

From: Jimmy Tobias

05/06/2020

Subject: Freedom of Information Act Request: SOL Review Hunton White Paper (U.S. Fish and Wildlife Service)

Portal

Exhibit 1

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

Any emails, email attachments, or other documents related to the Solicitor's review of the white paper referenced in the email chain attached below to this request. This request specifically seeks a copy of the Solicitor office's review of the white paper in question, which is entitled "The Proper Scope of Environmental Analysis of Roadway Impacts" and was written in February 2017 by lawyers for the East Collier Property Owners. This request seeks a copy of any communications between the Solicitor's office and/or the U.S. Fish and Wildlife Service and the East Collier Property Owners and their lawyers at the firm Hunton & Williams/Hunton AK concerning this white paper or SOL's review of said white paper

I am a reporter with The Guardian newspaper and other outlets and ask that this request be expedited.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

Jimmy Tobias



Screen20Shot202020-04-2820at202.43.0220PM.png

[Download](#)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

1 Wildlife Drive
Sanibel, Florida 33957



IN REPLY REFER TO:
FWS-2020-00661

August 19, 2021

Email: 92655-85710251@requests.muckrock.com

Jimmy Tobias
The Guardian
411A Highland Ave
Sommerville, Massachusetts 02144-2516

Dear Mr. Tobias:

The Fish and Wildlife Service Atlanta Regional FOIA office received your Freedom of Information Act (FOIA) request, dated May 7, 2020, and assigned it control number FWS-2020-00661. Please cite this number in any future communications with our office regarding your request.

In your request, you asked for the following records:

Any emails, email attachments, or other documents related to the Solicitor's review of the white paper referenced in the email chain attached below to this request. This request specifically seeks a copy of the Solicitor office's review of the white paper in question, which is entitled "The Proper Scope of Environmental Analysis of Roadway Impacts" and was written in February 2017 by lawyers for the East Collier Property Owners. This request seeks a copy of any communications between the Solicitor's office and/or the U.S. Fish and Wildlife Service and the East Collier Property Owners and their lawyers at the firm Hunton & Williams/Hunton AK concerning this white paper or SOL's review of said white paper.

Response

We are writing today to respond to your request on behalf of the Fish and Wildlife Service. We have enclosed four (4) pdf files consisting of one hundred forty (140) pages, which is being released to you in part. Portions of these materials and an additional sixty-nine (69) pages are being withheld under FOIA Exemption 5 that 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 and attorney-client. We are withholding eleven (11) pages in part and one hundred and twelve (112) pages in full under Exemption 5 because they qualify to be withheld both because they meet the Exemption 5 threshold of being inter-agency or intra-agency and under the following privileges:

Deliberative Process 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, such as: (1) assuring that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protecting against premature disclosure of proposed policies; and, (3) protecting 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 that reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional 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 and expose the agency's decision-making process in such a way as to discourage candid discussion within the agency, thereby, undermining its ability to perform its mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

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. The privilege is not limited to the context of litigation although it fundamentally applies to confidential facts divulged by a client to their attorney. The privilege also encompasses any opinions given by an attorney to their client based upon and 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 agency 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 FWS 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 FWS has held this information confidential and has not waived the attorney-client privilege.

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.

Stacey Cummins, FWS FOIA Coordinator is responsible for this partial denial. Vicki V. Mott, Attorney-Advisor in the Office of the Solicitor, was consulted.

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
Web: <https://ogis.archives.gov>
Telephone: (202) 741-5770
Fax: (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.

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, by phone at 1-877-684-6448, or by fax at (202) 741-5769.

Appeal Rights

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 FWS'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 FWS's response. Failure to include with your appeal all correspondence between you and the FWS 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

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.

This is our final response and closes your request, FWS-2020-00661. If you have any questions about our response to your request, you may contact me by phone at 303-236-4473 or by e-mail at stacey_cummins@fws.gov.

Sincerely,

**STACEY
CUMMINS**

Stacey Cummins
FWS FOIA Coordinator

Digitally signed by
STACEY CUMMINS
Date: 2021.08.19
16:11:47 -06'00'

Enclosures

Fwd: FOIA Appeal re: FWS-2020-00661

----- Forwarded message -----

From: **Jimmy Tobias** <jtoby87@gmail.com>
Date: Wed, Sep 8, 2021 at 8:41 AM
Subject: FOIA Appeal re: FWS-2020-00661
To: APPEALS, SOL <FOIA.Appeals@sol.doi.gov>

To Whom It May Concern:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552 in reference to the following FOIA request: FWS-2020-00661. The agency's final response letter to me is attached below as well as relevant released documents and my original request. I confirmed with FWS that this was indeed their final response.

The agency provided its final release of documents in response to this request on August 19, 2021. The responsive documents include numerous large passages that have been redacted under exemption b5, and numerous documents that were redacted in their entirety under b5. I seek to appeal all redactions and all withholdings under the b5 exemption from this release.

The agency has not met the threshold for withholding and redacting the content of these records under Exemption 5. Among other things, the agency did not articulate a clear reason for redacting and withholding these specific documents under Exemption 5. It used boilerplate language to justify its redactions rather than a clear description of why these specific documents are eligible for withholding. In redacting entire pages of documents, the agency also failed to attempt to segregate information for release. In the batch of documents titled "WIP_AC_DPP_FWS-2020-00661_Redacted.pdf", for instance, the agency redacted more than a dozen full pages without even attempting to segregate the material. What's more, many if not all of the records that were redacted or withheld were the product of email conversations between government officials about the activities of private individuals outside of the government, as such b5 should not apply at all to these records. They should be open to public scrutiny in their entirety. Finally, these records concern a matter that is fundamentally post-decisional, many of them are well over two years old. They should be released.

I trust that upon re-consideration, FWS will reverse the decision denying me access to this materials and re-release the full set of documents without redactions. However, if within twenty days I have not received a full response to my request, I will deem the appeal denied and explore initiating a lawsuit to compel disclosure on one or more of these requests.

As I have made this request in the capacity of a journalist and this information is of timely value, I would appreciate the FWS expediting the consideration of my appeal in every way possible. In any case, I will expect to receive the department's decision within 20 business days, as required by the statute.

Thank you again for your assistance and for the work that you do. I truly appreciate it.

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Jimmy Tobias
Email: jtoby87@gmail.com
Mobile: (248) 763-0088
Website: www.jimmytobias.com





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Website: www.jimmytobias.com

5 attachments



Original Request.png
396K

-  **20210819_LTR_signed_2nd_Interim_FWS-2020-00661.pdf**
256K
-  **WIP_AC_DPP_FWS-2020-00661_Redacted.pdf**
678K
-  **WIP_AC_FWS-2020-00661_Redacted.pdf**
667K
-  **WIP_DPP_FWS-2020-00661_Redacted.pdf**
1326K

Fwd: FOIA Appeal re: FWS-2020-00661

----- Forwarded message -----

From: **Jimmy Tobias** <jtoby87@gmail.com>
Date: Tue, Jan 11, 2022 at 12:52 PM
Subject: Re: FOIA Appeal re: FWS-2020-00661
To: APPEALS, SOL <FOIA.Appeals@sol.doi.gov>

Hello,

I never received an acknowledgement of the appeal below. Please provide acknowledgement, an appeal reference number & an estimated date of completion. Thank you.

Sincerely,

Jimmy Tobias

On Wed, Sep 8, 2021 at 8:41 AM Jimmy Tobias <jtoby87@gmail.com> wrote:
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Thank you again for your assistance and for the work that you do. I truly appreciate it.

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Jimmy Tobias
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