



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



IN REPLY REFER TO:  
FWS/FOIA

May 19, 2020

Via email: [bishop@westernlaw.org](mailto:bishop@westernlaw.org)

Matthew Bishop  
Western Environmental Law Center  
103 Reeder's Alley  
Helena, MT 59601

REF: FWS-2018-00329

Dear Mr. Bishop:

This letter is in regard to your Freedom of Information Act (FOIA) request dated January 3, 2018, generally seeking “*any and all documents and information pertaining to the U.S. Fish and Wildlife Service’s (Service’s) final Species Status Assessment (SSA) for Canada lynx referenced in the Service’s January 1, 2018 status report filed in Friends of the Wild Swan v. Ashe, Civ. No. 13-cv-57-DWM (D. Mont. 2014)(Doc. 53).*”

On January 2, 2020, we sent you our final response. After that response, we discovered documents responsive to your request that were not processed. We are amending our final response and enclosing three-hundred fourteen (314) documents, which are being withheld under the following FOIA Exemptions:

Three-hundred sixty-one (361) documents are being withheld in full or in part under Exemption 5. 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). 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 the documents in full or in part under Exemption 5 because they qualify to be withheld under the deliberative process privilege, the attorney-client privilege and the commercial information privilege as described below.

#### *Deliberative Process Privilege (15 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 fishbowl. 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.

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.

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 the release of these drafts 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 deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

*Attorney-Client Privilege (121 documents in full; 15 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. 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.

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.

*Commercial Information Privilege (202 pages in part, 3 documents also exemption 6)*

When the government enters the marketplace as an ordinary commercial buyer or seller, the government’s information is protected under the commercial information privilege if it is sensitive information not otherwise available, and disclosure would significantly harm the government’s monetary functions or commercial interests. The theory behind the privilege is that the government may be placed at a competitive disadvantage or the consummation of a contract may be endangered if confidential information generated by the government is disclosed during the process of awarding the contract.

The information withheld under this privilege reflects information concerning thoughts and determinations of the employees regarding the property. Disclosure of this information to the public would allow other parties who may be interested in purchasing the property to know how the Service values it, thereby allowing them to weaken the government’s negotiating position. Disclosure of

conference lines and passcodes would harm the government's monetary functions and commercial interests.

Exemption 6 - Personnel and Medical Files and Similar Files (22 documents in part). Exemption 6 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\(b\)\(6\)](#). We are withholding twenty-two (22) documents in part under Exemption 6.

The phrase "similar files" covers any agency records containing information about a particular individual that can be identified as applying to that individual. 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.

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. The burden is on the requester to establish that disclosure would serve the public interest. 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.

The information that has been withheld under Exemption 6 consists of employee's personal email addresses and private individuals' address and contact information, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6.

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.

Additionally, included in this response are twenty-one (21) pages that contain contractor's commercial confidential information, which was not processed. On May 12, 2020, we inquired as to your interest in receiving this information and you responded that you were not interested. As such, we did not process this information (it is redacted in gray) as it is not responsive to your request.

Stacey Cummins, FWS FOIA Coordinator, is responsible for this partial denial. Kate Williams-Shuck, Attorney-Advisor, in the Office of the Solicitor was consulted.

You may seek dispute resolution services from our FOIA Public Liaison, Cindy Cafaro, Acting Public Liaison, (888) 603-7119.

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.

You may also 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 90 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 the Service concerning your FOIA request, including your original FOIA request and the Service's response. Failure to include with your appeal all correspondence between you and the 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)

If you have any questions, you may contact me by phone at 303-236-4473, by email at [Stacey\\_Cummins@fws.gov](mailto:Stacey_Cummins@fws.gov), or by mail at the following address: U.S. Fish and Wildlife Service; ATTN: FOIA Office; 5275 Leesburg Pike; MS: IRTM; Falls Church, VA 22041.

Sincerely,

Stacey Cummins  
FWS FOIA Coordinator

Enclosure