



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/FOIA
DOI-FWS-2021-001256 (Final)

April 16, 2021

Ms. Rose Monahan
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, California 94602

Dear Ms. Monahan:

This responds to your Freedom of Information Act (FOIA) request dated October 22, 2020, in which you seek the following:

1. Plans or actions undertaken within the San Bernardino National Wildlife Refuge to relocate, preserve, or salvage endangered fish species;
2. Observed instances of environmental harm occurring within or directly adjacent to the San Bernardino National Wildlife Refuge as a result of border barrier and/or wall construction, including, but not limited to, fish kills, habitat destruction, loss of wildlife, and discharges of visibly dirty or otherwise contaminated water;
3. Water quantity and/or quality monitoring in ponds and wells located on the San Bernardino National Wildlife Refuge.
4. Communications between FWS employees, independent contractors, and/or representatives and U.S. Customs and Border Protection, the U.S. Army Corps of Engineers, and/or contractors (including, but not limited to, Southwest Valley Constructors, Kiewit, Logistics Management Institute, and Baker Engineering) employees, independent contracts, and/or representations regarding potential or observed impacts of border walls and roads on San Bernardino National Wildlife Refuge and adjacent lands
5. Communications between FWS employees, independent contractors, and/or representatives and U.S. Customs and Border Protection, the U.S. Army Corps of

Engineers, and/or contractors (including, but not limited to, Southwest Valley Constructors, Kiewit, Logistics Management Institute, and Baker Engineering) employees, independent contractors, and/or representations regarding any border wall design elements and/or mitigation to lessen adverse impacts on local wildlife.”

Your FOIA request was assigned tracking number DOI-FWS-2021-001256 and forwarded to the Southwest Region National Wildlife System for processing.

For this third and final response to your request, 97 records (consisting of approximately 326 pages) are provided to you with this letter.

Based on this office’s review, we reasonably foresee that disclosure of certain information in documents that fall under this request would harm an interest protected by one or more of the nine exemptions to the FOIA’s general rule of disclosure. Accordingly, from the responsive records, a portion of 94 records are partially redacted and four records are being withheld in full pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(c), and (b)(7)(e), as described below. The full release and partially redacted material are provided to you with this letter. pursuant to FOIA Exemption (b)(5) as described below.

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 one record in full (consisting of two pages) and three in part (consisting of 16 pages) in accordance with the attorney-client privilege of Exemption 5. 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 Federal 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 Federal 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 U.S. Fish and Wildlife Service (Service) has held this information confidential and has not waived the attorney-client 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. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect 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 deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested. None of the records here were created prior to 25 years from the request date.

Under the deliberative process privilege of Exemption 5, three records (consisting of 15 pages) have been withheld and seven records (consisting of 12 pages) are partially redacted that are both predecisional and deliberative. All of the documents withheld in full or partially redacted 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 these drafts would have a chilling effect on the agency's deliberative processes.

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 53 records (consisting of 138 pages) in part under Exemption 6.

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 contact information (e.g. email address and telephone numbers), 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 of these individuals and we are withholding it under Exemption 6.

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 78 records in part under Exemption 7 because they are protected under the following subparts:

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. Seventy-eight records have been partially withheld under 7(C), and 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.

Thirty-one records (consisting of 137 pages) are being withheld in part pursuant to FOIA Exemption (b)(7)(E). This exemption protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. Following consultation with U.S. Customs and Border Protection (CBP), CBP has determined that disclosure could reasonably be expected to risk circumvention of the law.

The Service consulted with CBP for a release determination of 31 records. These records are provided to you with the recommended redactions applied with the aforementioned FOIA exemptions of (b)(5), (b)(6), (b)(7)(c), and (b)(7)(e).

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

CESWF-OC
P.O. Box 17300
Fort Worth, TX 76102-0300
foia-swf@usace.army.mil

The undersigned is responsible for this partial denial.

This response to your FOIA request was made in consultation with Justin Tade, Attorney-Advisor, Office of the Solicitor, Southwest Region, U.S. Department of the Interior (Department). 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 the date of this letter. 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 in error. 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's rejection of 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 information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office
Department of the Interior, Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 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 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 Acting Public Liaison, Cindy Cafaro, at 888-603-7119 or via email at cindy.cafaro@sol.doi.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 request and provide a response as soon as possible. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, by email at david_tischer@fws.gov.

Sincerely,

FOIA Coordinator