



United States Department of the Interior

MINERALS MANAGEMENT SERVICE

Royalty Management Program

P.O. Box 25165

Denver, Colorado 80225-0165

IN REPLY REFER TO

AD/PSO/TSO 99-006-0
Mail Stop 3062

NOV 13 1998

Mr. Dow L. Campbell
Marathon Oil Company
539 South Main Street
Findlay, Ohio 45840-3295

Dear Mr. Campbell:

This is in response to your October 22, 1998, Freedom of Information Act (FOIA) request (copy as Enclosure 1). We have recently finished reviewing and making the necessary redactions on all of the responsive material. We are withholding certain information in these materials under FOIA Exemptions 4 and 5.

Our policy, in keeping with the spirit of FOIA, is the prompt release of records to the greatest extent possible. At the same time, we must protect the rights of individuals and the administrative processes surrounding such rights. The FOIA regulations require us to withhold information protected under FOIA exemptions at 43 CFR § 2.13 (1997) when disclosure is prohibited by statute or Executive Order, or if sound grounds exist to apply an exemption.

EXEMPTION 4

We have determined that the materials containing negotiated pricing data supplied by individual companies' that were engaged in Royalty-in-Kind (RIK) re-negotiation meetings conducted by the Minerals Management Service (MMS) are privileged and confidential. This pricing information is being withheld pursuant to the "second prong" of Exemption 4 of FOIA, which exempts from disclosure "... trade secrets and commercial or financial information obtained from a person and privileged or confidential." We have replaced the deleted information with the marking "X-4."

The "third prong" of Exemption 4 of FOIA protects RIK pricing data from disclosure because the requested information would result in an impairment to the administrative efficiency and effectiveness of the MMS in its efforts to enter into future RIK negotiations and contracts. MMS believes the success of the RIK program relies on our nondisclosure of negotiated prices and pricing formulas. We maintain companies would avoid the RIK program if they believed their pricing data would be made publicly available through FOIA. As a consequence, MMS would experience a decline in desirable companies participating in the RIK program. Thus weakening MMS's ability to obtain the best price and terms in future RIK negotiations and contracts.

Our policy is to employ Exemption 4 of FOIA by withholding from public release any financial information that could jeopardize the financial standing and/or competitive position of those associated

Rm File

Mr. Dow L. Campbell

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with this information. We believe that the public release of this information could jeopardize the competitive and financial standing of those parties associated with this information.

EXEMPTION 5

We are withholding our RIK negotiated prices and RIK pricing formulas because they reflect the personal opinions, recommendations and advice of staff members and were used to arrive at a final agency decision. We have replaced the deleted information with the marking "X-5." Disclosure of such material would inhibit the open and candid expression of such views in similar future deliberations, confuse the public as to the official agency position on an issue, and have a detrimental effect on our decisionmaking process. Sound grounds exist for withholding the materials under Exemption 5 of FOIA (5 U.S.C. 552(b)(5)), which permits an agency to withhold "... interagency or intra-agency memorandums or letters that would not be available by law to a party ... in litigation with the agency."

The Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA. Rule 501 of the Federal Rules of Evidence provides for courts to create privileges as necessary, there exists the potential for new privileges to be applied under Exemption 5.

Further, in Federal Open Market Committee v. Merrill, the Supreme Court found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown ... a trade secret or other confidential research, development or commercial information" is protected from discovery. The theory behind this privilege is ... "that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered." We maintain that any disclosure of our accepted Royalty-in-Kind (RIK) bids, RIK negotiated prices, and RIK pricing formulas would significantly weaken the Government's ability to negotiate and secure the best RIK contract on all our future RIK contract and price negotiations. Any harm to MMS will likely no longer exist when the RIK contracts expire or are terminated. However, the submitters may still have an interest in protecting the pricing data.

For your reference and further information regarding the Federal Open Market Committee v. Merrill citation, Enclosure 2 contains two pages from the U.S. Department of Justice, Office of Information and Privacy manual titled, "Freedom of Information Act Guide & Privacy Act Overview," September 1997 edition.

Enclosure 3 contains 530 pages, of responsive material for your FOIA request. The responsive materials were compiled from various sources with in MMS. The responsive materials are being released as a comprehensive standard package for all inquiries to our RIK re-negotiation meetings and final RIK contracts and prices.

In accordance with 43 CFR § 2.20(a)(1) (1997), we assess user fees to fulfill a FOIA request. Personnel charges cover our costs to conduct document searches and to review, identify, and delete privileged and confidential information. Other charges cover the direct costs of providing the material. Standard charges are:

Mr. Dow L. Campbell

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Professional support	\$18.60/hour	Computer/mag tapes	\$25.00/each
Clerical support	\$ 9.20/hour	CD-ROM	\$ 6.00/each
Photocopies	\$.13/page	8 mm. tapes	\$10.00/each
Microfiche	\$.08/page	Computer Diskettes	\$ 1.25/each
	Computer (CPU) time	\$35.00/minute (\$25.00 minimum)	

Fees for overdue bills include a \$35 administrative charge plus interest at the prevailing Treasury rate.

