



United States Department of the Interior

FISH AND WILDLIFE SERVICE

5275 Leesburg Pike, MS: IRTM
Falls Church, VA 22041



IN REPLY REFER TO:
FWS-2020-002484

January 15, 2021

Sam Ritzman
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
Via email: foia@democracyforward.org

Dear Mr. Ritzman:

This is in response to your Freedom of Information Act (FOIA) request dated February 25, 2020, and assigned it control number DOI-FWS-2020-002484. Please cite this number in any future communications with our office regarding your request. Your request is seeking:

- A copy of the Office of the Solicitor opinion referred to in Secretary Bernhardt's November 4, letter in which the Office of the Solicitor determined that the exemption in section 6 is not limited to shoreline stabilization projects occurring within the System
- All records concerning the Coastal Barrier Resources Act, Section 6(a)(6)(G) exception, including but not limited to, all records containing any of the search terms from the below list:
 - *6(G)*
 - *6(a)(6)(G)*
 - *exception AND "Section 6" (or "Sec. 6")*
 - *exemption AND "Section 6" (or "Sec. 6")*
 - *Morgenweck*
 - *FWS.CW.0380*
 - *shoreline stabilization*

The date range for this request is December 1, 2018 to the date the search is conducted.

We are providing 632 pages. Of these pages, 115 pages are being withheld in part. We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure. Portions of this document is being withheld under FOIA Exemptions 5 and 6. We are continuing to process records responsive to item two of your request.

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552 (b)(5); see *Nat’l Labor Relations Bd. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

The deliberative process privilege protects the decision-making process of government agencies and encourages the “frank exchange of ideas on legal or policy matters” by ensuring agencies are not “forced to operate in a fish bowl.” *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (internal citations omitted). A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) “assure that subordinates . . . will feel free to provide the decision maker with their uninhibited opinions and recommendations;” (2) “protect against premature disclosure of proposed policies;” and (3) “protect against confusing the issues and misleading the public.” *Coastal States Gas Corp. v. United States Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative process privilege protects materials that are both pre-decisional and deliberative. The privilege covers records that “reflect the give-and-take of the consultative process” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.*

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both pre-decisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency’s deliberative processes; expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The attorney-client privilege protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice” and is not limited to the context of litigation. *Mead Data Cent, Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information. *See Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 114-15 (D.D.C. 2005).

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, related to legal matters for which the client sought professional legal assistance and services. Additionally, the Bureau employees who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice. Finally, the Bureau has held this information confidential and has not waived the attorney-client privilege.

The 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. The materials being withheld under commercial privilege of Exemption 5 are conference call numbers and passcodes. The sensitivity and disclosure of the conference numbers and passcodes would inflict harm upon the Government and its normal course of business.

Exemption 6 of the FOIA allows an agency to withhold “personnel and medical files and similar files the disclosure of which 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. *See United States Dept of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-75 (1989).

Under the FOIA, “the only relevant public interest” to consider under the exemption is “the extent to which the information sought would ‘shed light on an agency’s performance of its statutory duties’ or otherwise let citizens ‘know what their government is up to.’” *United States Dept. of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495-96 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775). The burden is on the requester to establish that disclosure would serve the public interest. *See National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004). When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public. *See Reporters Comm.*, 489 U.S. at 771.

The information that has been withheld under Exemption 6 consists of personal information including: personal personnel information.

If you have any questions regarding this request, please contact Maritiza Harris, FWS Government Information Specialist, via email at FWHQ_FOIA@fws.gov or by mail at U.S. Fish and Wildlife Service; ATTN: Maritiza Harris; 5275 Leesburg Pike; MS: IRTM; Falls Church, VA 22041.

Sincerely,

**MARITIZA
HARRIS**

Digitally signed by
MARITIZA HARRIS

Date: 2021.01.15
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for Cathy Willis
FWS FOIA Officer