



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE Mountain-Prairie Region

IN REPLY REFER TO:  
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August 12, 2015

Via email: [info@peer.org](mailto:info@peer.org)

Paula Dinerstein  
PEER  
2000 P Street, NW, Suite 240  
Washington, DC 20036

REF: FWS-2014-01260  
Appeal Number 2015-016

Dear Ms. Dinerstein:

This letter is in response to your November 6, 2014, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”), which the Department assigned as Appeal Number 2015-016. Your appeal concerns your August 8, 2014, FOIA request (FWS-2014-01260) to the Fish and Wildlife Service (“FWS”) that sought “[c]opies of notes of all meetings concerning the preparation of the [Environmental Assessment (“EA”) for the Draft Fiscal Year 2013-2016 Annual Funding Agreement (“AFA”) between the Department and the Confederated Salish and Kootenai Tribes of the Flathead Reservation].” In response to the FOIA request, the FWS withheld in full, pursuant to FOIA exemption (5), specifically the deliberative process and attorney-client privileges, forty-five (45) pages that we determined were responsive to your FOIA request.

As directed, the FWS conducted another review of the withheld pages in response to your appeal, and identified portions that are not protected from disclosure or that we no longer object to releasing.

Accordingly, enclosed you will find two (2) documents (four (4) pages) which are released in full; and two documents (forty-one (41) pages) which contain material the FWS continues to object to disclosing because we have determined that the information is protected from disclosure by the deliberative process privilege of exemption 5, and the attorney-client privilege of exemption 5.

### **Exemption 5 - Inter-Agency or Intra-Agency Memorandums or Letters Which Would Not Be Available By Law**

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. We are withholding in full and in part under Exemption 5 because they qualify to be withheld under the deliberative process and attorney-client privilege.

#### Deliberative Process Privilege

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 predecisional 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 predecisional 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 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.

#### Attorney-Client Privilege

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. It also encompasses opinions given by attorneys to their clients based on client-supplied facts. Additionally, the Service 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 Service has held this information confidential and has not waived the attorney-client privilege.

If you are not satisfied with this response, please refer back to the Department's appeal decision for further rights.

If you have any questions you may contact me at 303-236-4325 or by email at [Cathy\\_Willis@fws.gov](mailto:Cathy_Willis@fws.gov).

Sincerely,



Cathy Willis  
Region 6 FOIA Office

Attachments