



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/RC-NWRS/FOIA/067180
FWS-2017-01127/01128/01146 (Partial 1)

JAN 02 2018

Ms. Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, Oregon 97211-0374

Dear Ms. Townsend:

This is a partial response to your Freedom of Information Act (FOIA) requests dated July 18, 2017, in which you sought the following:

“... all records mentioning, including, and/or referencing a border wall, fence, levees, and/or barriers, including but not limited to meeting notes, presentations, maps, and/or inter-agency and intra-agency correspondence from January 19, 2017, to the date of this search.”

You requested the above information for six refuges in the Southwest Region. The tracking numbers for the three requests related to the Texas National Wildlife Refuges (NWRs); Lower Rio Grande Valley NWR, Laguna Atascosa NWR, and Santa Ana NWR are FWS-2017-01127, FWS-2017-01128, and FWS-2017-01146, respectively. We are providing a consolidated response to these three FOIA requests. Your requests were forwarded to the National Wildlife Refuge System (NWRS), Southwest Regional Office for processing. While we continue to review the records for this FOIA, we are releasing to you records produced for a similar FOIA request related to the Lower Rio Grande Valley and Santa Ana NWRs. 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 U.S. Fish and Wildlife Service's (Service) 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 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.

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 and does not affect the timing of filing an appeal 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

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 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.

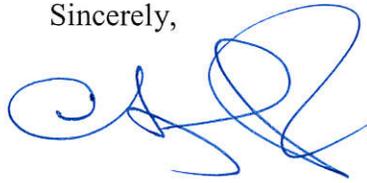
We will continue processing your pending Border Wall requests and provide a response as soon as possible. The fees associated with processing these requests have been waived in accordance with 43 CFR §2.45.

Ms. Margaret E. Townsend

4

If you have any questions or concerns regarding this request, 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 several loops and flourishes, positioned below the word "Sincerely,".

Regional Director

Enclosure: (CD)