Attachment B

April 12, 2021

Paul Gibson
Associate Chief Information Officer
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803
paul_gibson@fws.gov

CC: Martha Williams, Acting Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, D.C. 20240
martha_williams@fws.gov

Cathy Willis, Acting FOIA Contact
5275 Leesburg Pike, MS:IRTM
Falls Church, VA 22041
cathy_willis@fws.gov

Re: Rescission of U.S. Fish and Wildlife Guidance Extending U.S. Department of Justice "Skinny AR Memorandum" to Freedom of Information Act Disclosures

Dear Mr. Gibson:

We request immediate rescission of the U.S. Fish and Wildlife Service's 2018 guidance which directs the Service to withhold important information about human health and the environment from the public under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA").[1] So long as the Service decides that public records requested under FOIA may eventually benefit the legal positions of opposing parties in litigation challenging the agency's decision-making under the Endangered Species Act or other environmental laws, the 2018 guidance encourages Service personnel to expansively apply the deliberative process privilege and to shield those records from the public under FOIA. This is unacceptable for many reasons.

The Service's guidance is based on a 2017 policy from the U.S. Department of Justice ("DOJ") which advises federal agencies to use the deliberative process privilege to exclude material unfavorable to the government's position from administrative records prepared for litigation under the Administrative Procedure Act. Administrative Record Compilation in light of *In re Thomas E. Price*, Ninth Cir. No. 17-71121" ("DOJ AR Memo"). The Service guidance extends the DOJ AR Memo to determinations on FOIA records requests and encourages Ecological Services personnel to use it to withhold records from disclosure under FOIA. Unlike the DOJ AR Memo, the Service's guidance does not explicitly direct staff in the Ecological Services office to withhold the fact that the agency is withholding responsive records from the requester as "deliberative." Yet, that is the practical result. A FOIA requester will never learn of the existence of specific responsive records the agency has chosen to withhold as deliberative

[1] U.S. Fish and Wildlife Service, *Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records* (Sept. 6, 2018) (Attachment A).

until they file a FOIA lawsuit and obtain an index in that litigation under *Vaughn v. Rosen*—a privilege log—from the Service. Whether expansively applying the deliberative process privilege to an administrative record or a FOIA response, the effect is the same: a shroud of secrecy about federal activities related to human health and the environment.

In addition, the authority for the Service's guidance, the DOJ AR Memo, does not rely on black-letter law. The authority that DOJ cites in its Memo, *In re Thomas E. Price*, is not a published, reasoned court opinion or order. It is simply a petition for mandamus submitted by DOJ to the Ninth Circuit. It is far from binding or even precedential. Indeed, many courts take the opposite view.[2] Hence, the Service's guidance relies on a dubious legal basis. And notably, DOJ's AR Memo does not direct the Service (or any agency) to use the deliberative process privilege to withhold records from disclosure under FOIA. The DOJ AR Memo addresses a different issue: the basis for using the deliberative process privilege to keep unfavorable records out of an administrative record compiled for litigation under the Administrative Procedure Act.

FOIA has important requirements that render it fundamentally incompatible with the Service's guidance in ways that shine a light on the obvious cracks in the DOJ's approach. Like all exemptions from FOIA's disclosure mandate, Exemption 5 and the deliberative process privilege under the FOIA must be construed narrowly and applied only when disclosure of specific government information will foreseeably harm the agency.[3] The agency ultimately bears the burden of proving that responsive records being withheld actually qualify for the privilege under FOIA. An agency must attempt to justify its decision to withhold responsive records by preparing an index in FOIA litigation, known as a *Vaughn* Index, which functions as a privilege log to assess the lawfulness of an agency's decision to withhold responsive records. Even if an agency lawfully withholds records as deliberative under FOIA, it must segregate and disclose all non-exempt portions of those records to the requester. The DOJ Memo is inconsistent with these FOIA requirements.

