



# United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306  
Albuquerque, New Mexico 87103

In Reply Refer To:  
FWS/R2/NWRS/FOIA  
FWS-2019-00333

Mr. Jimmy Tobias  
MuckRock News  
DEPT MR 67425  
411A Highland Avenue  
Somerville, Massachusetts 02144-2516

Dear Mr. Tobias:

This responds to your Freedom of Information Act (FOIA) request dated January 15, 2019, in which you sought the following:

“E-mails containing the phrase "No More Deaths" sent or received by one or more staffers at the Cabeza Prieta National Wildlife Refuge between January 1, 2018 and the date this request is processed.”

Your request was assigned tracking number FWS-2019-00333 and forwarded to the Southwest Region National Wildlife Refuge System for processing. Staff located 68 records responsive to your request. From these records, we are withholding in part (via redaction) or in full, 41 documents in accordance with FOIA exemptions (b)(5), (b)(6), (b)(7)(a), (b)(7)(c), and (b)(7)(e), as described below. The partially redacted and full release records are provided to you on the enclosed compact disc (CD).

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 have withheld three documents in part and nine documents in full, in accordance with the attorney-client privilege of Exemption 5. 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 Federal 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 Federal 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 U.S. Fish and Wildlife Service (Service) has held this information confidential and has not waived the attorney-client 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. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect 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.

Eight records have been withheld under the deliberative process privilege of Exemption 5 that 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 these drafts 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.

Portions of four records have been redacted and one document is being withheld in full pursuant to Exemption (b)(6) of the FOIA. Under Exemption 6, agencies may withhold information or records on individuals contained in "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)). The withheld material includes personnel records and contact information (e.g. names, email addresses, and vehicle identification information).

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.' (*See DOD v. FLRA*, 510 U.S. 487, 497 (1994) (*quoting Reporters Comm.*, 489 U.S. at 773)). 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 personal information, as described above, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. 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 these individuals and we are withholding it under Exemption 6.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" if the records fall within one or more of six specific bases for withholding set forth in subparts (a) through (f) (5 U.S.C. § 552(b)(7)(a)-(f)). We are withholding 2 records in part and 16 in full under Exemption 7 because they are protected under the following subparts:

Exemption 7(A) protects law enforcement records if their release could reasonably be expected to interfere with enforcement proceedings. One record has been withheld under 7(A), we have determined they are law enforcement records for a pending or prospective investigation and releasing them could reasonably be expected to interfere with enforcement proceedings because their premature release could prematurely reveal the full scope of evidence obtained; the assessment of the evidence; strengths and weaknesses of the government's evidence and case; and the progress, status, direction, and limits of the government's investigation.

Exemption 7(C) protects law enforcement records if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. Two records have been partially withheld under 7(C), and we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency's performance of its statutory duties.

We have withheld 15 records pursuant to FOIA Exemption 7(E). This exemption protects law enforcement records if their release would disclose techniques and procedures for law enforcement investigation or prosecutions, or would disclose guidelines for law enforcement

investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law. The information redacted per 7(E) represents procedures for law enforcement investigations or prosecutions.

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.

Lastly, in our compilation and review of responsive records, we identified records that originated from or substantially concern other federal agencies. Two records are being referred to the U.S. Air Force (USAF) and three records are being referred to U.S. Customs and Border Protection (CBP) for a release determination. USAF and CBP will issue a response directly to you. You do not have to contact the agencies at this time, but should you need to do so in the future, you may do so at:

FOIA Manager  
56 CS/SCOKR  
13960 W. Eagle Street  
Luke AFB, Arizona 85309-1426

U.S. Customs and Border Protection  
Attn: FOIA Officer  
1300 Pennsylvania Avenue NW  
Washington, D.C. 20528

This response to your FOIA request was made in consultation with Justin Tade, Attorney-Advisor, Office of the Solicitor, Southwest Region, U.S. Department of the Interior (Department). 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 Service 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 the Service's 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  
Department of the Interior, Office of the Solicitor  
1849 C Street, N.W.  
MS-6556 MIB  
Washington, D.C. 20240  
Telephone: 202-208-5339 / Fax: 202-208-6677  
Email: FOIA.Appeals@sol.doi.gov

Also, please note 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 and does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. 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](mailto:ogis@nara.gov), Web: <https://ogis.archives.gov>  
Telephone: 202-741-5770 / Fax: 202-741-5769 / Toll-free: 1-877-684-6448

You also may seek dispute resolution services from our FOIA Public Liaison, Cathy Willis, at 720-425-5173 or via email at [cathy\\_willis@fws.gov](mailto:cathy_willis@fws.gov).

For your information, 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.

This completes the Southwest Region's response. The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.37. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, at 505-248-6658 or by email at [fw2foia@fws.gov](mailto:fw2foia@fws.gov).

Sincerely,

**MELANI** Digitally signed  
by MELANIE RUIZ  
**E RUIZ** Date: 2019.09.12  
08:22:16 -06'00'

Regional 2 FOIA Coordinator

Enclosure (CD)

