



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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



IN REPLY REFER TO:
FWS-2020-00627

November 13, 2020

Blakely Hildebrand
Southern Environmental Law Center
601 W Rosemary Street Ste 220
Chapel Hill, NC 27516
Email: bhildebrand@selcnc.org

Dear Ms. Hildebrand:

This interim letter is in response to your Freedom of Information Act (FOIA) request, dated April 24, 2020, and received in our office on the same day. The tracking number is 2020-00627. In your letter, you asked for the following:

- “1. Any documents related to a 2019 U.S. Department of Interior Solicitor’s Opinion announcing the reversal of the 1994 legal memorandum interpreting section 6(a)(6)(G) of CBRA and explaining why the 1994 legal memorandum was flawed, including but not limited to the 2019 opinion itself;
2. Any documents related to environmental review of the CSRM Projects pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, et seq., including but not limited to draft and final environmental reviews, Record(s) of Decision, and Finding(s) of No Significant Impact;
3. Any documents related to consultations or other analyses conducted pursuant to the Endangered Species Act, 16 U.S.C. 1531, et seq., related to the CSRM projects, including but not limited to biological opinions; and
4. Any documents related to the Interagency Consultation between the Corps and FWS related to the CSRM Projects, including but not limited to consultation request(s) by the Corps, addenda to consultation request(s), and the FWS’ response to the Corps’ request.”

We are providing 638 pages. Of these pages, 197 pages are being withheld in part. 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. Portions of this document is being withheld under FOIA Exemptions 5 and 6. We are continuing to process records responsive to item two of your request.

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 deliberative process, attorney work-product, attorney-client, and commercial information privileges.

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 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.” *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 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.” *Id.*

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; 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.

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 information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, related to legal matters for which the client sought professional legal assistance and services. Additionally, the Bureau 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 Bureau has held this information confidential and has not waived the attorney-client privilege.

The Federal Rule of Civil Procedure 26(c) (7), which provides that “for good cause shown...a trade secret or other confidential research, development or commercial information” is protected from discovery. This qualified privilege is available “at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract. The materials being withheld under commercial privilege of Exemption 5 are conference call numbers and passcodes. The sensitivity and disclosure of the conference numbers and passcodes would inflict harm upon the Government and its normal course of business.

Exemption 6 of the FOIA 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 Dept 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 ‘shed light on an agency’s performance of its statutory duties’ or otherwise let citizens ‘know what their government is up to.’” *United States Dept. 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 including: personal personnel information.

Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created 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
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 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.

You may seek dispute resolution services from the Acting FOIA Public Liaison, Cindy Cafaro at (888) 603-7119.

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.

If you have any questions regarding this request, please contact Maritiza Harris, FWS Government Information Specialist, via email at FWHQ_FOIA@fws.gov or by mail at U.S. Fish and Wildlife Service; ATTN: Maritiza Harris; 5275 Leesburg Pike; MS: IRTM; Falls Church, VA 22041.

Sincerely,

**MARITIZA
HARRIS**

for Cathy Willis
FWS FOIA Officer

Digitally signed by
MARITIZA HARRIS
Date: 2020.11.13
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