Far from providing clarity, the Service's guidance has also led to confusion among agency staff. Emails reveal the apparent "disconnect in the written guidance from HQ and the admin record guidance," and confusion among staff as to "whether the memo is telling [us] to just withhold everything in full from now on."[4] Service staff are "not sure [the guidance is] really

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[2] *See State v. U.S. Immigration & Customs Enforcement*, 438 F. Supp. 3d 216, 220 (S.D.N.Y. Feb. 9, 2020) (finding that the agency needed to produce a privilege log identifying deliberative materials withheld from the administrative record); *Exxon Mobil Corp. v. Mnuchin*, U.S. Dist. LEXIS 146670 (N.D. Tex. Aug. 29, 2018) ("If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege." (citing *Inst. for Fisheries Res. v. Burwell*, No. 16-01574, 2017 U.S. Dist. LEXIS 5642, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017))); *Ksanka Kupaqa Xa'lcin v. U.S. Fish & Wildlife Serv.*, U.S. Dist. LEXIS 40645 (D. Mont. March 9, 2020) (ordering defendants to complete the record, and concluding that "judicial review would be severely undermined if agencies could keep information from the court merely by classifying them as deliberative"); *In re Clean Water Act Rulemaking*, 2020 U.S. Dist. LEXIS 211820 (Nov. 12, 2020) ("Nowhere do the APA's provisions for judicial review exempt so-called deliberative documents from scrutiny.").

[3] *Moeller v. EEOC*, 2021 U.S. Dist. LEXIS 49575, *23, 2021 WL 1025815 (D.D.C. Mar. 17, 2021).

[4] U.S. Fish and Wildlife Service, Skinny AR Record Example: July Release Set docs_263 docs_1221 pages_redacted 958) (Attachment B); U.S. Fish and Wildlife Service, Email Doc 211_20181022 1419_Email_Re_ ES's Skinny AR Guidance in the news Fwd_ RE_ FOIA-FWS-2018-01131_IMPLEMENT_CW_Redacted) (Attachment C).

enough to help staff actually doing the AR/FOIA compilations understand how to actually apply it."[5] As one agency employee expressed, "it seem as if we need to be processing FOIA requests as if they were skinny ARs."[6] Indeed, the Service's ESA Litigation Specialist sanctioned this very idea, advising Ecological Services staff that "it's not a problem" if they were "to start withholding *more* documents under [the deliberative process privilege] in the FOIA context."[7]

In particular, the guidance encourages Ecological Services personnel to work with agency solicitors to *select which records* to shield from public disclosure as "deliberative," and which records to allow the public to see, in order to set the stage for the agency's eventual litigation position and compilation of what is, in effect, selectively curated representations of the government's activities compiled in a "record of ....". This is antithetical to one of the most axiomatic requirements of an administrative record, which is that it include "all documents and materials directly or indirectly considered by agency decision-makers," including *"evidence contrary to the agency's position*."[8]

Extending the dubious DOJ AR Memo to FOIA responses will not just lead to legally indefensible FOIA determinations. It will also result in incomplete administrative records for judicial review under the APA. The heightened application of policies that shield from public view records that implicate human health and the environment underscores the illegitimacy of the Service guidance even more. The upshot is that although the Service purports to have developed the 2018 guidance to reduce litigation under the Endangered Species Act, it will lead to the opposite result. The likely outcome is more litigation under FOIA, the Administrative Procedure Act, Endangered Species Act and other laws enacted by Congress to protect the environment and foster transparency of government information and activities concerning the environment.[9]

In short, there is no legitimate legal or policy objective that is served by these policies. The Service's guidance will undermine the public's ability to understand what the agency is up to, to assess the reliability of information the agency is relying on or the consequences of basing critical government decisions on incomplete or invalid information, and whether those consequences are acceptable under the nation's environmental laws. The citizen-suit provision of the Endangered Species Act, for instance, subjects agency actions that affect the environment to public scrutiny and judicial review, and requires the agencies to gather and apply the best available science to fact-focused documents informing decisions that affect endangered species.[10] Meeting this requirement is necessarily a fact-based, scientific inquiry, not a

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[5] U.S. Fish and Wildlife Service, Doc 046_20180126 1210_Email_Re_ latest version of FOIA DPP guidance re_ skinny ARs - for review_MFR ACP DPP_cw_Redacted) (Attachment D). The Service bungled its dissemination of the guidance to regional offices as well. As one agency staff observed, "I'm not sure how that was actually distributed, as I just received it from you and a few of my regional FOIA folks." 103_20180313 1726_Email_Re_ for review by M 3_5_ version of FOIA_skinny AR (Attachment E).

[6] Processing FOIA Requests as Skinny ARs Email (Attachment F).

