

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

WILD VIRGINIA,
a Virginia nonstock corporation,

and

DAVID SLIGH,

Plaintiffs;

v.

**UNITED STATES FISH
& WILDLIFE SERVICE,**

Defendant.

Civil Action No. 3:20-cv-51

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

EXHIBIT F

**ADMINISTRATIVE APPEAL OF WILD VIRGINIA
CONSERVATION DIRECTOR DAVID SLIGH**

FOIA Tracking No. FWS-2020-00656

July 22, 2020



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July 22, 2020

BY ELECTRONIC AND UNITED STATES CERTIFIED MAIL

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Attention: FOIA/Privacy Act Appeals Office
1849 C Street Northwest MS-6556 MIB
Washington, District of Columbia 20240
FOIA.Appeals@sol.doi.gov

RE: Freedom of Information Appeal, Tracking No. FWS-2020-00656

Good Afternoon,

This is an appeal under Section 552(a)(6)(A)(ii) of the federal Freedom of Information Act¹ (the Act) and 43 C.F.R. § 2.57, challenging the United States Fish and Wildlife Service's decision to withhold three records responsive to a request submitted by David Sligh, Conservation Director for Wild Virginia, on May 2, 2020, and processed under Tracking No. FWS-202-00656 (the Request). As detailed below, the Service has wrongfully invoked Exemption 4 of the Act, which does not apply to the non-commercial and non-confidential material responsive to Mr. Sligh's request. The Service's failure to produce that material is a violation of the Act.

You have twenty working days to respond to this appeal.² If the Service does not grant this appeal and provide Mr. Sligh with minimally redacted copies of the requested records, Mr. Sligh intends to seek appropriate relief—including reasonable attorneys' fees—under Section 552(a)(4) of the Act.³

FACTUAL AND CONTEXTUAL BACKGROUND

The documents at issue in this appeal relate to the Mountain Valley Pipeline project (the Pipeline)—a 303.5-mile natural gas transmission pipeline proposed by Mountain Valley Pipeline LLC (Mountain Valley) to run from Wetzel County, West Virginia to Pittsylvania County,

1 5 U.S.C. § 552(a)(6)(A)(ii).

2 *Id.*; 43 C.F.R. § 2.62(a).

3 5 U.S.C. § 552(a)(4)(B)-(E).

Virginia.⁴ Charged with reviewing the project under Section 7(c) of the Natural Gas Act,⁵ the Federal Energy Regulatory Commission determined that the Pipeline *could* affect up to twenty-three species protected under the federal Endangered Species Act,⁶ and likely *would* affect at least seven of those species.⁷ As such, the Commission directed its staff and Mountain Valley to initiate formal consultation with the Fish and Wildlife Service under Section 7 of the Endangered Species Act⁸ and prohibited construction of the Pipeline until that process was complete.⁹

The consultation nominally concluded on November 21, 2017, when the Service provided the Commission with a Biological Opinion and Incidental Take Statement for the Pipeline.¹⁰ After several conservation groups filed a federal lawsuit alleging serious flaws in the Service's analysis,¹¹ however, the agencies decided on August 28, 2019, to formally reinstate consultation under 50 C.F.R. § 502.16(b).¹² The agencies later agreed to extend the reinstated consultation period until April 2020, in accordance with 50 C.F.R. § 402.14(e).¹³

On April 27, 2020, Fish & Wildlife Service Field Supervisor Cindy Shulz advised the Commission by letter that, although the Service and Mountain Valley had made “considerable progress” in the consultation process, they estimated “an additional 30 days [would be] needed to complete consultation.”¹⁴ Ms. Shulz explained that the additional time would provide the Service

4 *See generally* *Mountain Valley Pipeline LLC*, FERC Docket No. CP16-10, Ordering Issuing Certificates & Granting Abandonment Authority (October 13, 2017), available at <https://bit.ly/30yhid0>.

5 15 U.S.C. § 717f(c).

6 16 U.S.C. §§ 1531–1544.

7 *See* Order Issuing Certificates, *supra* note 4, at ¶ 210.

8 16 U.S.C. § 1536.

9 *See* Order Issuing Certificates, *supra* note 4, at ¶ 213.

10 *See* Fish & Wildlife Service, Biological Opinion for Mountain Valley Pipeline, Project Nos. 05E2VA00-2016-F-0880, 05E2WV00-2015-F-0046 (November 21, 2017), available at <https://bit.ly/2WKssu2>.

11 *See Wild Virginia v. Department of the Interior*, Case No. 19-1866, Petitioners' Motion for Stay of Respondent Fish & Wildlife Service's Biological Opinion and Incidental Take Statement (4th Cir. August 21, 2019), available at <https://bit.ly/2WIPCAN>.

12 *See* Letter from Federal Energy Regulatory Commission Gas Division Chief James Martin, Ph.D., to Fish & Wildlife Service Field Supervisor Cindy Shulz (August 28, 2019), available at <https://bit.ly/2ZOr3EJ>.

