



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240



March 7, 2023

VIA Email: danb@fergusonlawmt.com

Daniel Brister
Save the Yellowstone Grizzly
P.O. Box 8359
Missoula, MT 59807

REF: DOI-FWS-2022-000971

Dear Mr. Daniel Brister,

The United States Fish and Wildlife Service (FWS) FOIA office received your Freedom of Information Act (FOIA) request, dated November 18, 2022, and assigned it control number DOI-FWS-2022-000971. Please cite this number in any future communications with our office regarding your request. You generally requested records related to the grizzly bear sow and two cubs killed in Tetonia, Idaho on November 9 and 10, 2022.

Fee Category and Fee

We have classified you as an “other-use” requester. As such, we may charge you for some of our search and duplication costs, but we will not charge you for our review costs; you are also entitled to up to 2 hours of search time and 100 pages of photocopies (or an equivalent volume) for free. See [43 C.F.R. § 2.39](#).

You have asked us to waive the fees for processing your request. Our FOIA regulations state that bureaus will waive, or partially waive, fees if disclosure of all or part of the information is:

- (1) In the public interest because it is likely to contribute significantly to public understanding of government operations or activities, and
- (2) Not primarily in your commercial interest.

See [43 C.F.R. § 2.45\(a\)](#). Our FOIA regulations also provide four specific criteria that are used to determine whether these two requirements are met. See [43 C.F.R. § 2.48\(a\)](#). Your request meets the requirements, and your fee waiver has been granted.

Response

For this partial response, we processed 76 responsive documents (174 pages) and our release determination is as follows: 57 documents (119 pages) are released in full, 16 documents (47 pages) are released in part, and 3 documents (8 pages) are withheld in full. We are continuing to review additional records that are responsive to your request.

The documents withheld in part and in full are being withheld under the following FOIA Exemptions:

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 fifty-six (56) pages in part and 2073 pages 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 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. We are withholding 8 documents (24 pages) in part under Exemption 5. In addition, we are withholding 1 document (4 pages) in full.

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 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 function.

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

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. We are withholding 1 document (3 pages) in part under Exemption 5.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys, related to legal matters for which the client sought professional legal assistance and services. 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.

Exemption 6

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 7 documents (20 pages) in part under Exemption 6. In addition, we are withholding 2 documents (4 pages) in full under Exemption 6 and 7c & 7F.

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 personal information, personal names and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, you have not provided information that explains a relevant public interest under the FOIA in the disclosure of this personal information and 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 these individuals and we are withholding it under Exemption 6.

Exemption 7

Exemption 7 protects from disclosure “records or information compiled for law enforcement purposes” if the records fall within one or more of six specific bases for withholding set forth in subparts (A) through (F). 5 U.S.C. § 552(b)(7)(A)-(F). We are withholding this information in full under Exemption 7 because it is protected under the following subpart:

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.

7(F)

Exemption 7(F) protects law enforcement records if their release could reasonably be expected to endanger the life or physical safety of any individual. For the materials that have been withheld under 7(F), we have determined releasing them could reasonably be expected to endanger the life or physical safety of an individual.

Lydia Grimm, Attorney- Advisor with the Office of the Solicitor, was consulted in reaching this decision. Stacey Cummins, FWS FOIA Coordinator is responsible for this denial.

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

If you have any questions about our response to your request, you may contact me by email at stacey_cummins@fws.gov or by phone at 303-236-4473.

Sincerely,

Stacey Cummins
FWS FOIA Coordinator