[7] ESA Litigation Specialist Withholding Under DPP Email (Attachment G) (emphasis added).

[8] *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added).

[9] *See* Attachment A, *supra* note 1.

[10] 16 U.S.C. § 1540(g)(2)(c).

policymaking process that the deliberative process privilege is meant to protect.[11] Yet, with this guidance, the Service is actively thwarting public disclosure under FOIA and eventual judicial review by diminishing transparency of information that would reveal whether the federal government is—or is not—taking into account all factors when making decisions about the environment with consequences for the health of people and the Earth's biodiversity.

The Service's guidance is ill-advised and must be rescinded without delay, with clear and consistent instruction reinstated to guide agency staff in pursuit of meeting the objectives and requirements of both FOIA and the Administrative Procedure Act, as well as all applicable federal law.

We appreciate your considering these important issues and welcome the opportunity to discuss them further with you at your convenience.

Sincerely,

Amy Atwood
Endangered Species Legal Director
Center for Biological Diversity

Attachments

Attachment A (U.S. Fish and Wildlife Service, Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records (Sept. 6, 2018))

Attachment B (U.S. Fish and Wildlife Service, Skinny AR Record Example: July Release Set docs_263 docs_1221 pages_redacted 958)

Attachment C (U.S. Fish and Wildlife Service, Email Doc 211_20181022 1419_Email_Re_ ES's Skinny AR Guidance in the news Fwd_ RE_ FOIA-FWS-2018-01131_IMPLEMENT_CW_Redacted)

Attachment D (Doc 046_20180126 1210_Email_Re_ latest version of FOIA DPP guidance re_ skinny ARs - for review_MFR ACP DPP_cw_Redacted)

Attachment E (103_20180313 1726_Email_Re_ for review by M 3_5_ version of FOIA_skinny AR

Attachment F (Processing FOIA Requests as Skinny ARs Email)

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[11] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121 (D.D.C. 2017) ("At bottom, '[p]urely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended."'") (internal citations omitted).

Attachment G (ESA Litigation Specialist Withholding Under DPP Email)

Attachment A

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

  - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
  - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
  - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

<u>Consultation/Referral Process for Other Agencies</u>

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

Attachment B

From: Lee, Larry <larry_lee@fws.gov>
Sent: Tuesday, January 29, 2019 12:38 PM
To: Schein, Guy <guy_schein@fws.gov>; Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov>
Subject: Re: FOIA Guidance

Good afternoon,

Tiffany and I did bring that up during our call with HQ, and they were leaning towards releasing more vs. less after conducting harm analysis. We can reach out and gain further guidance in reference to this. Agree "Tiffany from HQ now"? LOL Thanks

On Tue, Jan 29, 2019 at 12:30 PM Schein, Guy <guy_schein@fws.gov> wrote:

> Larry/Tiffany,
>
> First off, apologies if I mentioned this before but it might have been preempted by the shutdown and/or Holiday leave. Anyway, I've had several calls from the Field and some discussions here in the RO regarding the latest FOIA guidance. There seems to be a disconnect in the written guidance from HQ and the admin record guidance. The general interpretation is that things are essentially the same as under the Obama Administration...Unless clear reason to withhold, release everything. Current written guidance is same thing but the admin record should not include deliberative and pre-decisional info. b5-DPP [redacted]
>
> Long story short...right before Leo became RD, he said we should make sure our FOIA reflected our Admin record...that we would/should withhold deliberative and predecisional info. But...that differs from written guidance.
>
> Can we get some clarification?
>
> Thanks in advance...Guy
>
> --

Attachment C

From:	Gilbert, Parks
To:	Harke, Eileen
Cc:	Carey Galst
Subject:	Re: ES"s Skinny AR Guidance in the news Fwd: RE: FOIA-FWS-2018-01131
Date:	Monday, October 22, 2018 2:19:33 PM

I agree...I am pretty sure I emailed Larry back when we got the request from the Guardian reporter, but never heard back. We should have a call with him and Carrie.