13 *See generally* Exhibit A (Fish & Wildlife Service's April 27, 2020 Letter to Federal Energy Regulatory Commission)

14 *Id.*

with an opportunity to review the “updated technical analysis of potential project-related sedimentation” that Mountain Valley had recently completed.¹⁵

Mr. Sligh’s Request. On May 2, 2020, Mr. Sligh used the Department of the Interior’s online FOIA portal to submit a request for all “documents comprising the ‘updated technical analysis of potential project-related sedimentation’” mentioned in Ms. Shulz’s April 27, 2020 letter.¹⁶ Mr. Sligh requested expedited consideration of his request, explaining that any delays in processing would deprive the public of an opportunity to assess the technical sufficiency of the applicant’s analysis in time to inform the Service’s forthcoming biological opinion.¹⁷

Service’s Acknowledgment Letter. On May 14, 2020, the Service provided Mr. Sligh with a letter acknowledging that its Hadley FOIA Office was in receipt of his request.¹⁸ The May 14 letter also summarily denied Mr. Sligh’s request for expedited processing.¹⁹

Service’s Submitter Rights Letter. Also on May 14, 2020, the Service sent a letter to Mountain Valley, informing the company of Mr. Sligh’s Request and inviting it to comment on whether the materials described therein were subject to disclosure under the Act.²⁰ Although Mr. Sligh was copied on the Service’s May 14, 2020 letter, he received no indication as to whether Mountain Valley actually responded thereto.

Service’s Response Letter. The Service provided its final response to Mr. Sligh’s Request by letter dated June 25, 2020 (the Response Letter).²¹ In that letter, the Service stated that it had identified three records responsive to the Request but was “withholding 596 pages in full under FOIA Exemption 4, [which] protects ‘trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.’”²² The Response Letter justified its invocation of Exemption Four only by stating that

[t]he withheld information is commercial or financial information. The entity that supplied this information (the submitter) is considered a person, because the term “person,” under FOIA, includes a wide range of entities including corporations. Also, the submitter does not customarily release this information to the public, so the information is confidential for the purposes of Exemption 4.²³

15 *Id.*

16 *See generally* Exhibit B (David Sligh’s May 2, 2020 Request for Records).

17 *Id.* at 3.

18 *See generally* Exhibit C (Fish & Wildlife Service’s May 14, 2020 Acknowledgment Letter).

19 *Id.* at 1–2.

20 *See generally* Exhibit D (Fish & Wildlife Service’s May 14, 2020 Submitter’s Rights Letter).

21 *See generally* Exhibit E (Fish & Wildlife Service’s June 25, 2020 Response Letter).

22 *Id.* at 1 (quoting 5 U.S.C. § 552(b)(4)).

23 *Id.*

The Service provided no further explanation for its withholding, nor did it explain the extent to which the withheld records contained reasonably segregable information subject to disclosure under the Act.

LEGAL FRAMEWORK

The Freedom of Information Act “sets forth a policy of broad disclosure of Government documents in order ‘to ensure an informed citizenry, vital to the functioning of a democratic society.’”²⁴ To that end, the Act “mandates release of properly requested federal agency records unless the materials fall squarely within one of nine statutory exemptions.”²⁵ The Supreme Court has “repeatedly explained ‘the basic policy that disclosure, not secrecy, is the dominant objective’ of” the Act.²⁶ As such, the Act’s exemptions to disclosure are “explicitly made exclusive”²⁷ and must “be ‘given a narrow compass.’”²⁸ In short, any inquiry under the Act proceeds against a “strong presumption in favor of disclosure.”²⁹

Because “requesters face an information asymmetry given that the agency [alone] possesses the requested information,”³⁰ an agency bears the burden of justifying its decision to withhold any portion of a record responsive to a request under the Act.³¹ To meet that burden, the government must do more than “merely reiterate legal standards or offer far-ranging category definitions for information.”³² The federal courts have consistently held that “conclusory and generalized allegations of exemptions are unacceptable.”³³ Moreover, the Act’s exemptions “do not apply

24 *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 621 (1982) (quoting *National Labor Relations Board v. Robbins Tire & Rubber*, 437 U.S. 214, 242 (1978)).

25 *Property of the People v. Office of Management & Budget*, 330 F. Supp. 3d 373, 380 (D.D.C. 2018) (citing *Milner v. Department of the Navy*, 562 U.S. 562, 565 (2011)).

26 *BuzzFeed v. Department of Justice*, 419 F. Supp. 3d 69, 75 (D.D.C. 2019) (quoting *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8 (2001)).

27 *Milner*, 562 U.S. at 565 (quoting *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973)).

28 *Id.* at 571 (quoting *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

29 *Department of State v. Ray*, 502 U.S. 164, 173 (1991).

30 *COMPTEL v. Federal Communications Commission*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012).

31 5 U.S.C. § 552(a)(4).

32 *Property of the People*, 330 F. Supp. 3d at 380 (quoting *Citizens for Responsibility & Ethics in Washington v. Department of Justice*, 955 F. Supp. 2d 4, 13 (D.D.C. 2013)).

