



United States Department of the Interior  
FISH AND WILDLIFE SERVICE  
Mountain-Prairie Region



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BA/FOIA

April 19, 2016

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

Jeff Ruch  
Executive Director  
Public Employees for Environmental Responsibility  
962 Wayne Street, Suite 610  
Silver Spring, MD 20910

REF: FWS-2016-00479

Dear Mr. Ruch:

This is in response to your Freedom of Information Act (FOIA) request (FWS-2016-00479) dated February 18, 2016 for the following:

- 1. A copy of the proposed transfer legislation, outline of its provision or any other summary or description provided by FWS to the CSKT or to any member of Congress or staff of any member of Congress;*
- 2. A copy of the decision document authorizing FWS to state its support for this transfer legislation, together with any records detailing the rationale for that decision;*
- 3. Documents reflecting FWS compliance with the National Environmental Policy Act requirements relating to recommendations or proposals for legislation which may have a significant impact on the human environment;*
- 4. Documents describing or discussing the future role that the FWS envisions for the National Bison Range and the bison on the Refuge for bison conservation in the U.S. after transfer to the CSKT;*
- 5. Records describing the "landscape-scale conservation efforts" referenced in both emails to which the FWS now intends to shift its focus; and*
- 6. Documents relating to the future placements for FWS employees now assigned to the National Bison Range, together with any information provided these employees about referenced "options and opportunities" for their future employment in FWS.*

Enclosed you will find fourteen (14) documents ( 119 pages) which are released in their entirety, and fourteen (14) documents (38 pages) which are being withheld in part under exemption 5. We are withholding four (4) documents (12 pages) in full under 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 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.

This decision was made in consultation with Lori Caramanian, Office of Solicitor, Rocky Mountain Region, and Department of the Interior.

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal "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 Fish and Wildlife Service's (Service) response is in error. You must also include with your appeal copies of all correspondence between you and the 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

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)  
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 FOIA. See 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of 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 completes our response and closes your request FWS-16-00479. If you have any questions about our response to your request, you may contact me by phone at 303-236-4325, by email at [Cathey\\_Willis@fws.gov](mailto:Cathey_Willis@fws.gov), or by mail at 134 Union Blvd, Lakewood, Colorado 80225.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cathy Willis', written in a cursive style.

Cathy Willis  
FOIA Officer

Enclosure