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Mon, Oct 22, 2018 at 1:21 PM Harke, Eileen <eileen_harke@fws.gov> wrote:

> On September 7th I forwarded Bridget's email on the Skinny AR to Carrie and suggested it might be good to discuss the guidance on a future FOIA Coordinator's call. She never responded to my email and this topic never came up during our calls.
>
> I think a call with Carrie, Larry, and us would be a very good idea.
>
> ~~~~~~~~~~~~~~~~~~~~~~~~~
>
> Eileen Harke, CRM and ERM[M]
> Government Information Specialist
> Branch of Listing Policy and Support, Division of Conservation and Classification
> 5275 Leesburg Pike
> Falls Church, VA 22041-3803
> eileen_harke@fws.gov
> 703-358-2096
>
> On Mon, Oct 22, 2018 at 10:14 AM Galst, Carey <carey_galst@fws.gov> wrote:
>
> > See this email chain below - what do you think Eileen? I would like to hear from your perspective how this has been discussed on the FOIA coordinator's calls?
> >
> > ---------- Forwarded message ---------
> > From: **Galst, Carey** <carey_galst@fws.gov>
> > Date: Mon, Oct 22, 2018 at 12:58 PM
> > Subject: Re: ES's Skinny AR Guidance in the news Fwd: RE: FOIA-FWS-2018-01131
> > To: Shultz, Gina <Gina_Shultz@fws.gov>
> > Cc: Sarah Quamme <sarah_quamme@fws.gov>
> >
> > If you think it make sense to discuss with IRTM, we can. In our message sending the document out, we said we would be open to having a call with RO/FO staff to discuss. Maybe that is also an option. IRTM said they didn't want to be involved so, if it would be best for us to schedule with staff we can do that.

On Mon, Oct 22, 2018 at 11:48 AM Shultz, Gina <Gina_Shultz@fws.gov> wrote:

Should we discuss and set up a meeting with IRTM on who/what to say to the regions?

Gina Shultz
Deputy Assistant Director, Ecological Services
U.S. Fish and Wildlife Service
MS: ES
5275 Leesburg Pike
Falls Church, VA 22041-3803
703-358-1985

---------- Forwarded message ---------
From: **Shelley Hartmann** <shelley_hartmann@fws.gov>
Date: Mon, Oct 22, 2018 at 9:31 AM
Subject: Fwd: ES's Skinny AR Guidance in the news Fwd: RE: FOIA-FWS-2018-01131
To: Matthew Huggler <Matthew_Huggler@fws.gov>, Charisa Morris <Charisa_Morris@fws.gov>, <Gina_Shultz@fws.gov>, <barbara_wainman@fws.gov>

Begin forwarded message:

From: "Hyde-Michaels, Carrie" <carrie_hyde-michaels@fws.gov>
Date: October 19, 2018 at 9:30:53 AM EDT
To: Shelley Hartmann <shelley_hartmann@fws.gov>
Subject: ES's Skinny AR Guidance in the news Fwd: RE: FOIA-FWS-2018-01131

I think we need to meet with HQ ES and SOL to figure out what to do about this Skinny AR/FOIA Guidance ES sent out. Regional FOIA people are asking me what to tell field office SME's who are asking them questions and I'm just not totally sure.

I don't think the guidance was intended to change the fact that we must follow the law and the DOI guidance, but people in the field seem to be confused about whether the memo is telling them to just withhold everything in full from now on, and that's definitely how the requesters that are quoted in the news stories are interpreting it. Some of our most frequent and litigious requesters are up in arms. (See below: "We're not comfortable letting this request sit without a firm completion date, especially in light of the September guidance instructing FWS staff to take a less transparent approach with FOIA requests relating to de-listing, as reported today in the Guardian.") And they got a quote from Margaret Townsend from CBD in the Guardian story - 15% of our total requests by pure numbers come

from them, probably more like 25% by volume of records.

Carrie Hyde-Michaels
FWS FOIA Officer
Chief, Branch of FOIA, Records, Privacy
US Fish & Wildlife Service Headquarters
703-358-2291 (direct)

---------- Forwarded message ---------
From: **Tiffany McClurkin** <foiar4@fws.gov>
Date: Thu, Oct 18, 2018 at 2:32 PM
Subject: FW: [EXTERNAL] RE: FOIA-FWS-2018-01131
To: Carrie Hyde-Michaels <carrie_hyde-michaels@fws.gov>
Cc: Larry Lee <larry_lee@fws.gov>

Good Afternoon Carrie,

Please see below correspondence from Sam Evans. There is a hyperlink attached to "as reported today in the Guardian." Are you aware of this??

