



United States Department of the Interior

FISH AND WILDLIFE SERVICE

1875 Century Boulevard
Atlanta, Georgia 30345

In Reply Refer To:
FWS/R4/ES/2013-00355

MAR 20 2013

Mr. Richard M. Walker
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, Louisiana 70118

Re: Freedom of Information Act (FOIA) Request

Dear Mr. Walker:

This is our final response to your January 18, 2013 FOIA request, in which you requested:

“Documents dating from February 28, 2011, through the present date relating to U.S. Army Corps of Engineers (“Corps”) permit application numbers MVN-2010-1080-WLL and MVN-2010-1032-WLL, including but not limited to correspondence from the U.S. Fish and Wildlife Service to the Corps on or about December 17, 2012.”

On February 15, 2013, the U.S. Fish and Wildlife Service’s (Service) Louisiana Ecological Services Field Office released fourteen (14) responsive documents to you in an interim response. However, the Service retained additional responsive documents pending review and recommendation from the Department of the Interior’s Office of the Solicitor (SOL).

We have completed our review of the remaining records. Following consultation with the SOL, three (3) additional documents are being released to you in redacted form, and the remaining records are being withheld in their entirety pursuant to Exemption 5 of FOIA. For your convenience, we are providing an index of the withheld and redacted documents. The three (3) redacted documents are being provided to you on the enclosed compact disk (CD).

Exemption 5: Exemption 5 of the FOIA allows an agency to withhold “inter-agency and intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Agency (Service),” See 5 U.S.C. § 552(b)(5). This section of the statute has been interpreted as exempting documents which reveal the Agency’s deliberative process, attorney-client privilege, and attorney work-product. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

The threshold issue under Exemption 5 is whether a record can be classified as an “inter-agency or intra-agency” document. In this regard, the scope of Exemption 5 has been construed quite expansively. It has been held that “Congress apparently did not intend ‘inter-agency and intra-agency’ to be rigidly exclusive terms, but rather to include any Agency document that is part of

the deliberative process.” *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); *Hooper v. Bowen*, No. 99-1030, slip op. At 18 (C.D. Cal. May 24, 1989)(“courts have regularly construed this threshold test expansively rather than hypertechnically”). In our opinion, the documents that are being withheld meet the threshold requirement of Exemption 5, and are rightfully classified as interagency documents.

The Deliberative Process Privilege: The second step under Exemption 5 involves identifying a claim of privilege. The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 151. Three (3) policy purposes consistently have been held to constitute the bases for the deliberative process privilege: (1) To encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Missouri ex rel. Shorr v. United States Army Corps of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998). (“The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.”).

"Documents that are commonly encompassed by the deliberative process privilege include advisory opinions, recommendations, and deliberations, comprising part of a process by which governmental decisions and policies are formulated, the release of which would be likely to stifle honest and frank communication within the agency." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150; *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1121 (9th Cir. 1988). In our opinion, the documents being withheld as deliberative fit squarely within the deliberative process privilege included within Exemption 5. These documents contain the opinions, suggestions, and recommendations of Service employees. This information was prepared to assist decision-makers in rendering informed decisions. As a result, we are withholding these documents under Exemption 5.

Attorney-Work Product and Attorney Client Privileges: The attorney work-product and attorney-client privileges have traditionally been incorporated into Exemption 5. The attorney work-product privilege protects documents and other memorandum prepared by an attorney in contemplation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). 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. *Mead Data Cent., Inc. v. United States Dept. of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *Schlefer v. United States*, 702 F.2d 233, 244 n.26 (D.C. Cir 1983). The Mallard Basin project is already the subject of litigation. Therefore, documents prepared by SOL attorneys are being withheld under the attorney-work product privilege of Exemption 5.

Mr. Richard M. Walker

3

The information that has been withheld pursuant to the attorney-client privilege constitutes confidential communications between the Service and SOL attorneys, including the Department of Justice. As a result, these documents are also protected under Exemption 5. These documents reflect the Services' request for legal assistance as well as the advice provided.

Reasonably Segregable Obligation: In *Mead Data Cent. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the court stated that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead*, 566 F.2d at 260. To fulfill its obligations, an Agency need not "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content . . . it must separate out what is reasonably segregable . . . when factors such as the burden of line-by-line segregation on the agency and the usefulness of the disclosures to the requester are weighed against each other. *McKinley v. Federal Housing Finance Agency*, 2012 U.S. Dist. LEXIS 56900 (January 25, 2012)(quoting *Mead*, at 261); *Schoenman v. FBI*, 763 F. Supp. 2d 173, 202 (D.D.C. Feb. 9, 2011).

In this case, the Service is withholding several documents in their entirety pursuant to Exemption 5. We do not believe that the non-exempt portions of these documents are reasonably segregable from the exempt portions. First and foremost, the non-exempt material, which constitutes a small proportion of the information withheld, is so interspersed line-by-line throughout each of these documents, that the non-exempt information cannot be reasonably segregated from the exempt materials. If the Service were to redact the exempt material, the remaining documents would only contain non-informational phrases such as "can we _____"; the Corps _____"; "We have _____"; "We should _____"; the Solicitor says _____"; "my recommendation is _____"; and "What do you think about _____?" In some cases, redaction would result in a document that consists of nothing more than the names of Service employees in the "From" and "To" sections of emails, and this information has already been provided to you in the accompanying Index.

In our opinion, it would be unreasonable for the Service to spend the time and resources necessary to redact the exempt information from these documents, particularly when the resulting documents would consist of nothing more than a few disjointed and meaningless words, phrases and sentences with no informational content.

Finally, we are providing the following for information purposes only: 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.

In addition to myself, the following individual is responsible for this decision:

Delores Young, Attorney
Office of the Solicitor
U.S. Department of the Interior
75 Spring Street, S.W., Suite 304
Atlanta, Georgia 30303

Mr. Richard M. Walker

4

You may appeal this partial denial to the FOIA Appeals Officer. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. eastern, Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and addressed to:

U.S. Department of the Interior
Freedom of Information Act Appeals Officer
1849 C Street, N.W., Mailstop 6556
Washington, D.C. 20240

You must include with your appeal copies of all correspondence between you and the bureau concerning your FOIA request, including a copy of your original FOIA request and this denial letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and the face of the letter, with the legend, "FREEDOM OF INFORMATION APPEAL." Your letter should include in as much detail as possible any reasons why you believe the bureau's response is in error. Any fee that may have been associated with your request has been waived.

If you have any questions, please contact Mr. Ken Graham, Biologist, Ecological Services, Southeast Region, at (404) 679-7358.

Sincerely yours,



for Cynthia K. Dohner
Regional Director

Enclosures