



United States Department of the Interior
FISH AND WILDLIFE SERVICE

5275 Leesburg Pike, MS: MB
Falls Church, VA 22041



In Reply Refer To:
DOI-FWS-2021-003567

April 27, 2022

Ann Brown
Center for Biological Diversity
P.O. Box 11374
Portland, Oregon 97211

Dear Ms. Brown:

The U.S. Fish and Wildlife Service Headquarters Freedom of Information Act (FOIA) Office received your FOIA request dated April 13, 2021, and assigned it control number DOI-FWS-2021-003567. Please cite this number in any future communications with our office regarding your request. You requested the following:

- *All records generated in connection with consultation(s) pursuant to Section 7 of the Environmental Policy Act1 (“ESA”) (either formal or informal); and*
- *All records mentioning, including, and/or referencing the Eastern black rail (*Laterallus jamaicensis jamaicensis*).*

Response

We are writing to complete the response to your request. We have previously partially responded to this request on March 29, 2022. Enclosed is one binder containing three-hundred five (305) pages which are released in part as described below:

Exemption 5 Deliberative Process Privilege 5 U.S.C. § 552(b)(5)

Seven (7) pages are released but withheld in part under 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); see *Nat’l Labor Relations Bd. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). 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 documents in part under Exemption 5 because they qualify to be withheld under the 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 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.

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 have a chilling effect on the agency's deliberative processes.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Exemption 6 5 U.S.C. § 552(b)(6)

Fifty-five (55) pages are released but withheld in part under Exemption 6, which 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 also withholding one (1) page in full.

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 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.

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.

The decision to withhold/deny this information was made by the undersigned and approved by Cathy Willis, FWS FOIA Officer, Division of Information Resources & Technology Management (IRTM). Brigitte Beaton, Attorney-Advisor, in the Office of the Solicitor was consulted.

Fees

We do not bill requesters for FOIA processing fees when their fees are less than \$50.00, because the cost of collection would be greater than the fee collected. See [43 C.F.R. § 2.37\(g\)](#). Therefore, there is no billable fee for the processing of this request.

Mediation/Dispute Resolution

If after contacting us as described below, you need further information or assistance with your request, you may wish to seek dispute resolution services from the Department's FOIA Public Liaison, Natasha Alcantara by email at doifoiapublicliaison@sol.doi.gov.

If you need further information or assistance after contacting the Department's FOIA Public Liaison, you may wish to seek dispute resolution services from the Office of Government Information Services (OGIS). The 2007 FOIA amendments created the 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. 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://www.archives.gov/ogis>
Telephone: (202) 741-5770
Fax: (202) 741-5769
Toll-free: (877) 684-6448

Please note that using the Department's FOIA Public Liaison or OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

Appeal Rights

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 final response. Appeals arriving or delivered after 5:00 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 this response is in error. You must also include with your appeal copies of all correspondence between you and FWS concerning your FOIA request, including your original FOIA request and this response. Failure to include with your appeal all correspondence between you and FWS 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 Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, DC 20240
Attn: FOIA/Privacy Act Appeals Office
Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

Conclusion

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. See [5 U.S.C. § 552\(c\)](#). This response is limited to those records that are subject to the requirements of 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 is our final response and closes your referral request DOI-FWS-2021-003567. If you have any questions about our response to your request, you may contact me by email at tiffany_joseph@fws.gov, or by mail at U.S. Fish and Wildlife Service; ATTN: FOIA Office; 5275 Leesburg Pike; MS: IRTM; Falls Church, VA 22041.

Sincerely,

For Cathy Willis
FWS FOIA Officer