



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, DC 20240

IN REPLY REFER TO:  
7202.4-OS-2020-00353

July 10, 2020

Via email: [89124-61417337@requests.muckrock.com](mailto:89124-61417337@requests.muckrock.com)

Jimmy Tobias  
411A Highland Ave  
Somerville, MA 02144

*Re: Jimmy Tobias v. U.S. Department of the Interior, 1:20-cv-01110*

Dear Mr. Tobias:

On March 2, 2020, you filed a Freedom of Information Act (FOIA) request seeking the following:

Any and all written or electronic communications, including email attachments, sent or received by David Bernhardt that contain one or more of the following words or phrases: “ECPO”, “ECMSHCP”, “Collier”, “Colliers”, “Spilker”, and/or “panther”.

Your request was received in the Office of the Secretary FOIA office on March 2, 2020 and assigned control number **OS-2020-00353**.

We are writing today to respond to your request. Please find attached one file consisting of 163 pages, which is being released in part.

In reviewing the released records, you will find that the government has made certain redactions pursuant to the deliberative process privilege and attorney client privilege of FOIA Exemption 5, found at 5 U.S.C. § 552(b)(5). Additionally, certain redactions have been made under the FOIA Exemption 6 found at 5 U.S.C. § 552(b)(6).

## **Exemption 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 six (6) pages 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 privilege:

### *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 which 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, 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 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 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 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 and information. Additionally, the Office of the Secretary 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 Office of the Secretary has held this information confidential and has not waived the attorney-client privilege.

#### **Exemption 6**

Exemption 6 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\(b\)\(6\)](#). We are withholding six (6) pages in part under Exemption 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 the Secretary's email address and personal information and we have determined that the individual to whom this information pertains has a substantial privacy interest in withholding it. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of this individual and we are withholding it under Exemption 6.

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.

Leah Fairman, Office of the Secretary, Acting FOIA Officer is responsible for this partial denial. Jeffrey Scott, Attorney-Advisor in the Office of the Solicitor was consulted.

If you have any questions about our response to your request, you may contact Sean Tepe Assistant United States Attorney, by phone at (202) 252-2533 or by email at [Sean.Tepe@usdoj.gov](mailto:Sean.Tepe@usdoj.gov)

Sincerely,

Leah Fairman  
Office of the Secretary  
Acting FOIA Officer

cc: Sean Tepe, AUSA

Electronic Enclosure