



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE Mountain-Prairie Region

IN REPLY REFER TO:  
BA/FOIA  
MS 60180

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134 Union Blvd.  
Lakewood, Colorado 80228-1807

June 9, 2015

Paula Dinerstein  
PEER  
2000 P Street, NW, Suite 240  
Washington, D.C. 20036

REF: FWS-2014-01301

Dear Ms. Dinerstein:

This letter responds to your Freedom of Information Act (FOIA) request dated August 26, 2014, in which you requested:

*Documents related to the decision to negotiate a Fiscal Year 2013-2016 Annual Funding Agreement (AFA) between the United States Department of the Interior and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT). Specifically, we request the following:*

- *All correspondence and communications:*
  - 1) *among FWS Region 6 officers and employees and*
  - 2) *between Region 6 officers and employees and FWS Headquarters or Department of Interior Headquarters officers and employees concerning or reflecting the need for, and any directive or guidance or discussion of entering negotiations for, an AF A with the CSKT concerning the National Bison Range or National Bison Range Complex.*
  
- *All correspondence and communications which reflect who determined that negotiations for a new AF A with the CSKT should be entered.*

On April 6, 2015, this request was expanded to include any records related to the AFA until September 2014.

On June 3, 2015, we provided a partial response to your request. In that response we stated documents were still under review. We have completed our review and enclosed is one CD containing eleven (11) documents, which are being released to you in part. Portions of these materials are being withheld under 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

*Freedom of Information Act*

that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. We are withholding in part under Exemption 5 because they qualify to be withheld under the deliberative process privilege and attorney-client privilege.

*Deliberative Process Privilege (7 documents in part)*

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 decisionmaker 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 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.

*Attorney-Client Privilege (4 documents in part)*

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.

Sharon Brenna, Attorney-Advisor, Rocky Mountain Regional Office, Office of the Solicitor was consulted in this determination.

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, your appeal must be received no later than 30 workdays from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the Service's response is in error. You must also include with your appeal copies of all correspondence between you and Service concerning your FOIA request, including your original FOIA request and Service's response. Failure to include with your appeal all correspondence between you and Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior  
Office of the Solicitor  
1849 C Street, N.W.  
MS-6556 MIB  
Washington, DC 20240  
Attn: FOIA/Privacy Act Appeals Office  
Telephone: (202) 208-5339  
Fax: (202) 208-6677  
Email: [FOIA.Appeals@sol.doi.gov](mailto:FOIA.Appeals@sol.doi.gov)

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - OGIS  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
*Freedom of Information Act*

Web: <https://ogis.archives.gov>

Telephone: 202-741-5770

Fax: 202-741-5769

Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This is our final response and closes your request FWS-2014-01301. If you have any questions on your request you may contact me at 303-236-4473 or by email at [Stacey\\_Cummins@fws.gov](mailto:Stacey_Cummins@fws.gov).

Sincerely,



Stacey Cummins  
Region 6 FOIA Office