33 *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1115 (D.C. Cir. 2007) (quoting *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)); *see also Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (“[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions.”), *certiorari denied*, 415 U.S. 977 (1974); *accord Kamman v. Internal Revenue Service*, 56 F.3d 46, 48 (9th Cir. 1995); *Ferri v. Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981).

wholesale,” and any information exempt from mandatory disclosure “does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.”³⁴ The Act provides instead that “[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.”³⁵ The requirement is so critical to the Act that even when parties to an enforcement action “do not address segregability, the district court must raise it *sua sponte*.”³⁶ Failure to do so is reversible error.³⁷

One of the Act’s “narrow” exceptions to disclosure—a provision commonly referred to as “Exemption Four”—allows agencies to withhold “trade secrets and commercial or financial information [that was] obtained from a person and [is] privileged or confidential.”³⁸ To qualify under Exemption Four, information must either constitute a “trade secret” or “be (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.”³⁹ However, “like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the” Act.⁴⁰

GROUNDS FOR APPEAL

A. The information requested is, by its very nature, not exempt from disclosure.

1. *The information requested is neither “commercial” nor “financial information.”*

Where, as here, no genuine trade secrets are at issue,⁴¹ the threshold determination under Exemption Four is whether the responsive material qualifies as “commercial or financial information.” To meet this standard, information must, “‘in and of itself,’ . . . serve[] a ‘commercial function’ or [be] of a ‘commercial nature.’”⁴² Courts have “consistently held that

34 *Arieff v. Department of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983).

35 5 U.S.C. § 552(b).

36 *Billington v. Department of Justice*, 233 F.3d 581, 586 (D.C. Cir. 2000) (citing *Trans-Pacific Policing Agreement v. Customs Service*, 177 F.3d 1022, 1028 (D.C. Cir. 1999)).

37 *Trans-Pacific Policing Agreement*, 177 F.3d at 1028.

38 5 U.S.C. § 552(b)(4).

39 *Friends of Animals v. Bernhardt*, Case No. 19-cv-01443-MEH, 2020 WL 2041337, at *6 (D. Colo. April 24, 2020) (quoting *Brown v. Perez*, 835 F.3d 1223, 1230 (10th Cir. 2016)).

40 *New York Public Interest Research Group v. Environmental Protection Agency*, 249 F. Supp. 2d 327, 334 (S.D.N.Y. 2003) (quoting *Washington Post v. Department of Health & Human Services*, 865 F.2d 320, 324 (D.C. Cir. 1989)).

41 The Service has not invoked Exemption 4’s protection of genuine trade secrets.

42 *National Association of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (quoting *American Airlines v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978)).

the term ‘commercial’ should be given its ordinary, common sense meaning.”⁴³ However, they also recognize that the term must be understood in light of “the fundamental premise that the principal objective of the Freedom of Information Act is one of ‘disclosure, not secrecy.’”⁴⁴ Accordingly, the general rule that “exemptions to the Act are to be construed narrowly” applies with full force in defining the scope of “commercial” information.⁴⁵

At its most general, information “is commercial if it relates to commerce, trade, or profit.”⁴⁶ Records that “actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business,” therefore generally qualify for the exemption.⁴⁷ Courts have traditionally focused on whether the information withheld concerns “a particular commercial transaction.”⁴⁸ But the “mere fact that an event occurs in connection with a commercial operation does not automatically transform regarding that event into commercial information.”⁴⁹ Rather, “in order to constitute ‘commercial’ information under exemption 4, the documents must contain information that bears a more direct relationship with the operations of a commercial venture.”⁵⁰ The D.C. Circuit has accordingly rejected as “plainly incorrect” the argument that commercial information includes “all records

43 *Chicago Tribune v. Federal Aviation Administration*, Case No. 97-C-2363, 1998 WL 242611, at *2 (N.D. Ill. May 7, 1998) (citing *Public Citizens Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

44 *Id.* (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

45 *Id.*; *Public Citizen v. Department of Health & Human Services*, 975 F. Supp. 2d 81, 101 (D.D.C. 2013) (“[C]onsistent with the narrow construction given to FOIA exemptions, ‘not every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4.’”) (quoting *Public Citizen Health Research*, 704 F.2d at 1290).

46 *Carlson v. Postal Service*, 504 F.3d 1123, 1129 (9th Cir. 2007) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987)).

47 *100Reporters LLC v. Department of Justice*, 248 F. Supp. 3d 115, 134 (D.D.C. 2017) (quoting *Public Citizen Health Research*, 704 F.2d at 1290); *see also, e.g., Public Citizen Health Research Group v. Department of Health, Education & Welfare*, 477 F. Supp. 595, 605 (D.D.C. 1979) (concluding that “commercial information” includes “data concerning fees, payment schedules, or other commercial arrangements”), *reversed on unrelated grounds*, 668 F.2d 537 (D.C. Cir. 1981).

48 *See, e.g., Friends of Animals*, 2020 WL 2041337, at *8; *100Reporters*, 248 F. Supp. 3d at 136 (concluding that government met its burden of establishing that records withheld under Exemption 4 “describe[d] specific transactions, projects, bids, and business partners”).

49 *Chicago Tribune*, 1998 WL 242611, at *2 (citing *Kyle v. United States*, Case No. CIV-80-1038E, 1986 WL 12134 (W.D.N.Y. October 27, 1996)).

50 *Id.* (citing *Critical Mass Energy v. Nuclear Regulatory Commission*, 830 F.2d 278, 281 (D.C. Cir. 1987)).

that relate to every aspect of [a] company’s trade or business”⁵¹ or that information is sufficiently “commercial” if “it has value” to someone.⁵²

The records described in Mr. Sligh’s Request do not relate to the purchase or sale of goods or to any commercial transaction whatsoever. Nor can the records be construed as “financial,” as they do not relate to finances or money. Mr. Sligh has instead requested records reflecting technical, scientific information developed solely for the purpose of environmental compliance under the Endangered Species Act. If ordinary environmental information such as this is to be considered “commercial” merely because it is tangentially related to a commercial project, the exception would swallow the rule and completely undermine the Act’s goal of governmental transparency. As such, the requested records are not “commercial or financial” information and do not qualify under Exemption Four.

