To: Reynolds, Rebekah[Reynolds.Rebekah@epa.gov]; Daugherty, Steven A CIV NAVFAC Pacific, 09C[(b) (6) [redacted]
Cc: Viola, Dana M O (dviola@honolulu.gov)[dviola@honolulu.gov]; Kelly, Kathleen[kkelly@honolulu.gov]; Wade.H.Hargrove@hawaii.gov[Wade.H.Hargrove@hawaii.gov]; Yee, Corinne S CIV NAVFAC HAWAII[(b) (6) [redacted]
From: Dragna, James J.
Sent: Mon 11/23/2015 11:11:00 PM
Subject: RE: Non-Disclosure Issues

Thanks Rebekah.

We received Steven's comments and we are going to be chatting internally soon. I will let you know whether a call would be helpful once we circle back with the client.

Jim

James J. Dragna
Morgan, Lewis & Bockius LLP
355 South Grand Avenue, Suite 4400 | Los Angeles, CA 90071-3106
Direct: +1.213.680.6436 | Main: +1.213.680.6400 | Fax: +1.213.680.6499
jim.dragna@morganlewis.com | www.morganlewis.com
Assistant: Diane Abeyta | +1.213.680.6601 | diane.abeyta@morganlewis.com

-----Original Message-----
From: Reynolds, Rebekah [mailto:Reynolds.Rebekah@epa.gov]
Sent: Monday, November 23, 2015 3:06 PM
To: Daugherty, Steven A CIV NAVFAC Pacific, 09C; Dragna, James J.
Cc: Viola, Dana M O (dviola@honolulu.gov); Kelly, Kathleen; Wade.H.Hargrove@hawaii.gov; Yee, Corinne S CIV NAVFAC HAWAII
Subject: RE: Non-Disclosure Issues

Hi Jim,

I just wanted to let you know that I'd be happy to reach out to the Navy and DOH to put together a conference call this afternoon to answer any remaining questions you might have regarding the non-disclosure/non-conflict of interest form.

Although the regulatory agencies would value BWS's technical input in the meetings next week, if BWS is not willing to sign these forms, we will look for other opportunities to solicit input from your client.

Best,

Rebekah Reynolds
Assistant Regional Counsel
Office of Regional Counsel
Environmental Protection Agency - Region 9
(415) 972-3916

-----Original Message-----
From: Daugherty, Steven A CIV NAVFAC Pacific, 09C [(b) (6) [redacted]]
Sent: Friday, November 20, 2015 4:17 PM
To: Dragna, James J.
Cc: Viola, Dana M O (dviola@honolulu.gov); Kelly, Kathleen; Reynolds, Rebekah;

Wade.H.Hargrove@hawaii.gov; Yee, Corinne S CIV NAVFAC HAWAII
Subject: RE: Non-Disclosure Issues

Jim,

I have reviewed the draft memorandum that you provided on 18 November as a proposed alternative to the Certificate of Non-Disclosure and Conflict of Interest Statement (NDA) provided to the Board of Water Supply on 9 November, and have discussed with my clients and contracting officers. After a thorough review of the issue, we are unable to agree with your suggested approach or with the relaxed substantive standards reflected in your proposed guidance which we feel would constrain full and open technical dialog in the scoping process.

The NDA that we provided is designed to ensure that each BWS employee who serves as a technical advisor or consultant on matters related to the implementation of the Red Hill Administrative Order on Consent (AOC) is aware of and intends to comply with the requirements of the Procurement Integrity Act and implanting regulations as well as the requirements of the AOC. The provided NDA reflected our attempt to simplify the NDAs and other agreements required of our own employees and contractors. We feel that this individual understanding and commitment is vital to the integrity of the procurement process and to successful implementation of the AOC, especially for individuals who do not routinely participate in such processes.

While we have agreed to a guidance approach for the regulatory agencies; we do not feel such an approach is appropriate or adequately enforceable for a semi-autonomous non-regulatory entity for several reasons:

. Federal regulatory agencies are subject to the same requirements of the Procurement Integrity Act and Federal Conflict of Interest Statutes and Regulations as the Navy and DLA regardless of whether an NDA is signed.

. Federal and State Regulatory agencies have routine access to many otherwise privileged federal records under numerous environmental statutes and have demonstrated histories of compliance with statutory and regulatory limitations, including HRS 342L-15, and HRS 92F-13, on their use and disclosure of such information.

. Federal and State Regulatory Agencies are bound by the terms of the AOC executed by the Parties.

