



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
FWS-2020-00203

June 23, 2020

Ms. Ann Brown
Center for Biological Diversity
P.O. Box 11374
Portland, Oregon 97211-0374

Dear Ms. Brown:

This responds to your Freedom of Information Act (FOIA) request dated December 10, 2019, in which you seek the following:

“From October 1, 2019 to the date FWS conducts this search, all records mentioning and/or referencing impacts of U.S.-Mexico border wall construction on the availability and condition of water resources at Slaughter Ranch and the San Bernardino NWR, prioritizing the records of inter- and intra-agency communications that show the analysis and/or assessment of the changes in available water resources, depth to groundwater levels, surface water levels, and/or impacts of construction activity on water quality in Black Draw drainage.”

Your FOIA request was assigned tracking number FWS-2020-00203 and forwarded to the San Bernardino National Wildlife Refuge and Southwest Region National Wildlife Refuge System for processing. 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, portions of 90 records are partially redacted, and 64 records are being withheld in full pursuant to FOIA Exemptions (b)(3), (b)(5), (b)(6), and (b)(7)(C), as described below. Multiple exemptions may have been applied on a single document. The full release and partially redacted material are provided to you with this letter.

Portions of two records has been redacted pursuant to Exemption (b)(3) of the FOIA. Exemption 3 allows the withholding of information protected by a nondisclosure provision in a federal statute other than FOIA. In this instance, the redacted record contains information related to

federal and tribal sites that are protected under the Archaeological Resources Protection Act of 1979. 16 USC §470hh. We reasonably foresee that disclosure of this information would be prohibited by law.

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 11 documents in full 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.

We have withheld 53 records in their entirety pursuant to the deliberative process privilege of Exemption 5. These records are both predecisional and deliberative and 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 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.

We redacted a portion of eight documents pursuant to the commercial information privilege of Exemption 5. The information withheld under this privilege consists of active conference call telephone numbers and access codes, which could be used to conduct conference calls by parties outside the government or used to call in to monitor internal government conversations. We are withholding it because disclosure to the public would chill communications between federal employees, harm the government's ability to exchange information, and waste government financial resources.

When the government enters the marketplace as an ordinary commercial buyer or seller, the government's information is protected under the commercial information privilege if it is sensitive information not otherwise available, and disclosure would significantly harm the government's monetary functions or commercial interests. In regard to conference call numbers, if the information was released, the government's financial interest would be significantly harmed as the calls would no longer be private and the funds spent on purchasing the information would be wasted. We are releasing the majority of the communication that would not harm the Service's commercial interests.

Portions of 63 records have been redacted pursuant to Exemption (b)(6) of the FOIA. Under Exemption 6, agencies may withhold information or records on individuals contained in "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 withheld material includes personal contact information (e.g. names of individuals, personal cell, and email addresses).

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." (*See Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (*quoting Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989))). 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, as described above, 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 these individuals and we are withholding it under Exemption 6. We are releasing the majority of the communication that would not warrant an invasion of privacy for these individuals.

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 17 documents in part under Exemptions 7 because they are protected under the following subpart:

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. Seventeen 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.

Lastly, in our compilation and review of responsive records, we identified records that originated from or substantially concern another federal agency. Twenty-six records are being referred to U.S. Customs and Border Protection (CBP) and 57 records are being referred to U.S. Army Corps of Engineers (USACE) for a release determination. CBP and 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

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NW
9th Floor, Mail Stop 1181
Washington, D.C. 20229

The undersigned is responsible for this partial denial.

The following categories of preapproved withholdings were the subject of consultation with the Office of the Solicitor's Division of General Law and the Departmental FOIA Office: Exemption 5 (Commercial Information Privilege), Exemption 6 (Personally Identifiable Information), and Exemption 6 and 7C (all @dhs.gov email addresses). 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) for all other withholdings.

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 U.S. Fish and Wildlife Service's (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
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.

This completes the Service's response. The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.37. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, at 505-248-6658 or by email at fw2foia@fws.gov.

Sincerely,

FOIA Coordinator