2. *The information requested is neither “privileged” nor “confidential.”*

Even assuming that the information the Service is withholding genuinely qualifies as “commercial information,” its “exempt status turns on the sufficiency of the [Service’s] showing of confidentiality.”⁵³ The Supreme Court recently explained that the “ordinary, contemporary, common meaning” of the term “confidential” incorporates two general considerations.⁵⁴

- ☞ First, the source of the information must “both customarily and actually treat[it] as private.”⁵⁵ The case law surrounding this consideration “makes clear [that a] court must examine whether the information actually is kept and treated as confidential, not whether the submitter considers it to be so.”⁵⁶ In other words, “the owners’ subjective view of the nature of the information . . . is not the test for confidentiality.”⁵⁷
- ☞ In addition, “information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.”⁵⁸ Therefore, information provided to the government is confidential only when the government has assured the submitter that it would treat that information as private. The Department of Justice has instructed that, in determining whether information was submitted under an assurance of confidentiality,

51 *Public Citizen*, 975 F. Supp. 2d at 100 (citing *Getman v. National Labor Relations Board*, 450 F.2d 670, 673 (D.C. Cir. 1971)).

52 *Carlson*, 504 F.3d at 1129.

53 *Public Citizen Health Research*, 704 F.2d at 1286.

54 *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362–63 (2019).

55 *Id.* at 2363, 2366 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 476 (1961)).

56 *Center for Investigative Reporting v. Department of Labor*, Case No.18-cv-02414-DMR, 2020 WL 2995209, at *4 (N.D. Cal. June 4, 2020).

57 *Id.*

58 *Food Marketing*, 139 S. Ct. at 2363 (citing 1 OXFORD UNIVERSAL DICTIONARY ILLUSTRATED 367 (3d ed. 1971); WEBSTER’S NEW WORLD DICTIONARY 158 (1960)).

“[f]actors to consider include the government’s treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates.”⁵⁹

As detailed further below, the Service’s Response Letter fails to establish either of these factual predicates. But more importantly, the information at issue here is necessarily ineligible for “confidential” status under this standard, because information submitted in support of a biological opinion is submitted with the understanding that it will, if accepted by the Service, be incorporated in whole or in part in the Service’s final biological opinion—an unquestionably public document. The notion that Mountain Valley provided each bit of information within the nearly-600 pages of withheld records under an assurance of privacy is preposterous.

C. To the extent any ambiguity remains over the applicability of Exemption Four, the Service’s Response Letter provides an inadequate basis on which to evaluate its defense.

As detailed above, the very nature of the material described in Mr. Sligh’s Request forecloses the Service’s reliance on Exemption Four. But even assuming that the information withheld is not, by its nature, categorically ineligible for protection under Exemption Four, the Service’s Response Letter fails even to provide a boilerplate recitation of the statutory standard. As such, the Service has failed to properly invoke Exemption Four and has likewise failed to justify withholding the responsive records in whole.

To properly invoke one of the Act’s statutory exemptions, an agency must “provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.”⁶⁰ By contrast, it is “patently insufficient for the agency ‘merely to recite the statutory standards’ set forth in the exemptions.”⁶¹ Therefore, when Exemption Four is at issue, courts have refused to accept the mere “conclusory statement that ‘the records contain . . . commercial or financial information.’”⁶²

In stark contrast to the “substantial quantum of information” required to properly invoke a statutory exemption,⁶³ the Service’s Response Letter states only—and in cursory fashion—that:

[t]he withheld information is commercial or financial information. The entity that supplied this information (the submitter) is considered a person, because the term “person,” under FOIA, includes a wide range of entities including corporations.

59 United States Department of Justice, *Exemption 4 After the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media* (October 4, 2019), available at <https://bit.ly/3hffPPr>.

60 *Mead Data Center v. Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977).

61 *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 57 (D.D.C. 2014) (quoting *Carter v. Department of Commerce*, 830 F.2d 388, 392–93 (D.C. Cir. 1987)).

62 *Public Citizen*, 975 F. Supp. 2d at 103.

63 *See Ely v. Federal Bureau of Investigations*, 781 F.2d 1487, 1490 (D.C. Cir. 1986).

Also, the submitter does not customarily release this information to the public, so the information is confidential for the purposes of Exemption 4.⁶⁴

By “merely labeling information as ‘commercial’ or ‘financial,’” the Service has here provided Mr. Sligh with “exactly the sort of description that [courts have] already rejected as inadequate.”⁶⁵ The Service fails, even, to specify whether the information withheld is commercial or financial in nature—or, for that matter, whether it is confidential or privileged.