V/R

Tiffany McClurkin

Government Information Specialist

Freedom of Information Act (FOIA) Coordinator

U.S. Fish & Wildlife Service

Southeast Region (Region 4)

1875 Century Blvd, Suite 214

Atlanta GA 30345

(E) foiar4@fws.gov

From: Lee, Larry <larry_lee@fws.gov>
Sent: Thursday, October 18, 2018 2:09 PM
To: Sam Evans <sevans@selcnc.org>

Cc: FOIA R4, FW4 <foiar4@fws.gov>
Subject: Re: [EXTERNAL] RE: FOIA-FWS-2018-01131

Good afternoon Sam,

I am in the process of reviewing the records for this, and I plan to have a partial response to you no later than Friday the 26 Oct. Hope this helps. Have a great afternoon. V/R

On Thu, Oct 18, 2018 at 1:42 PM Sam Evans <sevans@selcnc.org> wrote:

> Larry, do you have any update on this request? We passed the due date this week. We're not comfortable letting this request sit without a firm completion date, especially in light of the September guidance instructing FWS staff to take a less transparent approach with FOIA requests relating to de-listing, as reported today in the Guardian.
>
> Although we do not wish to litigate these issues at this time because we believe that a cooperative approach is better for all parties, the requested records are time sensitive and legal action will be required if the requested information is not produced in the near future.
>
> ---
>
> **From:** Sam Evans
> **Sent:** Monday, September 24, 2018 2:48 PM
> **To:** 'Lee, Larry'; FOIA R4, FW4
> **Cc:** Lindsay Dubin (ldubin@defenders.org); bprater@defenders.org
> **Subject:** FOIA-FWS-2018-01131
>
> Larry, per below, attached are our additional notes to the verification memorandum you circulated. Please let me know if you have any questions,
>
> **From:** Lee, Larry [mailto:larry_lee@fws.gov]
> **Sent:** Monday, September 10, 2018 4:31 PM
> **To:** Sam Evans; FOIA R4, FW4
> **Subject:** Re: [EXTERNAL] Re: Your recent Freedom of Information Act Request

Good afternoon,

Sorry for the delayed response. Please see attached Verification Memorandum. Thanks and have a great day. V/R

On Wed, Aug 29, 2018 at 2:34 PM, Sam Evans <sevans@selcnc.org> wrote:

Thank you!

From: Lee, Larry [mailto:larry_lee@fws.gov]
Sent: Wednesday, August 29, 2018 12:40 PM
To: Sam Evans
Cc: Tiffany Mcclurkin; FOIA R4, FW4

Subject: Re: [EXTERNAL] Re: Your recent Freedom of Information Act Request

Good afternoon,

Memo from our call (same subject) has been created and is being routed for editing, approval, and the like and plan to you all nlt Friday 31 Aug. Thanks and have a great day. V/R

On Tue, Aug 28, 2018 at 2:12 PM, Sam Evans <sevans@selcnc.org> wrote:

Hi, Tiffany; thanks for checking in. I think it was productive. I believe Larry is going to memorialize the call and circulate, and we'll add notes as appropriate. Larry, do you know yet when we should expect your memo? Thank you,

Sam Evans

National Parks and Forests Program Leader

Southern Environmental Law Center

48 Patton Avenue, Suite 304

Asheville, NC 28801

Phone: 828.258.2023

Fax: 828.258.2024

www.southernenvironment.org

From: Tiffany Mcclurkin [mailto:tiffany_mcclurkin@fws.gov]
Sent: Friday, August 24, 2018 7:00 AM
To: Jack Arnold; Sam Evans
Cc: Aaron Valenta; Timothy Merritt; bprater@defenders.org; Lindsay Dubin; Larry Lee
Subject: RE: [EXTERNAL] Re: Your recent Freedom of Information Act Request

Morning All,

Sorry I missed the call as I was in another meeting. Did everything go well?

V/R

Tiffany McClurkin

Government Information Specialist

Freedom of Information Act (FOIA) Coordinator

U.S. Fish & Wildlife Service

Southeast Region (Region 4)

1875 Century Blvd, Suite 218

Atlanta GA 30345

(O) (404) 679-4104

(E) tiffany_mcclurkin@fws.gov

From: Arnold, Jack <jack_arnold@fws.gov>
Sent: Thursday, August 23, 2018 8:41 AM
To: Sam Evans <sevans@selcnc.org>
Cc: Mcclurkin, Tiffany <tiffany_mcclurkin@fws.gov>; Aaron Valenta <Aaron_Valenta@fws.gov>; Timothy Merritt <timothy_merritt@fws.gov>; bprater@defenders.org; Lindsay Dubin <ldubin@defenders.org>
Subject: Re: [EXTERNAL] Re: Your recent Freedom of Information Act Request

Sam - Thanks for the reply.