Enclosure 4 is a bill for \$68.90, the cost to fulfill your FOIA request.

As the Royalty Management Program FOIA Officer, I am the official denying portions of your request. If you disagree with this determination, you have the right under Department of the Interior regulations at 43 CFR § 2.18 (1997) to appeal to:

Freedom of Information Act Appeals Officer
Office of Information Resources Management
Mail Stop 5312
1849 C Street, N.W.
Washington, D.C. 20240

Your written appeal must be delivered to the FOIA Appeals Officer no later than 20 working days from the date of this letter. The appeal must include copies of your original request and of the initial denial. To expedite the appellate process and to ensure full consideration of your appeal, include a brief statement as to why you believe this decision is in error. Both the envelope containing the appeal and the face of the appeal itself should include the legend "FREEDOM OF INFORMATION APPEAL."

If you have any questions, please contact Mitchell Parker at (303) 231-3615 or me at (303) 231-3013.

Sincerely,
Original Signed By
Gregory K. Kann

Gregory K. Kann
Freedom of
Information Act Officer

Enclosures

bcc: RM File (705-16)
RM Chron/Lkwd
MMS FOIA Officer, MS 2200 (e.t.) ✓
RMP FOIA Officer, MS 3062
PSO Chron, MS 3060
TSO Chron, MS 3062

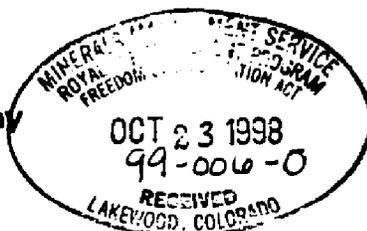
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Finalized:lpm:11/10/98

ENCLOSURE

Dow L. Campbell
Attorney



**Marathon
Oil Company**

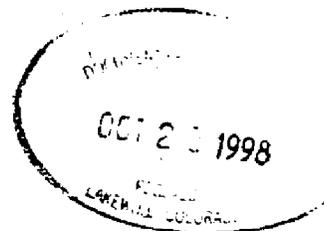


539 South Main Street
Findlay, OH 45840-3295
Direct No. 419/421-4121
Main No. 419/422-2121
Facsimile 419/427-3681
E-mail: DLCampbell@MarathonOil.com

October 22, 1998

Via Overnight Mail

Minerals Management Service
Mr. Greg Kann, FOIA Officer
Denver Federal Center, Building 85, MS 3062
Denver, Colorado 80225



**Re: Freedom of Information Act Request
Supplemental to July 10, 1998 FOIA Request**

Dear Mr. Kann:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, we hereby request a copy of the following identified documents and materials:

Any and all contracts or agreements, and extensions thereof or amendments thereto, by and between the Minerals Management Service and "small refiners" [As this term is defined and applied in 43 U.S.C. §1353(b).] for the sale/purchase of crude oil from Outer Continental Shelf leases for the time period of July 1998 through the current date.

This request supplements our earlier request (see: Marathon FOIA Request dated July 10, 1998 and MMS Response dated July 27, 1998) for identical information for the time period from November 1994 through June 1998.

Marathon is willing to pay all reasonable reproduction and search fees provided by regulation. However, I request that you notify me before proceeding if you anticipate such expense will exceed \$500.00.

Should you determine that any of the requested information is exempt from disclosure, please delete such allegedly exempt portions and identify in your response the nature of the deleted information and the reason for the deletion. This consent is intended to facilitate your prompt response and in no way waives our entitlement to complete documents. Also, in the event that we are denied any document or any portion of any requested document, please identify each document with particularity and specify the statutory basis for the denial of each document or portion withheld and the names and titles of the persons responsible for the denial.

Your response to this FOIA request should be directed to the undersigned. We look forward to hearing from you within twenty (20) working days.

Thank you for your prompt attention to this matter. Please call if we can answer any questions regarding this request.

Sincerely,

Dow L. Campbell

(96885)

A subsidiary of USX Corporation

EXEMPTION 5

lowed.²⁰¹

The Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-echelon employees as well.²⁰² This broad construction of the attorney-client privilege acknowledges the reality that such lower-echelon personnel often possess information relevant to an attorney's advice-rendering function.²⁰³ However, the D.C. Circuit has recently held that otherwise confidential agency memoranda are not protected under the privilege if they are merely interpretations of agency law.²⁰⁴

The nature of this privilege, and its partial overlap with the deliberative process privilege and attorney work-product privilege under Exemption 5, make it no less subject to potential discretionary disclosure under new policy standards.²⁰⁵ (See discussions of such discretionary disclosure under Applying the "Foreseeable Harm" Standard, below, and Discretionary Disclosure and Waiver, below.)

Other Privileges

The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.²⁰⁶ However, the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory

²⁰¹ See FOIA Update, Spring 1985, at 4.

²⁰² 449 U.S. at 392-97.

²⁰³ See id.; see also Sherlock v. United States, No. 93-0650, slip op. at 8-9 (E.D. La. Jan. 12, 1994) (collection officer providing information to district counsel); Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (circulation within agency to employees involved in matter for which advice sought does not breach confidentiality); LSB Indus. v. Commissioner, 556 F. Supp. 40, 43 (W.D. Okla. 1982) (agency investigators reporting information used by agency attorneys).

