



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/NWRS-RC/FOIA/066638
FWS-2017-00804

SEP 26 2017

Mr. Scott Nicol
Sierra Club Borderlands Team
7300 N. 32nd
McAllen, Texas 78504

Dear Mr. Nicol:

This is in response to your Freedom of Information Act (FOIA) request dated May 17, 2017, in which you requested the following:

“... documents and information regarding the anticipated and observed environmental impacts of border fencing (also referred to as the “border wall” and “tactical infrastructure” and “levee-wall”) in the Border Patrol’s Rio Grande Valley (RGV) Sector, upon the Lower Rio Grande Valley (LRGV) National Wildlife Refuge and Santa Ana National Wildlife Refuge in South Texas.”

Your response was assigned tracking number FWS-2017-00804. The U.S. Fish and Wildlife Service (Service) compiled and reviewed 74 documents responsive to this request. Of these documents, we withheld in part (via redaction) or in full, four documents pursuant to FOIA Exemption 5, as described below. The redacted and full release documents are provided to you on the enclosed compact disc.

Pursuant to the attorney-client privilege of Exemption (b)(5), we are withholding one email thread (consisting of 14 pages) in full. Under Exemption 5, agencies may 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)). As such, Exemption 5 “exempt[s] those documents normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears Roebuck & Co., 421 U.S. 132 (1975). This exemption incorporates several disclosure privileges contained in the civil discovery context, including the 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. 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 the Service's attorney and Service employees seeking professional legal assistance and services. It also encompasses opinions given by the Service's attorney to employees based on employee-supplied facts. The Service's employees who communicated with the attorney regarding this information were clients of the attorney at the time the information was generated and the attorney was acting in his capacity as a lawyer at the time they communicated legal advice. Finally, the Service has held this information confidential and has not waived the attorney-client privilege.

We have redacted conference call-in numbers and passcodes from three documents, pursuant to Exemption 5, confidential commercial information privilege. 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.

The information withheld under this privilege consists of active conference call telephone numbers and access codes, which could be used to conduct conference calls by parties outside the government or used to call in to monitor internal Government conversations. We are withholding it because disclosure to the public would chill communications between Federal employees and harm the Government's ability to exchange information.

Because releasing this information would significantly harm the Government's financial interest by publicizing sensitive information, the Service is withholding it in accordance with FOIA Exemption 5.

Some of the documents we are releasing (i.e. draft and/or final briefing papers, draft talking points and/or discussions among staff offering suggestions and/or discussing potential courses of action, etc.), technically meet the requirements to be withheld under the deliberative process privilege of FOIA Exemption 5 (5 U.S.C. §552(b)(5)); however, after consulting with our legal counsel, and carefully considering the parties involved, we believe there are is no harm in releasing this information and no other exemptions apply, i.e. there are no institutional, commercial, and/or personal privacy interests at risk with the release of these documents. Therefore, we are releasing these documents to you in full as discretionary release. Please note, that in exercising administrative discretion, the Service does not waive its ability to invoke applicable FOIA exemptions for any arguably similar information in future requests.

This response to your request was made in consultation with Justin Tade, Attorney-Advisor, Office of the Solicitor, and U.S. 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 90 workdays from this letter's date. 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 erroneous. 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 rejecting 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 appeal information or clarification.

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

Also, please note 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 litigation alternative. Using OGIS services does not affect your right to pursue litigation and does not affect appeal filing timing with the Department's FOIA/Privacy Act Appeals Officer. 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
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

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You also may seek dispute resolution services from our FOIA Public Liaison, Carrie Hyde-Michaels, at 703-358-2521, or via email at carrie_hyde-michaels@fws.gov.

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

The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.45. If you have any questions concerning this response, please contact Assistant Refuge Supervisor, Monica Kimbrough, at 505-248-7419, or by email at monica_kimbrough@fws.gov.

Sincerely,

A handwritten signature in blue ink, consisting of a large loop followed by a series of smaller, connected strokes that end in a long, sweeping tail.

Regional Chief **Acting**
National Wildlife Refuge System

Enclosure (CD)

Mr. Scott Nicol

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cc: FOIA Coordinator, National Wildlife Refuge System, Albuquerque, New Mexico
Justin Tade, Office of the Solicitor, Albuquerque, New Mexico