Moreover, the Service provides absolutely no explanation regarding the segregability of exempt from non-exempt information in the withheld records. For an agency to justify withholding records in their entirety, its segregability analysis must be more than an “unsophisticated parroting of FOIA’s statutory language.”⁶⁶ The Service’s Response Letter, however, fails to clear even *that* “patently insufficient” bar.⁶⁷ Instead, the Service makes no effort whatsoever to explain its failure to provide minimally redacted versions of the records response to Mr. Sligh’s Request. As stated above, the segregability analysis is of such importance that the failure of a trial court to address it *sua sponte* is reversible error.⁶⁸ An agency’s failure to provide *any* information regarding segregability is an arrant violation of the Act.

CONCLUSION

The Service’s cursory Response Letter reflects “a reflexive attitude of nondisclosure [that is] anathema . . . to the principles embodied in” the Act.⁶⁹ Because this refusal to provide Mr. Sligh with appropriately (and minimally) redacted copies of the requested records is a violation of both the principles and text of the Act, the Service must provide Mr. Sligh with those records immediately.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions regarding this appeal.

⁶⁴ Exhibit E at 1.

⁶⁵ *COMPTTEL v. Federal Communications Commission*, 945 F. Supp. 2d 48, 57 (D.D.C. 2013).

⁶⁶ *Animal Legal Defense Fund v. Department of the Air Force*, 44 F. Supp. 2d 295, 301 (D.D.C. 1999); *see also Center for Public Integrity v. Department of Energy*, 234 F. Supp. 3d 65, 84 (D.D.C. 2017) (finding inadequate declaration that “merely states, without ‘detailed justification’ and in ‘conclusory’ fashion that no responsive documents are segregable”); *Natural Resources Defense Council v. Department of Defense*, 442 F. Supp. 2d 857, 873 (C.D. Cal. 2006) (rejecting “boilerplate” segregability analysis that merely stated “[a]ny factual information [was] so intertwined with the sender’s personal thoughts that disclosure would reveal the specific considerations associated with the decision-making process of the executive branch”); *United America Financial v. Potter*, 531 F. Supp. 2d 29, 44–45 (D.D.C. 2008).

⁶⁷ *Animal Legal Defense*, 44 F. Supp. 2d at 301.

⁶⁸ *Trans-Pacific Policing*, 177 F.3d at 1028.

⁶⁹ *Chesapeake Bay Foundation v. Army Corps of Engineers*, 677 F. Supp. 101, 108 (D.D.C. 2009).

Respectfully submitted,



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(Virginia State Bar No. 89285)

(West Virginia State Bar No. 12590)

Elizabeth A. Bower

(West Virginia State Bar No. 13589)

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Counsel for David Sligh

Enclosures:

Exhibit A: Fish & Wildlife Service's April 27, 2020 Letter to Federal Energy Regulatory Commission

Exhibit B: David Sligh's May 2, 2020 Request for Records

Exhibit C: Fish & Wildlife Service's May 14, 2020 Acknowledgment Letter

Exhibit D: Fish & Wildlife Service's May 14, 2020 Submitter's Rights Letter

Exhibit E: Fish & Wildlife Service's June 25, 2020 Response Letter

EXHIBIT A

**Fish & Wildlife Service's Letter to
Federal Energy Regulatory Commission**

(April 27, 2020)



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Virginia Field Office
6669 Short Lane
Gloucester, VA 23061

April 27, 2020

Dr. James Martin
Chief, Gas Branch 3
Division of Gas – Environment and Engineering
Federal Energy Regulatory Commission
Washington, D.C. 20426

Re: Mountain Valley Pipeline, LLC; Docket
Number CP 16-10-000; Project
#05E2VA00-2016-F-0880 and
#05E2WV00-2015-F-0046

Dear Dr. Martin:

On September 11, 2019, the U.S. Fish and Wildlife Service (Service) accepted your request for reinitiation of Section 7 consultation on the Mountain Valley Pipeline (MVP) project. The 90-day consultation period was originally set to expire on December 10, 2019. Pursuant to 50 C.F.R. § 402.14(e), the Federal Energy Regulatory Commission (FERC), the Service, and MVP previously agreed to extend the consultation until April 27, 2020.

The Service and the applicant have continued to make considerable progress, but estimate that an additional 30 days are needed to complete consultation. The applicant has completed its updated technical analysis of potential project-related sedimentation and has been working diligently to compile a substantial amount of additional information and analyses that will facilitate the Service's evaluation of potential effects on threatened or endangered species and expects to submit a comprehensive supplement to the Biological Assessment on April 27, 2020. The additional time will allow the Service time to review the supplemental information and analyses from the applicant and ensure that any additional information needs have been addressed. Consequently, on April 21, 2020, the Service contacted FERC to request an extension of consultation. This letter documents the agreement between the Service and FERC, with the consent of the project applicant in accordance with 50 C.F.R. § 402.14(e), to extend the consultation period by an additional 30 days until May 27, 2020. A copy of this letter confirming the extension is being forwarded to the applicant.

INTERIOR REGION 1 • NORTH ATLANTIC-APPALACHIAN

CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS
NEW HAMPSHIRE, NEW JERSEY, NEW YORK, PENNSYLVANIA, RHODE ISLAND, VERMONT
VIRGINIA, WEST VIRGINIA

If you have any questions regarding this extension or our shared responsibilities under the Endangered Species Act, please contact me at (804) 824-2426 or via email at cindy_schulz@fws.gov.

