



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/068204
FWS-2017-01025

JUN 05 2018

Mr. Brett Paben
Defenders of Wildlife
535 16th Street, Suite 310
Denver, Colorado 80202

Dear Mr. Paben:

This is a response to your Freedom of Information Act (FOIA) request dated July 19, 2017, in which you sought the following:

- “1. All records related to activities conducted on the Santa Ana National Wildlife Refuge (NWR) by Department of Homeland Security (DHS) and/or Customs Border Patrol (CBP);
2. All records related to any special use permit (SUP) or right-of-way issued to DHS and/or CBP for activities on the Santa Ana NWR;
3. All records related to any compatibility determination, or other finding concerning compatibility, regarding DHS and/or CBP activities on the Santa Ana NWR, including but not limited to those made pursuant to the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee, and its implementing regulations, 25 C.F.R. pts. 25-35;
4. All records related to any information or activities, including but not limited to analysis, documentation, decisions, and discussions, conducted pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* for DHS and/or CBP activities on the Santa Ana NWR;
5. All records related to any information or activities conducted pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, for DHS and/or CBP activities on the Santa Ana NWR;

6. All records related to any communications between the Service and DHS and/or CPB concerning the Santa Ana NWR; and,

7. All records related to any communications between the Service and the U.S. Army Corps of Engineers (Corps) regarding the activities of DHS and/or CBP activities on the Santa Ana NWR.”

Your request was assigned tracking number FWS-2017-01025 and forwarded to the National Wildlife Refuge System (NWRS), Southwest Regional Office for processing.

We also processed records for other border wall related requests for Santa Ana National Wildlife Refuge. The NWRS compiled and reviewed approximately 500 records. The partially redacted and full release documents from all related Texas border wall FOIAs are provided to you on the enclosed compact disc. Although the additional records were not specially requested, we believe they are reasonably related to the subject matter of your request. There are 181 records being referred and/or withheld in part or in full in accordance with FOIA Exemptions 5 (Attorney-Client Privilege), (Commercial Information Privilege), Exemption 6, and Exemption 7, as described below.

In our compilation and review of responsive records, we identified records that originated from or substantially concern other federal agencies. Ten records are being referred to the U.S. Army Corps of Engineers (USACE) and 81 records are being referred to Customs and Border Protection (CBP) for a release determination. USACE and CBP will issue a response directly to you. You do not have to contact the agencies at this time, but should you need to do so in the future, you may do so at:

U.S. Army Corps of Engineers
Galveston District
Attn: FOIA Officer
Jadwin Building
2000 Fort Point Road
Galveston, Texas 77553

U.S. Customs and Border Protection
Attn: FOIA Officer
1300 Pennsylvania Avenue NW
Washington, D.C. 20528

Exemption 5 (Attorney-Client Privilege)

Pursuant to the attorney-client privilege of Exemption (b)(5), we are withholding 22 records 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.

Exemption 5 (Commercial Information Privilege)

We have redacted conference call-in numbers and passcodes from 15 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.

Exemption 6

Portions of 46 records have been redacted pursuant to Exemption (b)(6) of the FOIA. Under Exemption 6, agencies may withhold information or records on individuals contained in "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)). The withheld material includes personal contact information (e.g. personal cell and personal email addresses), as well as the names of private land owners. We believe the privacy interest in this information outweighs the public interest, as this information does not directly reveal government operations or activities. Therefore, we have determined the balancing of the interest weighs in favor of non-disclosure of this information under FOIA Exemption 6.

Exemption 7

Finally, we have redacted the names, images and/or contact information of law enforcement personnel from seven documents pursuant to Exemption (b)(7)(C). Exemption 7(C) protects law enforcement records if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. For the materials that have been withheld under 7(C), we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency's performance of its statutory duties.

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.

Additionally, 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:

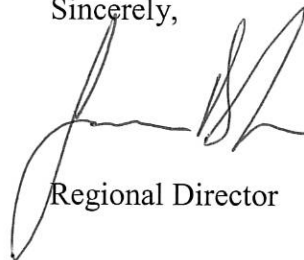
Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov, Web: <https://ogis.archives.gov>
Telephone: 202-741-5770/ Fax: 202-741-5769 /Toll-free: 1-877-684-6448

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.

This completes the Southwest Region's response. 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 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,



Regional Director Acting DRD

Enclosure: (CD)