



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

April 24, 2015

IN REPLY REFER TO:  
Appeal No. 2015-085

Christian Lane

(b) (6)

Dear Mr. Lane:

This concerns your April 1, 2015, Freedom of Information Act (“FOIA”) appeal (“appeal”) to the Department of the Interior (“Department”), which it received on the same date and that the Department assigned as **Appeal Number 2015-085**. Your appeal concerns a February 19, 2015, FOIA request that you submitted to the Fish and Wildlife Service (“FWS”) seeking:

[A]ll FWS records regarding emails, and meeting notes between Mr. Roddy Gabel and Mr. Michael Moore. Records/emails/contact/meeting notes from 2012 to the present.

In response to the FOIA request, the FWS released 10 pages and withheld, pursuant to FOIA exemption (5),<sup>1</sup> specifically the deliberative process privilege,<sup>2</sup> information from one of the pages that it released. You timely filed this appeal, asserting that the 10 pages that the FWS released do not include “ANY communication, in any format, as requested between” the two individuals that you named. (emphasis in original). You also challenge the FWS’s decision to invoke exemption (5) to withhold information from the one page.

Your appeal is **DENIED IN PART** and **GRANTED IN PART**.

Your appeal is **DENIED** in that the Department’s review of the redacted information reveals that the FWS properly invoked the deliberative process privilege of exemption (5) as a basis to withhold the information on the one page. This protected information reflects a FWS employee’s preliminary opinions and deliberations on how to address the matter under discussion and a draft of a response that another FWS employee prepared to address an inquiry directed to her about the status of your permit (as noted in the subject line of the e-mail message from which the FWS redacted this information). The FWS employees prepared the protected information prior to reaching a decision on the final action to take on each issue and their creation is the result of the type of candid and open exchanges needed among agency employees to assist decisionmakers in the development of agency decisions.

Your appeal is **GRANTED** insofar as the FWS’s search of its files for documents that are responsive to the FOIA request was too narrow to uncover all relevant documents that might exist, which renders its processing of the FOIA request procedurally deficient. As previously noted, your FOIA request seeks

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<sup>1</sup> 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).

<sup>2</sup> 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); *Sierra Club, et al. v. United States Department of Interior, et al.*, 384 F. Supp. 2d 1, 15 (D.D.C. 2004).

“all FWS records regarding emails[] and meeting notes” and “Records/emails/contact/meeting notes” between Mr. Gabel and Mr. Moore from 2012 to the present. You did not include a limitation on the subject matter of any of the types of documents that you requested. Nor did you submit any correspondence to the FWS otherwise modifying the scope of documents that you seek. So, any of the above types of documents between the two named individuals, regardless of their subject matter, are responsive to the request.

However, the Department’s review of the search that the FWS conducted in response to your request reveals that it searched for only documents involving your permit information (by using your name to conduct a search of its database that contains information on permits) and documents concerning you or that referenced your name (by querying certain employees for records and e-mail messages under your name). Since there was no basis for the FWS to conduct such a narrow search for responsive documents, the Department concludes that the FWS’s processing of this matter is procedurally deficient.

To resolve this deficiency, **by copy of this letter, the Department is remanding this aspect of the appeal to the FWS for it to:**

- **Conduct a new search of the paper and electronic files (including e-mails) of Roddy Gabel and Michael Moore for “all FWS records regarding emails[] and meeting notes” and “Records/emails/contact/meeting notes” between them from 2012 to the present regardless of the subject matter of the documents.**
- **Make a determination on the releasability of any documents that it may locate during this search.**
  - If the FWS’s search of the files does not yield responsive documents, it will advise the Appellant of this finding.
  - Should the FWS determine to invoke a FOIA exemption as a basis to withhold any portion of any responsive documents that it locates, it will advise the Appellant of the determination and include all of the information that the Department’s FOIA regulations require a bureau to include in such a response. *See 43 C.F.R. § 2.24.*
- **Correspond directly with the Appellant regarding the remand within 20 workdays of the date of this decision,** including releasing the non-exempt portions of any responsive documents that it locates (with a copy of its letter to this Office).

This completes the Department’s response to your appeal. Pursuant to 5 U.S.C. § 552(a)(4)(B), you have a right to seek judicial review of the Department’s decision to uphold the FWS’s invocation of exemption (5).

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

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cc: Melissa Allen, FOIA Officer, FWS (**FOR ACTION**)  
Brenda Tapia, Branch of Permits, Division of Management Authority, FWS  
Cindy Cafaro, Department FOIA Officer