



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

In Reply Refer to:  
ABA-CGS-FOIA FWS-  
2020-00724

911 NE 11<sup>th</sup> Avenue  
Portland, Oregon 97232-4181

August 2, 2021

***Sent by Email***

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

Dear Ms. Brown:

This letter concludes our response to your May 29, 2020, Freedom of Information Act (FOIA) request for the following information:

“The records in the decision file that FWS relied upon when finding that the northern California and southern Oregon fisher population does not warrant listing as a threatened or endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”) found at Federal Register, Vol. 85, No. 95, May 15, 2020, 29532“.

Your request has been placed in the Department of Interior FOIA Tracking System under reference number FWS-2020-00724. Please refer to this number in your communications regarding this request.

Following your initial request, the Center for Biological Diversity and Yreka Fish and Wildlife Office discussed the specifics of the request on June 11, 2020. Based on the agreement reached during that conversation, we are providing relevant documents beginning with Judge Alsup’s decision (case 3:16-cv-06040-WHA) on September 21, 2018, which remanded the Fish and Wildlife Service’s 2016 fisher determination, through the publication of the final listing determination on May 15, 2020. As part of our response, we are including any new and relevant information obtained after our 2016 listing decision that was considered as part of our 2020 decision.

During this initial discussion, you indicated that you prefer we take time to organize the documents before delivering them (i.e., deduplicated, no .pdf portfolios, and with an index). Accordingly, you agreed to allow the Service more time to compile the decision file, and the Service agreed, in this instance, to produce an index. An index is not required for FOIA requests.

We agreed to the following tentative schedule of rolling responses:

- 1) References by July 15, 2020.
- 2) All non-privileged materials within nine months (March 2021, which was later extended to July 2021), if possible. If this deadline was unattainable for some reason, we agreed to let you know by the end of January 2021.
- 3) Release of materials that underwent privilege review and have been determined subject to release.

We also discussed your list of document types requested. You indicated that some of the items listed in your request may not apply to this request, such as telephone records and telephone logs, and accordingly, these types of documents are not included in our response. Some of these items may no longer be available, such as voicemails.

Because we needed an extension beyond March 2021, we submitted a request for additional time to you in January 2021 and agreed to conclude our response by the end of July 2021. This letter and the enclosed documents constitute our final and full response to your request; it includes those items in #3 above, for which no time frame was set in our discussions as to the schedule for this response.

### **Response**

We conducted a thorough record search, and the following responsive documents were identified: 4,377 records (including documents and emails), Geographic Information Systems (GIS) files, and 1 Access database. The GIS shape files and databases are being provided to you in the original format, so that they can still be displayed and used. We've created 5 .zip files with the GIS data (with the following names – 2018 Recommendation Team Meeting, Final Rule, Proposed Rule, PublicComment, and NSO habitat baseline reset fires). Within the first 4 of these .zip files, we created map packages to display the data. And when we processed data, we've created a map package to show how we processed the data. We created these map packages to make the GIS data easier to understand and use.

We have redacted commercial information related to conference line numbers and passcodes pursuant to Exemption 5-Commercial Information Privilege from 61 records. Personal email, phone numbers and medical information are redacted pursuant to Exemption 6-Personal Privacy from 19 records. We are withholding in part 44 records and withholding in full 171 records pursuant to Exemption 5-Attorney Work-Product Privilege and Attorney-Client Privilege.

### **Exemption 5 - 5 U.S.C. § 552(b)(5)**

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 171 documents in full and 44 documents in part under Exemption 5 because they qualify to be withheld under the following privileges:

*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. The privilege applies once specific claims have been identified that make litigation probable; the actual beginning of litigation is not required. Its purpose is to protect the adversarial trial process by insulating litigation preparation from scrutiny, as it 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. The privilege extends to administrative, as well as judicial proceedings. 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.

The materials that have been withheld under Exemption 5 under the attorney work-product privilege were prepared by or for a Department attorney in reasonable anticipation of litigation and they reflect the Service's pre-litigation thoughts regarding the finding that the northern California and southern Oregon fisher population does not warrant listing as a threatened or endangered species under the Endangered Species Act. So, we conclude that the withheld materials are protected in full from disclosure by the attorney work-product privilege of Exemption 5.

*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. 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 US Fish and Wildlife 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 US Fish and Wildlife Service has held this information confidential and has not waived the attorney-client privilege.

*Commercial Information Privilege*

Sixty-one (61) released pages contain redactions under the Exemption 5 Commercial Information Privilege.

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 monitor internal government conversations. We are withholding it because disclosure to the public would chill communications between federal employees and harm the government's ability to exchange information.

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.

Exemption 6 - 5 U.S.C. § 552(b)(6)

Nineteen (19) released pages contain redactions 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).

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, such as personal email addresses, phone numbers, and medical 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

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constitute a clearly unwarranted invasion of the privacy of these individuals, and we are withholding it under Exemption 6.

We reasonably foresee that disclosure of the redacted and withheld material discussed above 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 John DeClerk, FWS Headquarters FOIA Coordinator, Division of Information Resources & Technology Management (IRTM). Kerry O'Hara, Assistant Regional Solicitor, in the DOI Office of the Solicitor was consulted.

All the responsive documents described above are being released to you in two different ways. First, we are sending you a USB drive via FedEx. Second, we are posting the documents at our FOIA reading room. The address for this site is: [www.fws.gov/irm/bpimfoiareadingroom.html](http://www.fws.gov/irm/bpimfoiareadingroom.html). Once at the site navigate to the Species heading, the Fisher heading, and then the heading for this FOIA (FWS-2020-00724). Both this release as well as our previous release are located under the Fisher heading.

Please note that the indexed hyperlinks will not work in the reading room. You will need to download all the documents, for the hyperlinks to work.

### **Mediation Services**

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](mailto:ogis@nara.gov), Web: <https://ogis.archives.gov>  
Telephone: (202) 741-5770, Fax: (202) 741-5769, Toll-free: (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.

OGIS serves as a bridge between requesters and agencies, particularly in situations where clear, direct communication has been lacking. You can reach OGIS by email at [ogis@nara.gov](mailto:ogis@nara.gov), by phone at 1-877-684-6448, or by fax at (202) 741-5769.

### Appeal Rights

You may appeal this final 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's (Service's) response is in error. You must also include with your appeal copies of all correspondence between you and the FWS 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](mailto:FOIA.Appeals@sol.doi.gov)

For more information on FOIA Administrative Appeals, you may review the Department's FOIA regulations at [43 C.F.R. Part 2, Subpart H.](#)

### 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.

Ann Brown, Center for Biological Diversity

If you have any questions on your FOIA request, please contact me at [mailto:john\\_declerk@fws.gov](mailto:john_declerk@fws.gov) or by telephone at 503-231-2072.

Sincerely,

John DeClerck,  
U.S. Fish and Wildlife Service  
FWS Headquarters FOIA Coordinator, Portland Office