²⁰⁴ Tax Analysts, 117 F.3d at 619-20.

²⁰⁵ See FOIA Update, Spring 1994, at 3-6 ("OIP Guidance: Applying the 'Foreseeable Harm' Standard Under Exemption Five") (pointing out that attorney-client privilege can be waived with consent of client agency).

²⁰⁶ See Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977); see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("To decide [whether a recognized privilege should be abandoned] in a FOIA case would be inappropriate, as Exemption 5 requires the application of existing rules regarding discovery, not their reformulation.").

Enclosure 2

EXEMPTION 5

disclosure under the FOIA.²⁰⁷ Because Rule 501 of the Federal Rules of Evidence provides for courts to create privileges as necessary, there exists the potential for "new" privileges to be applied under Exemption 5.²⁰⁸ However, one major caveat should be noted in the application of any discovery privilege under the FOIA: A privilege should not be used against a requester who would routinely receive such information in civil discovery.²⁰⁹

The Supreme Court in Federal Open Market Committee v. Merrill²¹⁰ found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.²¹¹ The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."²¹²

This harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.²¹³ Based upon this underlying theory, there is nothing in Merrill to prevent it from being read more expansively to protect the government from competitive disadvantage outside of the contract setting, as the issue in Merrill was not presented strictly within such a

²⁰⁷ See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983).

²⁰⁸ See Trammel v. United States, 445 U.S. 40, 47 (1980); cf. Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 571-73 (E.D. Mo. 1991) (recognizing "ombudsman privilege" under Rule 501 of Federal Rules of Evidence) (non-FOIA case); Shabazz v. Scutt, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (same) (non-FOIA case).

²⁰⁹ See, e.g., United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988) (presence report privilege, designed to protect report's subject, cannot be invoked against him as first-party requester); cf. Badhwar, 829 F.2d at 184 ("Exemption 5 requires application of existing rules regarding discovery, not their reformulation.").

²¹⁰ 443 U.S. 340 (1979).

²¹¹ Id. at 360.

²¹² Id. at 363.

²¹³ Taylor Woodrow Int'l. Ltd. v. United States, No. 88-429, slip op. at 5-7 (W.D. Wash. Apr. 6, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).

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Minerals Management Service
Royalty Valuation Division
P.O. Box 25165, Mail Stop 3150
Denver, Colorado 80225
FAX: (303) 275-7227

FAX COVER SHEET

**To establish and communicate the proper value of mineral production from Federal and Indian lands*

Date: 4/8

To: KEN VOGEL

Division/Company: _____

Phone: _____

FAX: 231-3362

From: DGT

Phone: _____

Comments: REFUSED COUNTER NEGOTIATE

Division:		Oil and Gas Valuation Branch:	
Deborah Gibbs Tschudy, Chief	(303) 275-7200	Martin Grieshaber, Chief	(303) 275-7240
Shelia Dean, Secretary	(303) 275-7201	Loretta Stockton, Secretary	(303) 275-7241
Economic Valuation Branch:		Section I:	
Dave Hubbard, Chief	(303) 275-7260	Theresa Walsh Bayani, Chief	(303) 275-7247
Mary Reynolds, Secretary	(303) 275-7259	Section II:	
Section I:		Rich Adamski, Chief	(303) 275-7242
Jim Morris, Chief	(303) 275-7213	Solid Minerals Valuation Branch:	
		Herb Wincentzen, Chief	(303) 275-7210
		Glenda Simpson, Secretary	(303) 275-7214
		Section I:	
		John Hovanec, Chief	(303) 275-7212

Number of pages including this cover _____

BILL FOR COLLECTION

Bill No. 99-3020-008

Make Remittance Payable to: DOI/Minerals Management Service Date: 11-10-98

Mail Payment to: F&AMD, 381 Elden Street, Mail Stop 2300, Herndon, Virginia 20170-4817

Payor:

Mr. Dow L. Campbell
Marathon Oil Company
539 South Main Street
Findlay, Ohio 45840-3295

RE: FOIA Request No. 99-006-0

Amount of Payment \$ _____

Fees charged under the Freedom of Information Act:

Date	Description	Qty	Unit Price		Amount	
			Cost	Per		
	Professional Support		\$18.60/hr.			
	Clerical Support		\$ 9.20/hr.			
11-10	Photocopies	530	\$ 0.13/pg.		68	90
	CPU Time		\$35.00/minute \$25.00/minimum			
	Tape/Cartridge*		\$25.00/ea.			
	Less Credit for Returned Tape*		(\$25.00)/ea.			
11-10	Due Date: 12-11-98					
<p>Note: A one-time \$35.00 administrative charge, plus a .42 percent late charge of \$0.29 for each 30-day period or portion thereof, will be assessed for overdue bills.</p> <p>*Magnetic tapes may be returned for a credit toward your next request. However, we will not process a cash refund.</p>						
AMOUNT DUE THIS BILL					\$68	90

APPROPRIATION NUMBER 142419.1