the deliberative process privilege applies to documents generated by consultants for government agencies. As the Court of Appeals for the District of Columbia has put it,

> [C]ourts have repeatedly found a privilege attaches to reports of outsiders commissioned by an agency to perform agency work, when such reports would be protected if compiled within the agency itself. Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any that the document plays in the process of agency deliberations.

CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 977 (1988).[5] Thus, even though the exemptions under FOIA are to be narrowly construed, *Formaldehyde Inst. v. Dep't of Health and Human Servs.,* 889 F.2d 1118, 1122 (D.C. Cir. 1989), these federal courts of appeals and lower federal courts, including the District Court of New Mexico, have extended the protections under Exemption 5 to materials generated by government consultants. *See, e.g., Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs,* 241 F. Supp. 1342, 1355-56 (D.N.M. 2002) (consultant letter and report fall within Exemption 5); *Sakamoto v. U.S. Envt'l Protection Agency,* 443 F. Supp. 2d 1182, 1191-92 (N.D. Ca. 2006) (technical documents prepared by outside consultants to federal agency fall within Exemption 5);

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[5] The same court has also stated that:

> The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In the course of its day-to-day activities, any agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy makers and likely impair the quality of decisions.

Ryan v. Dep't of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980).

Brush Wellman, Inc. v. Dep't of Labor, 500 F. Supp. 519, 522 (N.D. Oh. 1980) (draft economic impact statement prepared by consultant to federal agency falls within Exemption 5); *see also Formaldehyde Inst.,* 889 F.2d at 1124-25 (review letter submitted to federal agency by review panel for publication of federal employee in scholarly journal falls within Exemption 5); *CNA Financial Corp.,* 830 F.2d at 1161-62 (consultant's analysis to federal agency falls within Exemption 5); 1131, *Ryan,* 617 F.2d at 789-90 (Congressional responses to Justice Department questionnaires fall within Exemption 5); *K.C. Wu v. Nat'l Endowment for Humanities,* 460 F.2d 1030, 1032 (5th Cir. 1972) (memorandum prepared by federal agency's consultants falls within Exemption 5).[6]

In its analysis, the Supreme Court observed that in these cases,

> the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done. To be sure, the consultants in these cases were independent contractors and were not assumed to be subject to the degree of control that agency employment could have entailed; nor do we read the cases as necessarily assuming that an outside consultant must be devoid of a definite point of view when the agency contracts for services. But the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Klamath Water Users Protective Ass'n, 532 U.S. at 10-11.[7]

In this case, TechLaw is the type of consultant that the federal courts would recognize as falling within FOIA's Exemption 5: TechLaw was retained by NMED to conduct a technical review on behalf of NMED, and not on its own behalf, and to function as an NMED employee would be expected to function, that is, TechLaw staff was expected to use their best judgment in reviewing and evaluating the SNL fate and transport model on behalf of NMED.

With respect to the second condition under Exemption 5, courts have construed the exemption to encompass the protections traditionally afforded to certain documents pursuant to evidentiary privileges in the civil discovery context, including the privilege for attorney work-product and

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[6] We have attempted to find countervailing federal case law on this point, but have thus far not located any federal cases that have not extended protection under Exemption 5 to government agency consultants.

[7] In *Klamath,* the Department of Interior ("DOI") attempted to extend Exemption 5 to communications with a tribe, with whom DOI had a trust relationship. The Court, however, did not extend the protections of Exemption 5 to such communications because tribes act on behalf of their own, independent interests and not necessarily on behalf of DOI. *Klamath Water Users Protective Ass'n,* 32 U.S. at 12-14.

the "deliberative process" privilege. *Id.* at 8; *see also Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 853, 862 (D.C. Cir. 1980) (Exemption 5 protects materials which would be protected under the attorney-client privilege, the attorney work-product privilege, or the executive deliberative process privilege). The deliberative process privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath Water Users Protective Ass'n,* 532 U.S. at 8 (quoting *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150 (1975)). As the United States Supreme Court has observed:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," by protecting open and frank discussion among those who make them within the Government.

Id. at 8-9 (quoting *EPA v. Mink,* 410 U.S. 73, 86-87) (citation omitted). In order for Exemption 5 to apply, an agency's materials must be both "predecisional" and part of the "deliberative process." *Formaldehyde Inst.,* 889 F.2d at 1121 (citing *Sears, Roebuck & Co.,* 421 U.S. at 151-52). A "predecisional" document is one "'prepared in order to assist an agency decisionmaker in arriving at his decision,'" and may include "'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer than the policy of the agency[.]'" *Id.* (citation omitted). A predecisional document is part of the "deliberative process," if "the disclosure of [the] materials would expose an agency's decisionmaking process in which a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* (citation omitted).

In this case, the TechLaw preliminary review falls squarely within the deliberative process doctrine. The January 6, 2006 TechLaw preliminary review was predecisional: it was submitted to NMED prior to NMED's November 20, 2006 final evaluation of the SNL fate and transport model. Likewise, the TechLaw preliminary review was part of the deliberative process: it was relied upon by NMED in crafting its final evaluation of the SNL fate and transport model. Some comments in the TechLaw preliminary review were accepted by NMED; some comments were modified; some comments were not used at all; and as well NMED staff developed their own comments which were set forth in the agency's final evaluation. As the court in *Sakamoto v. U.S. Env'l Protection Agency,* put it, the TechLaw preliminary review is "deliberative because it consists of internal analyses, opinions and recommendations that contributed to [NMED's] final decisions." 443 F. Supp. 2d at 1192. Disclosure of the TechLaw preliminary review would, quite clearly, expose NMED's decision making process.

While NMED agrees that IPRA should be broadly construed and that the countervailing policy exception to IPRA should be narrowly construed, NMED requests the Attorney General's Office to recognize that executive privilege constitutes one such exception to IPRA and to extend the doctrine to materials generated by state agency consultants in accordance with the parameters set

by the federal courts, including the U.S. Supreme Court in *Klamath Water Users Protective Ass'n.* In this particular case, withholding the TechLaw preliminary review is fully consistent with the purposes of the deliberative process privilege, that is, to protect the deliberative process of the government in order to promote the free exchange of ideas within government and to improve the quality of government decision making. As the Fifth Circuit Court of Appeals has put it, "[t]he Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity." *K.C. Wu,* 460 F.2d at 1032. On the other hand, a determination that such consultant materials do not come within the deliberative process privilege would have a chilling effect on state agencies' use of consultant and expert services. State agencies use such services for legitimate purposes, often when the agencies themselves lack necessary expertise or when stretched agency resources are not able to complete projects within the necessary time frames. If state agencies refrain from using consultants and experts when appropriate, the quality of government decision making will suffer.

Again, thank you for allowing NMED to request reconsideration of the AGO's determination, and we appreciate your review of this matter.

Sincerely,

Tracy Hughes
General Counsel

Enclosures

Cc.: Hilary Tompkins, Chief Counsel, Office of the Governor
Al Lama, Deputy Attorney General, AGO
David McCoy, Executive Director, Citizen Action

Cc w/out encl. Ron Curry, Secretary, NMED
Leslie Lowe, Assistant Attorney General, AGO
Tannis Fox, Deputy General Counsel, NMED