



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240



March 21, 2024

Letter via email at KSchmidt@afphq.org

Kevin Schmidt
Director of Investigations
Americans for Prosperity Foundation

Dear Mr. Schmidt:

We are writing to respond to your Freedom of Information Act (FOIA) request, dated September 13, 2023, and assigned it control number DOI-FWS-2023-005884 (FOIA litigation 23-cv-3241). Please cite this number in any future communications with our office regarding your request. You requested communications of Martha Williams, Cynthia Martinez, and Sara Boario related to certain combinations of search terms in connection with the Arctic National Wildlife Refuge.

Response

For this second interim response we processed 306 pages, and our determination is as follows: 293 pages are being released in full, five (5) pages are withheld in part and 8 pages are withheld in full under FOIA Exemption 5 which 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 these pages in part and in full under Exemption 5 because they qualify to be withheld both because they meet the Exemption 5 threshold of being inter-agency or intra-agency and under the following privileges:

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. A number of policy purposes have been attributed to the deliberative process privilege, such as: (1) assuring that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protecting against premature disclosure of proposed policies; and (3) protecting against confusing the issues and misleading the public.

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.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional 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 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 Work-Product Privilege

As incorporated into Exemption 5, the attorney work-product privilege protects from disclosure any materials prepared by or for a party or its representative (including their attorney, consultant, surety, indemnitor, insurer, or agent) in anticipation of litigation or for trial. The privilege applies once specific claims have been identified that make litigation probable; the actual beginning of litigation is not required. Its purpose is to protect the adversarial trial process by insulating litigation preparation from scrutiny, as it is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case. The privilege extends to administrative, as well as judicial proceedings. Once the determination is made that records are protected from disclosure by the attorney work-product privilege, the entire contents of those records are exempt from disclosure under FOIA. The materials that have been withheld under Exemption 5 under the attorney work-product privilege were prepared by or for a Departmental attorney or Department of Justice attorney in reasonable anticipation of litigation and they reflect [NOTE: Specifically describe. For example, "the parties' pre-litigation thoughts and evaluation of your request that you be compensated for damages to your property that occurred in connection with the Smith fire."]. Thus, we conclude that the withheld materials are protected in full from disclosure by the attorney work-product privilege of Exemption 5.

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 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 FWS 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 FWS has held this information confidential and has not waived the attorney-client privilege.

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.

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

We are still reviewing additional records responsive to your request.

Because this is an interim response to your request, we will provide notice of your appeal rights in our final response letter.

For additional information, please contact Brian Levy, Assistant U.S. Attorney, U.S. Department of Justice by phone at (202) 252-6734.

Sincerely,

Stacey Cummins
FWS FOIA Coordinator