
From: David.Longo@dot.gov
To: Hamayasu, Toru
Sent: 4/6/2010 2:12:36 AM
Subject: RE: From Cliff Slater's website

Toru,

Cliff Slater emailed FTA asking why we provided the draft copy to the newspaper. He thought it was FTA's policy not to release draft documents. We replied to his email with the following response:

Mr. Slater:

The U.S. Department of Transportation (USDOT) has regulations at 49 CFR Part 7 that govern the release of agency records and documents in response to requests under the Freedom of Information Act (FOIA). It has always been USDOT policy to make agency records available to the public to the greatest extent possible, in keeping with the spirit of FOIA. This includes providing reasonably segregable information from documents that contain information that may be withheld pursuant to one of the statutory exemptions under FOIA. See, 49 CFR § 7.13(a).

Quite often, of course, FTA and other agencies within USDOT receive FOIA requests for *drafts* of chapters and working documents that will lead to the eventual publication of an Environmental Impact Statement under the National Environmental Policy Act (NEPA). We handle each such FOIA request for a NEPA document on a case by case basis. Sometimes, we find that we can release a draft NEPA document in its entirety. Sometimes, we choose to withhold a NEPA document either in part or in its entirety, for any of the reasons identified by the statutory exemptions under FOIA. See, 5 U.S.C. Subsections 552(b)(1) through (b)(7). For example, we sometimes choose to invoke the FOIA exemption at 5 U.S.C. § 552(b)(5) to withhold a NEPA document in whole or part, perhaps because the data or conclusions in that document are preliminary or subject to change by FTA decision makers; we call this the "deliberative process" exemption.

As you note, FTA recently released a copy of a draft environmental impact statement in response to a FOIA request by the *Honolulu Weekly*. In that instance, we did not find it necessary to withhold any portion of the draft document. Let me emphasize, however, that the identity of a FOIA requester makes no difference in how FTA responds to a FOIA request. Whether we choose to withhold any portion of a NEPA document or any other record in FTA's possession depends on the nature of the material set forth in that document.

If you have provided FTA with an updated version of the document, we are happy to provide it to requesters. However, if he submits a FOIA request for the document we provided the newspaper, we are obligated by FOIA regulations to provide that, too, since it has already been released. Draft documents, by their nature, are subject to change for whatever reason.

Feel free to call me with any questions or concerns.

Dave

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From: Hamayasu, Toru [mailto:thamayasu@honolulu.gov]

Sent: Monday, April 05, 2010 8:01 PM

To: Longo, David (FTA)

Cc: Hogan, Steven; Miyamoto, Faith

Subject: FW: From Cliff Slater's website

David,

I think you know who Slater is by this time. Only thing I ask is to replace the FOIA copy with the latest copy rather than that of October since we found errors in it. We'll provide you with the latest version. I don't want to need to defend the errors. Ideally, though, we have the final FEIS out on time so Slater FOIA becomes moot.

Toru

From: Brennan, Bill

Sent: Monday, April 05, 2010 1:52 PM

To: Yoshioka, Wayne; Hamayasu, Toru; Caldwell, Kirk; Williams, Patrick; 'ndahl@hawaii.rr.com'; Dahl, Nalani

Subject: From Cliff Slater's website

Honolulu Weekly scoops us with Draft FEIS:

Honolulu Weekly is running "Rail: The EIS, unbound." That's embarrassing. The Weekly apparently did not know that the feds NEVER accept FOIAs (Freedom of Information Act) for documents that are still in draft form, so they asked the FTA for the Draft FEIS — and got it!

That leads us to the main question: Why did the FTA release the Draft FEIS? Was it an error or some strategic move?

Rather than comment on the Weekly's story, we have made a FOIA request ourselves and will comment on it when we receive it

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