



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

May 1, 2015

IN REPLY REFER TO:
Appeal No. 2014-162

Susan Hlywa Topp
Topp Law PLC
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Gaylord, MI 49734

Dear Ms. Topp:

This responds to the September 12, 2014, Freedom of Information Act (“FOIA”) appeal (“appeal”) (No. 2014-162) that you filed with the Department of the Interior (“Department”). Your appeal concerns your April 9, 2013, FOIA request to the Fish and Wildlife Service (“FWS”) that sought three categories of documents generally regarding the “Heritage Sustainable Energy Wind Turbine Project (Heritage Garden Wind Farm)” (“Project”) located in the Garden Peninsula, Delta County, Michigan. You filed the appeal to challenge the FWS’s decision to withhold, pursuant to FOIA exemption (4)¹ and the deliberative process privilege of FOIA exemption (5),² information from approximately 96 pages that it determined are responsive to the FOIA request.

As an initial matter, the Department notes that in connection with processing the appeal, the FWS advised the Department that it inadvertently stated in its letter to you that it withheld information pursuant to exemption (4). While the FWS preliminarily evaluated withholding some of the information in the documents under that exemption during its processing of the FOIA request, it did not actually do so and it did not identify any of the redactions that it made in the documents that it released to you as having been made pursuant to that exemption.

On another note, the FWS also advised the Department that the documents it released to you contained redactions that it made under two other FOIA exemptions that it invoked but inadvertently did not cite in its letter responding to the request: FOIA exemptions (7)(A)³ and (7)(C).⁴ The Department addresses the FWS’s use of each of these exemptions below.

With that noted, after reviewing the issues presented in the appeal, the withheld information, and current case law, the Department concludes that your appeal will be **DENIED IN PART** and **GRANTED IN PART**.

¹ Exemption (4) allows an agency to withhold from public disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4).

² 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).

³ Exemption (7)(A) permits the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings.” See 5 U.S.C. § 552(b)(7)(A).

⁴ Exemption (7)(C) allows the withholding of records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

Your appeal is **DENIED** in that the FWS properly invoked the deliberative process privilege of exemption (5)⁵ as a basis to withhold most of the information at issue in the appeal. This information consists of drafts, employees' comments on drafts, other communications among FWS employees regarding the preparation and review of those drafts, and other internal FWS discussions regarding the Project. This protected information is predecisional, as the FWS employees prepared the documents or provided comments on the materials prior to the FWS making a final decision on the contents of the final versions of the documents. The other protected communications among FWS employees regarding the preparation and review of these drafts and internal discussions among FWS employees are also predecisional in that the employees prepared these communications prior to decisionmakers determining how to proceed with the issues that were under discussion.

Further, all of the information that the Department will continue to withhold under exemption (5) is also deliberative, as it reflects the personal views and opinions of the employees on the issues presented in the documents. The information was also tentative and subject to adoption, rejection, or modification by decisionmakers and it may not accurately reflect the views of the FWS on the issues under discussion. Moreover, these communications do not reflect the final position of the FWS and, instead, they represent the give-and-take of the consultative process that is designed to provide agency decisionmakers with quality products and recommendations. The recommendations and opinions contained in these documents reflect precisely the type of internal deliberations that the deliberative process privilege of exemption (5) was designed to protect.⁶

In determining to continue to withhold the above types of information under exemption (5), the Department evaluated the arguments that you presented in the appeal to explain why the exemption does not apply. You initially focus your arguments on the provisions in the Department's FOIA regulations that discuss the information requesters must provide in order to establish their entitlements to statutory fee waivers.⁷ However, please note that an agency's evaluation of a requester's entitlement to a fee waiver (a matter that is not at issue in this appeal) is separate from the evaluation undertaken to determine whether a FOIA exemption applies to responsive documents.

Indeed, in this case, the Department explained above the evaluation that it undertook to determine that the deliberative process privilege applies to the withheld information at issue in the appeal and none of the arguments that you presented in your discussion of a fee waiver establish that this exemption (5)

⁵ The deliberative process privilege protects the decisionmaking process of government agencies in order to prevent injury to the quality of agency decisions. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) ("*Coastal States*"); *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004) ("*Sierra Club*").

⁶ *Morley v. CIA*, 699 F. Supp. 2d 244, 255-56 (D.D.C. 2010) (stating that the privilege is "intended to prevent chilling future government employees from engaging in frank discussions during the deliberative process" (citing *Coastal States*, 617 F.2d at 866)); *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) ("The deliberative process privilege protects agencies from being 'forced to operate in a fishbowl.'" (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)); *Kidd v. DOJ*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (finding that the privilege protects documents whose disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents").

⁷ See 5 U.S.C. § 552(a)(4)(A)(iii) (directing agencies to provide documents to FOIA requesters without charge or at a reduced charge in particular circumstances). See also 43 C.F.R. § 2.48 (explaining "How will the bureau evaluate your fee waiver request?").

privilege does not apply. Thus, the Department finds no basis to diverge from its conclusion that the above-described information is protected from disclosure.

Your remaining arguments in the appeal focus, in essence, on the public interest in the disclosure of the withheld information. Please be aware that the courts have ruled that “[o]nce a document is deemed exempt from disclosure pursuant to Exemption 5, there is no need...to consider the public interest in disclosure.”⁸ This is because “by enacting specific FOIA exemptions, Congress determined that disclosure of material protected under an exemption is not in [the] public interest.”⁹ Accordingly, there is no reason for the Department to further evaluate the arguments that you make in the appeal regarding the public interest that you assert exists in the disclosure of the above-described protected information.


The appeal is **GRANTED** insofar as there is nothing on the record before the Department to support the FWS’s invocation of exemptions (7)(A) or (7)(C) as bases to withhold any of the information in the documents. Accordingly, the Department is not upholding the FWS’s use of these exemptions to redact information. However, since the information that the FWS withheld under these two exemptions reflects the type of information that the Department determined above is protected from disclosure by the deliberative process privilege of exemption (5) (i.e., comments on a draft and internal discussions regarding the Project), the Department will continue to withhold this information.

The appeal is also granted in that the Department’s review of the documents reveals that some of the information that the FWS withheld is not protected from disclosure. **The Department will release this non-exempt information to you within 20 workdays from the date of this decision.** The Department’s letter to you transmitting the non-exempt information will indicate the number of documents from which it is continuing to withhold information based on exemption (5).

This completes the Department’s response to your appeal. You have a right to seek judicial review of this decision under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Melissa Allen, FOIA Officer, FWS
Mark Hogeboom, FOIA Coordinator, FWS-Region 3
Kara Pfister, Attorney-Advisor, SOL-Twin Cities Field Office
Cindy Cafaro, Departmental FOIA Officer

⁸ *Sierra Club*, 384 F. Supp. 2d at 29-30 (quoting *Bilbrey v. Dep’t of the Air Force*, No. 00-0539 (W.D. Mo. Jan. 30, 2001)).

⁹ *Winterstein v. DOJ*, 89 F. Supp. 2d 79, 82 (D.D.C. 2000)