Sincerely,

Cindy Schulz
Field Supervisor
Virginia Ecological Services

cc: MVP, Pittsburgh, PA (Attn: Megan Stahl)

EXHIBIT B

David Sligh's Request for Records

(May 2, 2020)



U.S. Department of the Interior

Your Form Has Been Submitted

Please print or save a copy of this confirmation page for your records.

Your Submission Details

Your Name

David Sligh

Mailing Address

P.O. Box 1065

City

Charlottesville

State or Country

Virginia

Zip or Postal Code

22902

Address Type

Business

Daytime Phone Number

434-964-7455

Fax Number

E-mail Address

david@wildvirginia.org

Confirm E-mail Address

david@wildvirginia.org

Your Organization

Wild Virginia

Are you filing the request on behalf of another party?

No

breakline**If so, who are you filing the request on behalf of?****Contact Information Certification****Request Information****Bureau/Office**

Fish & Wildlife Service (FWS)

Relevant park, refuge, site or other location

Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061

Request Message**Request Description**

I seek the documents comprising the "updated technical analysis of potential project-related sedimentation" prepared in relation to the Endangered Species Act, Section 7 consultation for the Mountain Valley Pipeline (MVP) project. These documents are referenced, as shown in the quotation, in a letter dated April 27, 2020 from Cindy Schulz, Field Supervisor, Virginia Ecological Services to Dr. James Martin, Chief, Gas Branch 3, Division of Gas – Environment and Engineering, Federal Energy Regulatory Commission.

Requester's Communication Preferences

Electronic communication via email

Document Disclosure Preferences

Electronic copies via email

Expedited Processing**Select the applicable reason why you are requesting expedited processing**

There is an urgency to inform the public concerning actual or alleged Federal government activity and the request is made by a person primarily engaged in disseminating information.

Justification spacing

Justification for Expedited Processing

The documents pertain to potential impacts to endangered, threatened, and sensitive species that could be caused by MVP project. The project has already impacted habitats for some of these species and could cause additional and very damaging impacts to these species after the current Section 7 consultation and issuance of a biological opinion (bi op) are completed and if/when active construction is allowed to continue. Because the consultation process is currently projected to be completed by May 27, 2020 and then the bi op could be released within 45 days or sooner after that. Wild Virginia intends to use these documents to perform an analysis of the scientific and technical sufficiency of the technical analysis performed by the applicant and to make the documents available to others to perform their own analyses. We intend to submit any appropriate analyses and comments, based on these reviews, to the Fish and Wildlife Service and other appropriate agencies, in an attempt further inform their regulatory decisions and supplement agency records that are to support their decisions. It is urgent that we acquire these documents as soon as possible, because the dissemination of these documents, the preparation of analyses, and the transmittal to agencies will require substantial amounts of time. It is very important that all possible useful reviews and analyses are used in agency decisions and that the public is fully informed of these issues and that these are done before any additional impacts occur from this project, so it is vital that we have the information before additional agency decisions are made.

Expedited Processing Certification

I certify that the above statement(s) concerning expedited processing are true and correct to the best of my knowledge and belief.

Submission Date / Time May 2, 2020, 12:59 pm

Submission Page FOIA Request Form (<https://www.doi.gov/node/32906>)

Submission ID 606556

[Go back to the form](#)



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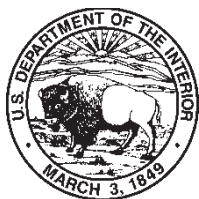
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U.S. Department of the Interior, 1849 C Street NW, Washington, DC 20240. feedback@ios.doi.gov

EXHIBIT C

**Fish & Wildlife Service's
Acknowledgment Letter**

(May 14, 2020)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, Massachusetts 01035



IN REPLY REFER TO:
FWS-2020-00656

May 14, 2020

VIA EMAIL: david@wildvirginia.org

Mr. David Sligh
P.O. Box 1065
Charlottesville, Virginia 22902

Dear Mr. Sligh:

The United States Fish and Wildlife Service (Service) Hadley, Massachusetts FOIA Office received your request dated May 4, 2020, and assigned it tracking number FWS-2020-00656. Please refer to this number in communications regarding your request. You requested the following:

- *The documents comprising the "updated technical analysis of potential project-related sedimentation" prepared in relation to the Endangered Species Act, Section 7 consultation for the Mountain Valley Pipeline (MVP) project. These documents are referenced, as shown in the quotation, in a letter dated April 27, 2020 from Cindy Schulz, Field Supervisor, Virginia Ecological Services to Dr. James Martin, Chief, Gas Branch 3, Division of Gas – Environment and Engineering, Federal Energy Regulatory Commission.*

EXPEDITED PROCESSING - Denied

You have asked for expedited processing of your FOIA request. The Department's FOIA regulations state that a bureau will provide expedited processing when a requester demonstrates a compelling need for the records by explaining in detail how the request meets one or both of the criteria below and certifying the explanation is true and correct to the best of the requester's knowledge and belief. The two criteria are as follows:

- (1) Failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (2) There is an urgency to inform the public about an actual or alleged government activity and the request is made by a person primarily engaged in disseminating information. (The requested information must be the type of information that has particular value that will be lost if not disseminated quickly; this ordinarily refers to a breaking news story that concerns a matter of public exigency. Information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media deadline unrelated to breaking news.) 43 C.F.R. § 2.20.

