



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

JAN 08 2016

In Reply Refer To:

FWS/DCC/BEL/062024

FOIA #FWS- FWS-2014-01226

Mr. Eric Huber
Sierra Club
Suite 102W
1650 38th Street
Boulder, Colorado 80301

Sent by Email and Fed-Ex

Dear Mr. Huber:

This is our final response to your Freedom of Information Act (FOIA) request (FWS-2015-01226) dated August 11, 2014, seeking a variety of records related to the development of the Biological Opinion on the U.S. Environmental Protection Agency's Promulgation of the Final Regulations implementing Section 316(b) of the Clean Water Act (the "BiOp"). On March 10, 2015, you were notified that your fee waiver request was approved; therefore, there are no charges for processing your FOIA request.

We have conducted a thorough search of the U.S. Fish and Wildlife Service (Service) files and have identified 2,194 documents responsive to your request. We have already provided you with the following 766 responsive documents –

1. March 10, 2015 – 17 documents were provided in their entirety.
2. March 26, 2015 – 94 documents were provided in their entirety.
3. June 22, 2015 – 12 documents were provided in their entirety.
4. August 14, 2015 – 54 documents were provided in their entirety.
5. October 19, 2015 – 241 documents were provided in their entirety and 48 were provided in part.
6. October 30 – November 23, 2015 – 87 documents were provided in their entirety and 17 were provided in part.
 - a. On October 30, 2015, 104 documents were provided to you in their entirety.
 - b. On November 5, 2015, you notified our office that we had inadvertently provided 16 documents that were marked for redaction.
 - c. On November 6, 2015, we provided a corrected set of documents. 88 documents were provided in their entirety and 16 were provided in part.

- d. On November 23, 2015, we notified you that one document provided to you in full on October 30, 2015, contained privileged information and should have been redacted. We provided you with a sixth incremental release of one document withheld in part.
- 7. December 1, 2015 – 62 documents were provided in their entirety and 31 were provided in part.
- 8. December 24, 2015 – 9 documents were provided in their entirety and 94 were provided in part.

In addition to these incremental releases, we are providing you with an additional 205 documents responsive to your request. Forty-eight documents are provided in full and 157 documents are provided in part. In total, 624 documents have been provided in full, 347 have been provided in part, and 1,075 documents are being withheld in full.

We are withholding 1,075 documents in full and 339 in part pursuant to Exemption 5 of the FOIA because they reflect either attorney-client communications, attorney work-products, or predecisional deliberative communications among government personnel and their contractors.

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); 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 attorney-client, deliberative process, and attorney work-product privileges.

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. *Mead Data Cent, Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). 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. See *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 114-15 (D.D.C. 2005).

The materials that have been withheld under the attorney-client privilege of Exemption 5 constitute 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 Service 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 Service has held this information confidential and has not waived the attorney-client privilege.

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.” *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (internal citations omitted). 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 decisionmaker 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.” *Coastal States Gas Corp. v. United States Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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.” *Id.*

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. In addition, because the subject matter of the FOIA request pertains to a rule that is national in scope and includes highly technical details and requirements that apply to various cooling water intake facilities across the country, the disclosure of information that does not reflect agency policy could result in significant confusion to the regulated public.

We have conducted a line-by-line, page-by-page review of the documents that we have withheld in full under the attorney-client and deliberative process privileges of Exemption (5) to determine whether there is any non-exempt information that we can reasonably segregate and release to you and did not find any.

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. *See Judicial Watch, Inc. v. United States Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005). The privilege applies once specific claims have been identified that make litigation probable; the actual beginning of litigation is not required. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 75 (D.D.C. 2003). Its purpose is to protect the adversarial trial process by insulating litigation preparation from scrutiny, as “[i]t 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.” *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). The privilege extends to administrative, as well as judicial proceedings. *See Exxon Corp. v. United States Dep't of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983). 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. *See Judicial Watch, Inc.*, 432 F.3d at 370-71.

The material that has been withheld under Exemption 5 under the attorney work-product privilege was prepared by or for a Department attorney in reasonable anticipation of litigation and they reflect mental impressions or legal theories of counsel. Therefore we conclude that the withheld materials are protected in full from disclosure by the attorney work-product privilege of Exemption 5.

We are withholding 3 documents in part under Exemption 4 5 U.S.C. § 552(b)(4) in consultation with the U.S. Environmental Protection Agency. Please note that one of these documents is also captured under the deliberative process privilege noted above and one of the documents is captured under both the deliberative process privilege and under Exemption 6.

Exemption 4 protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” The withheld information is confidential commercial information that reflects the identity of subcontractors. The identities of key personnel are well recognized as having commercial value to competitors, see, e.g., *Audio Technical Services v. Army*, 487 F.Supp. 779 (D.D.C. 1979), and the identities of employees in general are entitled to confidentiality where they are found in such a context as to make the employees attractive and vulnerable to raiding by competitors. See, e.g., *Burroughs v. Brown*, 501 F.Supp. 375, 381 (E.D. Va. 1980). The company that supplied this information (the submitter) is considered a person, because the term “person,” under the FOIA, includes a wide range of entities including corporations.

We are withholding 11 documents in part under Exemption 6 [5 U.S.C. § 552\(b\)\(6\)](#) in consultation with the Office of Management and Budget. Please note that ten of these documents are also captured under the deliberative process privilege noted above and one of the documents is captured under both the deliberative process privilege and under Exemption 4.

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\(b\)\(6\)](#). The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. *See United States Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). 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. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-75 (1989).

Under the FOIA, “the only relevant public interest” to consider under the exemption is “the extent to which the information sought would ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens ‘know what their government is up to.’” *United States Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495-96 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775). The burden is on the requester to establish that disclosure would serve the public interest. *See National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004). 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. *See Reporters Comm.*, 489 U.S. at 771.

The information that has been withheld under Exemption 6 consists of personal information such as email addresses, cellphone numbers, and references to medical appointment, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, 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 this individual and we are withholding it under Exemption 6.

In addition, we have redacted information from some of the documents that reflects non-responsive information such as cellphone numbers, conference lines, and passcodes. We have identified the portions of documents that contain this type of information with an overlay and text that reflects the designation of “non-responsive”. There are seven documents that have only non-responsive information redacted with no other FOIA exemptions applied.

This decision was made in consultation with Shawn Finley, Attorney, Department of the Interior Office of the Solicitor, Washington, DC.

There are 148 documents that originate with either the U.S. Environmental Protection Agency and/or the National Oceanic Atmospheric Administration. Pursuant to the provisions of 43 CFR 2.13(d), your request and a copy of the documents in question are being referred to these agencies for their review and direct response to you. You do not have to contact them at this time, but should you need to do so in the future, you may do so at:

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910
301-628-5658

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 30 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 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 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

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.

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. 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

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

If you have any questions concerning this response or need additional information, please contact Headquarters Ecological Services (HQ ES) FOIA Coordinator, Eileen Harke, at (703) 358-2096 or by email at eileen_harke@fws.gov.

Sincerely,

A handwritten signature in black ink that reads "Caitlin Snyder". The signature is written in a cursive, flowing style.

Caitlin Snyder
Acting Chief, Branch of ES Litigation Support
Ecological Services Program

Enclosure

cc: Eileen Harke – HQ ES FOIA Coordinator
Melissa Allen – HQ FWS FOIA Coordinator
Larry Mellinger – DOI Solicitor
Shawn Finley – DOI Solicitor