

Exhibit I



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

September 30, 2013

IN REPLY REFER TO
FOIA Appeal No. 2013-131

Richard M. Walker
Lisa W. Jordan
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118

Dear Mr. Walker & Ms. Jordan:

This responds to the May 6, 2013, Freedom of Information Act (“FOIA”) appeal (“appeal”) (No. 2013-131) that you filed with the Department of the Interior (“Department”) on behalf of Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association – West, and the Louisiana Environmental Action Network. Your appeal challenges the Fish and Wildlife Service’s (“FWS”) decision to invoke FOIA exemption (5)¹ as a basis to redact information from three documents and to withhold 21 documents in their entirety. The documents at issue in the appeal are responsive to Mr. Walker’s January 18, 2013, FOIA request, which sought “[d]ocuments 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...”

After reviewing the issues presented in the appeal, the withheld documents and information, and relevant case law, the Department concludes that it will deny the appeal in part and grant it in part. The Department fully adopts the FWS’s rationale for the denial as a part of this decision.

The appeal is **DENIED IN PART** in that the FWS properly invoked the deliberative process privilege of exemption (5)² as a basis to withhold information in each of the documents at issue in the appeal. The Department is upholding the FWS’s use of the privilege in this case to protect draft documents, agency employees’ comments on the drafts, and internal discussions between governmental personnel about issues related to the lawsuit filed against the Corps. The Department also concludes that the FWS properly invoked the attorney-client privilege of exemption (5)³ to withhold information

¹ Exemption (5) protects “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).

² The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. See *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004) (“*Sierra Club*”).

³ The attorney-client privilege of exemption (5) protects confidential communications made by a client to his/her attorney and also protects from disclosure certain communications provided by

in some of the documents that reflects confidential discussions between FWS employees and agency attorneys about matters for which the employees sought legal advice. Further, the FWS properly invoked the attorney work-product privilege of exemption (5)⁴ as a basis to withhold some of the documents in full.⁵ FWS employees and Departmental attorneys prepared these protected documents in connection with and in response to requests from attorneys in the Department of Justice for information that would assist them in defending against a lawsuit that was filed against the Corps and the development of its litigation strategy.

In reaching the above conclusions, the Department notes your assertion in the appeal that the deliberative process privilege of exemption (5) does not apply to the withheld documents and information because it is your belief that they are all “post-decisional” documents.⁶ To support your assertion on this point, you offer:

[T]he FWS’s decision and its policy statement regarding the...project/permits [that are the subject of the request] was reflected in [a] February 28, 2011, letter [to the Corps.] [A]ny documentation related to that issue which post-dates the letter is post-decisional and not subject to deliberative process privilege. All of the withheld responsive documentation dates from after February 28, 2011. Therefore, the deliberative process privilege does not shield any of the responsive documentation from release.

You are mistaken. The FWS’s February 28, 2011, decision on the project/permits is not

an attorney to his/her client. *See Maine v. United States Dep’t of the Interior*, 298 F.3d 60 (1st Cir. 2002).

⁴ The attorney work-product privilege protects from disclosure any materials prepared by or for a party or its attorney or by or for a party’s representative in anticipation of litigation that reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 75 (D.D.C. 2003). *See also* Fed. R. Civ. P. 26(b)(3).

⁵ Once the determination is made that documents are protected from disclosure by the attorney work-product privilege of exemption (5), the entire contents of those documents are exempt from disclosure under the FOIA. *See Judicial Watch v. DOJ*, 432 F.3d 366 (D.C. Cir. 2005).

⁶ The deliberative process privilege applies to records “generated *before* the adoption of an agency policy.” *Sierra Club*, 384 F. Supp. 2d at 15-16. Postdecisional documents generally embody statements of policy and final opinions that have the force of law, that implement an established policy of an agency, or that explain actions that an agency has already taken. The United States Supreme Court has held that the privilege ordinarily does not apply to postdecisional documents, as “the public is vitally concerned with the reasons which did the supply the basis for an agency policy actually adopted.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (U.S. 1975).

the only decision involved here.⁷ The documents that the Department will continue to withhold in full and in part under the deliberative process privilege relate to the FWS's deliberations and discussions on what its employees and agency attorneys believed should be included in a December 17, 2012, follow-up letter that the FWS sent to the Corps about the project/permits, how they should address DOJ's request for information to assist it in responding to the litigation against the Corps, and how the FWS should respond to a request from Ms. Jordan for a meeting to discuss the lawsuit against the Corps.

Each document at issue in the appeal is predecisional in that the FWS employees and, in some cases, the attorneys who advised them prepared or provided comments on their contents prior to the FWS making a final decision on what should be included in the final versions of these documents or how it should proceed with the issues that were under discussion. Each of these documents is deliberative in that they express the employees' candid and frank opinions, makes recommendations, and reflects the give-and-take of the consultative process. Since the documents contain precisely the type of information that the deliberative process privilege of exemption (5) was designed to protect and none are "post-decisional," the Department finds no basis to diverge from its conclusion that the privilege applies in this case.

Your appeal is **GRANTED IN PART** in that the FWS did not segregate and release all of the non-exempt information contained in some of the documents that it withheld in full and in part, as required by the FOIA⁸ and the Department's FOIA regulations.⁹

The Department's line-by-line, page-by-page review of the documents at issue in the appeal reveals information that is not protected from disclosure by any FOIA exemption--information that consists of more than just "meaningless words" and phrases, as the FWS stated in its letter responding to the FOIA request.¹⁰ **This non-exempt information will be released to you within 10 workdays from the date of this decision.** The Department's letter to you transmitting the non-exempt information will indicate the

⁷ See *Judicial Watch, Inc. v. Reno*, 2001 U.S. Dist. LEXIS 25318, No. 00-0723 (D.D.C. Mar. 30, 2001) (finding that even though the agency decided the broader policy issue, the withheld documents were "predecisional" because the policy issue "involved multiple agency decisions," including many made after the decision on the broader issue).

⁸ See 5 U.S.C. § 552(b) (discussion after exemptions).

⁹ At the time you submitted your FOIA request, the provision in the regulations that discusses this segregation obligation 43 C.F.R. § 2.21(c). However, since that time, the Department revised its regulations and the requirement is now found at 43 C.F.R. § 2.25(a). See 77 Fed. Reg. 76,902, effective Jan. 30, 2013.

¹⁰ The FWS stated in its letter responding to the FOIA request that "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."

Richard M. Walker & Lisa W. Jordan

FOIA Appeal No. 2013-131

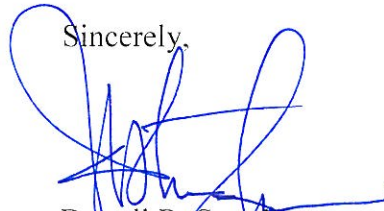
Page 4 of 4

number of documents it is continuing to withhold in full and in part and under which exemption (5) privilege.

This completes the Department's response to your appeal. If you are dissatisfied with this decision, you have a right to seek judicial review under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding your appeal, please call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA & Privacy Act Appeals Officer
Department of the Interior

cc: Johnny Hunt, FOIA Officer, FWS

Sharneka Harvey, FOIA Coordinator, FWS-Region 4

Jeff Weller, Field Supervisor, Louisiana Ecological Services Office, FWS

Delores Young, Attorney-Advisor, SOL-Southeast Region

Cindy Cafaro, Departmental FOIA Officer