Mr. David Sligh
FWS-2020-00656

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Your request does not contain enough evidence to support either of these criteria because you have provided no evidence that failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, nor have you shown that the type of information requested has particular value that will be lost if not disseminated quickly. The requested information is not related to a breaking news story that concerns a matter of public exigency. Your request for expedited processing therefore has been denied.

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 communication denying the fee waiver. 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 this response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and this 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

FEE WAIVER - Granted

You have asked us to waive the fees for processing your request. Our FOIA regulations state that bureaus will waive, or partially waive, fees if disclosure of all or part of the information is:

Mr. David Sligh
FWS-2020-00656

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- (1) In the public interest because it is likely to contribute significantly to public understanding of government operations or activities, and
- (2) Not primarily in your commercial interest.

See 43 C.F.R. § 2.45(a). Our FOIA regulations also provide specific criteria that are used to determine whether these two requirements are met. *See 43 C.F.R. § 2.48.* Your request adequately addresses this criteria. Therefore, your request for a fee waiver is granted.

REQUESTER CATEGORY

We have classified you as an educational or noncommercial scientific institution. As such, we may charge you for some of our duplication costs, but we will not charge you for our search or review costs; you also are entitled to up to 100 pages of photocopies (or an equivalent volume) for free. *See 43 C.F.R. § 2.39.* However, as noted above your request for a fee waiver has been granted and there will not be any fees associated with the processing of your request.

MULTITRACK PROCESSING

We use Multitrack Processing to process FOIA requests. The Simple track is for requests that would generally take one to five workdays to process. The Normal track is for requests that would generally take six to twenty workdays to process. The Complex track is for requests that would generally take twenty-one to sixty workdays to process. The Extraordinary track is for requests that would generally take more than sixty workdays to process. The Expedited track is for requests that have been granted expedited processing, which are processed as soon as practicable. Within each track, requests are usually processed on a first-in, first-out basis.

Your request falls into the Complex processing track. There are 22 requests pending ahead of yours in this processing track. Presuming that our current FOIA capacity and burden remain constant, we expect that we will dispatch a determination to you by July 27, 2020.

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://www.archives.gov/ogis>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Contact information for the Department's FOIA Public Liaison, who you may also seek dispute resolution services from, is available at <https://www.doi.gov/foia/foiacenters>.

Mr. David Sligh
FWS-2020-00656

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If you have any questions about this response, you may contact me by phone at 413-253-8629 or by email at Eleanor_McVey@fws.gov.

Sincerely,

Eleanor Mcvey
FOIA Coordinator

EXHIBIT D

**Fish & Wildlife Service's
Submitter's Rights Letter**

(May 14, 2020)



United States Department of the Interior



FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589

May 14, 2020

Via Email: tnormane@equitransmidstream.com

In Reply Refer To:
FWS/Region 5/FOIA FWS-2020-00656

Mr. Todd Normane
Assistant General Counsel
Mountain Valley Pipeline, LLC
2200 Energy Drive
Canonsburg, Pennsylvania

Dear Mr. Normane:

This concerns a May 4, 2020, Freedom of Information Act (FOIA) request that David Sligh, Conservation Director of Wild Virginia submitted to the U.S. Fish and Wildlife Service (Service). This FOIA request was assigned control number FWS-2020-00656 and seeks: *...documents comprising the "updated technical analysis of potential project-related sedimentation" prepared in relation to the Endangered Species Act, Section 7 consultation for the Mountain Valley Pipeline (MVP) project. These documents are referenced, as shown in the quotation, in a letter dated April 27, 2020 from Cindy Schulz, Field Supervisor, Virginia Ecological Services to Dr. James Martin, Chief, Gas Branch 3, Division of Gas – Environment and Engineering, Federal Energy Regulatory Commission.*

It is possible that you have submitted information responsive to this request that may be protected under FOIA Exemption 4, which protects from disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). Accordingly, our FOIA regulations, 43 C.F.R. Part 2, Subpart F, require us to provide you, as the submitter of the information, with written notice of the FOIA request and to seek your views on the disclosure of the information.

We are providing a pdf file of the exact language of the request as well as a copy of the responsive records containing possibly confidential information. A copy of the responsive records can be found using the Fileshare link provided in the email transmitting this correspondence. If you wish to object to the release of this information, the regulations require you to provide a written statement setting forth the specific and detailed justification for withholding any portion of the information. 43 C.F.R. § 2.30 to § 2.31(a).

Mr. Todd Normane
FWS-2020-00656

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Please note that this is your chance to let us know why some of the information you submitted should be protected. Please review the guidance below carefully and be very clear and specific about your concerns and rationales. If you do not respond, we likely will have no choice but to release this information in full.

Information may qualify for protection under Exemption 4 as a “trade secret” if it is information that is “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires there be a direct relationship between the information at issue and the productive process. *See id.* Should you wish to object to the disclosure of any of the information in the records because it is a trade secret, your specific and detailed discussion must explain how *each category* of information the objections are related to qualifies for protection under Exemption 4 as a trade secret. The explanation must also identify a direct relationship between the information and the productive process.

Alternatively, information may qualify for protection under Exemption 4 if it is commercial or financial information that is privileged or confidential. Should you wish to object to the disclosure of any of the information in the records because it is commercial or financial information that is privileged or confidential, your specific and detailed discussion must explain how *each category* of information the objections are related to qualifies for protection under Exemption 4 as commercial or financial information that is privileged or confidential.