. BWS is responsible for managing, controlling, and operating the waterworks for the purpose of supplying water to the public on Oahu. It is not a regulatory agency, does not routinely have access to federal documents, does not have the same direct statutory and regulatory restrictions on use and disclosure of information that are applicable to federal and state regulatory agencies, and is not directly bound by the requirements of the AOC.

We also feel that the substantive provisions of your suggested guidance which attempt to more precisely define what data are protectable and which purport to allow direct release of privileged information by the BWS is inappropriate. The AOC defines the types of information that may be subject to a privilege claim and provides a mechanism for the Parties to the AOC to resolve any dispute regarding whether a claim is properly asserted. As discussed in our teleconference on Monday, under our NDA, for written communications, only information that is marked as privileged would be subject to disclosure limitations, and the Navy/DLA would be amenable to widespread release of some otherwise privileged source selection information where it is determined that release will not threaten the integrity of the government procurement process, however, any release of information marked as privileged would need to be arranged by the Parties. We cannot agree to any process that allows a non-party to make decisions regarding release of information that is marked as privileged under the AOC.

We hope that your clients will re-review our NDA in light of our earlier discussions. In order to ensure that base access can be arranged in time for the next round of scoping meetings we will need your list of proposed participants along with driver's license info for each participant and signed NDA's no later than close of business on Monday November 23.

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC
(b) (6) [redacted]

-----Original Message-----
From: Dragna, James J. [mailto:jim.dragna@morganlewis.com]
Sent: Wednesday, November 18, 2015 2:02 PM
To: Reynolds, Rebekah; Daugherty, Steven A CIV NAVFAC Pacific, 09C
Cc: Viola, Dana M O (dviola@honolulu.gov); Kelly, Kathleen; Dragna, James J.
Subject: [Non-DoD Source] RE: Non-Disclosure Issues

Hi.

Attached for your reading pleasure is a draft memorandum that would govern the confidentiality obligations of the Honolulu Board of Water Supply associated with its participation as an "SME" in issues relating to the Red Hill RCRA AOC. Based on our review of the statutory obligations imposed upon the Board by State law, the documents that you have provided, and our discussion on Monday, we believe that the memorandum addresses our respective concerns over confidentiality. It is contemplated that the memorandum would be provided to each and every Board employee and member who will be working on the Red Hill matter, or who will otherwise have access to Red Hill information. It is also contemplated that the Board would require that each of its contractors working on the matter sign a NDA similar to the one that was provided prior to our call on Monday.

We are available to discuss the memorandum at your convenience.

Thank you,

Jim

James J. Dragna

Morgan, Lewis & Bockius LLP

355 South Grand Avenue, Suite 4400 | Los Angeles, CA 90071-3106

Direct: +1.213.680.6436 | Main: +1.213.680.6400 | Fax: +1.213.680.6499

jim.dragna@morganlewis.com <mailto:jim.dragna@morganlewis.com> | www.morganlewis.com

<http://www.morganlewis.com/>

Assistant: Diane Abeyta | +1.213.680.6601 | diane.abeyta@morganlewis.com
<mailto:diane.abeyta@morganlewis.com>

From: Reynolds, Rebekah [mailto:Reynolds.Rebekah@epa.gov]
Sent: Monday, November 16, 2015 2:15 PM
To: Dragna, James J.; karen.glasgow@sol.doi.gov
Cc: Wade.H.Hargrove@hawaii.gov; Daugherty, Steven A CIV NAVFAC Pacific, 09C
Subject: Non-Disclosure Issues

Hi Jim and Karen,

As promised, here is my contact information. Steve Daugherty's email is above and he can be reached at (808) 472-1331. As I mentioned on the phone earlier today, my clients would really like the issues regarding disclosure to be worked out so that the SMEs can participate in the scoping meetings at the end of the month. To that end, I'd like to propose that we, along with Wade and Steve who are copied on this email, speak tomorrow. I'm available anytime except 11-12 pst.

One issue that was raised on the phone that we should discuss tomorrow is whether the BWS's municipal council could issue a memo to its employees reminding them of its obligations with respect to confidentiality and conflict of interest. On the call, Steve identified some criteria that needs to be met in order for this approach to work. I know that a major component for the Navy's contracting office is that the confidentiality/conflict of interest requirements are enforceable. I think it would be helpful if Steve could come to the call with a good sense of the criteria that the BWS needs to meet in order for this mechanism to work and Jim can come to the call with the reasons why BWS can meet those criteria.

Jim also suggested that the BWS continues to have questions about the scope of the information that will be labeled as confidential and we can work through those remaining questions as well.

Best,

Rebekah Reynolds

Assistant Regional Counsel

Office of Regional Counsel

Environmental Protection Agency - Region 9

(415) 972-3916

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