In determining whether information is commercial or financial, the terms are given their “ordinary meanings.” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). You therefore must provide a specific and detailed explanation of how the information relates to your commercial or financial interest and either the commercial/financial function the information serves or the commercial/financial nature of the information.

The Supreme Court has noted that “at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4. *See Food Mktg. Inst. v. Argus Leader Media* 588 U.S. ___ (2019). You therefore must certify and explain that the information you object to disclosing is confidential, you have not disclosed the information to the public, the information is not routinely available to the public from other sources, and you treat it as private. Finally, you must let us know whether you provided the information to the government under an express or implied assurance of privacy.

Please be aware that the FOIA requires that “any reasonably segregable portion of a record” must be released after appropriate application of one of the FOIA’s nine exemptions. *See 5 U.S.C. § 552(b)* (discussion after exemptions). Where a record contains both exempt and nonexempt material, the bureau will generally separate and release the nonexempt information. *See 43 C.F.R. § 2.25*. You should be mindful of this segregability requirement in formulating any objections you may have to the disclosure of the records. Information that does not qualify as a trade secret or as confidential commercial or financial information will not qualify for Exemption 4 protection and will be released.

Mr. Todd Normane
FWS-2020-00656

Should you wish to object to disclosure of any of the information at issue here, we must receive all of the information requested above **no later than May 29, 2020.**

You may send the documentation via email to Eleanor_Mcvey@fws.gov. If you do not submit the requested detailed written statement on or before the deadline set above, we will presume that you do not object to the disclosure of the information in question and will proceed with processing the FOIA request accordingly. *See 43 C.F.R. § 2.30(b).*

Also, please note that any comments you submit to us objecting to the disclosure of the records may themselves be subject to disclosure if the Department receives a FOIA request for them. If your comments contain commercial or financial information and a requester asks for the comments under FOIA, we will notify you and give you an opportunity to comment on the disclosure of such information.

Finally, please note that we are responsible for deciding what will be released or withheld. *See 43 C.F.R. § 2.28(f).* However, if you object to the disclosure of information and we decide to release it over your objections, we will notify you before we release the records. *See 43 C.F.R. § 2.33.*

You may find the regulations at <https://www.doi.gov/foia/news/guidance>.

If you have any questions, you may contact me by phone at (423) 253-8629, or by email at Eleanor_Mcvey@fws.gov.

Sincerely,

Eleanor McVey
Regional FOIA Coordinator

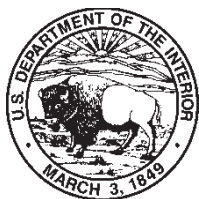
Enclosure

cc: David Sligh (without enclosure)
Virginia Field Office (C. Schulz)
Amanda Bossie (Solicitor)
Parker Moore (Beveridge & Diamond)

EXHIBIT E

**Fish & Wildlife Service's
Response Letter**

(June 25, 2020)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, Massachusetts 01035



IN REPLY REFER TO:
FWS-2020-00656

June 25, 2020

VIA EMAIL ONLY: david@wildvirginia.org

Mr. David Sligh
P.O. Box 1065
Charlottesville, Virginia 22902

Dear Mr. Sligh:

The United States Fish and Wildlife Service (Service) Hadley, Massachusetts FOIA Office received your request dated May 4, 2020, and assigned it tracking number FWS-2020-00656. Please refer to this number in communications regarding your request. You requested the following:

- *The documents comprising the "updated technical analysis of potential project-related sedimentation" prepared in relation to the Endangered Species Act, Section 7 consultation for the Mountain Valley Pipeline (MVP) project. These documents are referenced, as shown in the quotation, in a letter dated April 27, 2020 from Cindy Schulz, Field Supervisor, Virginia Ecological Services to Dr. James Martin, Chief, Gas Branch 3, Division of Gas – Environment and Engineering, Federal Energy Regulatory Commission.*

RESPONSE

This is the Service's final response to your request. We are withholding three records consisting of 596 pages in full as described below:

Exemption 4 - 43 C.F.R. §§ 2.23, .24

We are withholding 596 pages in full under FOIA Exemption 4. 5 U.S.C. § 552(b)(4). Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

The withheld information is commercial or financial information. The entity that supplied this information (the submitter) is considered a person, because the term "person," under the FOIA, includes a wide range of entities including corporations. Also, the submitter does not customarily release this information to the public, so the information is confidential for the purposes of Exemption 4.

Eleanor Mcvey, FOIA Coordinator, is responsible for this denial. Amanda Bossie in the Office of the Solicitor was consulted.

Mr. David Sligh
FWS-2020-00656

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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 final response. 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 this response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and this 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.

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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

MEDIATION SERVICES

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8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://www.archives.gov/ogis>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Mr. David Sligh
FWS-2020-00656

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Contact information for the Department's FOIA Public Liaison, who you may also seek dispute resolution services from, is available at <https://www.doi.gov/foia/foiacenters>.

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.

You were granted a fee waiver, therefore there are no fees associated with the processing of this request.

If you have any questions about this response, you may contact me by phone at 413-253-8629 or by email at Eleanor_McVey@fws.gov.

Sincerely,

Eleanor Mcvey
FOIA Coordinator