We can use the following conference number:

b5-CIP [redacted]

We'll talk with you at 10:30.

- Jack

Jack Arnold

Deputy Assistant Regional Director - Ecological Services

U.S. Fish and Wildlife Service

1875 Century Blvd.

Atlanta, GA 30345

404-679-7311 office

404-679-7081 fax

703-789-5620 cell

NOTE: This email correspondence and any attachments to and from this

sender is subject to the Freedom of Information Act (FOIA) and may be disclosed to third parties.

On Wed, Aug 22, 2018 at 8:29 PM, Sam Evans <sevans@selcnc.org> wrote:

> Hi, Jack; thanks. I've copied Lindsay Dubin and Ben Prater with Defenders, who will be joining us. Remarkably, it looks like we are all available at 10:30 tomorrow. I have a hard stop at 11:00, but hopefully that will be enough time. Should I set up a conference line in the morning or do you have one ready?
>
> Sent from my iPhone
>
> On Aug 22, 2018, at 4:13 PM, Arnold, Jack <jack_arnold@fws.gov> wrote:
>
>> Mr. Evans -
>>
>> Your recent Freedom of Information Act request (attached below) was forwarded to this office by our Regional FOIA Coordinator for review and to search for responsive records.
>>
>> After sharing with staff here and reviewing the request, we have some questions regarding the request. I would like to set up a call with you and two of my Division Chiefs (within whose areas of responsibility this FOIA request rests) to seek clarification on some of the record request topics - to help us focus our search for any records that we may have to ensure they accurately reflect the intent of your request.
>>
>> In looking at our calendars, we would be available between 10:30 and noon tomorrow and most any time on Friday. Would you be available to discuss during any of these times? I'm happy to share a conference number for

us all to call into. If this week does not fit your schedule, please let us know your availability next week at your earliest convenience.

Thanks in advance and I look forward to hearing back from you.

- Jack

Jack Arnold

Deputy Assistant Regional Director - Ecological Services

U.S. Fish and Wildlife Service

1875 Century Blvd.

Atlanta, GA 30345

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404-679-7081 fax

703-789-5620 cell

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disclosed to third parties.

Disclaimer

The information contained in this communication from the sender is confidential.

Disclaimer

The information contained in this communication from the sender is confidential.

--

Larry B. Lee

Government Information Specialist

FOIA/Records

U.S. Fish & Wildlife Service

Southeast Region (Region 4)

1875 Century Blvd,

Atlanta GA 30345

(O) (404) 679-4109

(E) larry_lee@fws.gov

Disclaimer

The information contained in this communication from the sender is confidential.

--

Larry B. Lee

Government Information Specialist

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--

Larry B. Lee

Government Information Specialist

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(O) (404) 679-4109

(E) larry_lee@fws.gov

Attachment D

From:	Gilbert, Parks
To:	Galst, Carey
Cc:	Harke, Eileen
Subject:	Re: latest version of FOIA DPP guidance re: skinny ARs - for review
Date:	Friday, January 26, 2018 12:10:38 PM

Thanks for the feedback, Eileen. I could see how it's a hybrid between high-level information and some more specifics (hey, take a look at these sets of documents). Let's talk next week. I wonder if we can try to finalize this as higher-level direction and more specific guidance can be prepared later? Food for thought. I'll find a time for the three of us to talk next week.

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Fri, Jan 26, 2018 at 11:54 AM, Galst, Carey <carey_galst@fws.gov> wrote:

> This was my concern...and I wonder if we should pick a few of the FOIA folks and litigation folks from the ROs and have a conversation about this and then you two can edit the document following their ideas?
>
> ><> ><> ><> ><> ><> ><> ><> ><> ><> ><>
>
> **Carey Galst-Cavalcante**
> Chief, Branch of Listing Policy and Support, Ecological Services
> U.S. Fish and Wildlife Service Headquarters
> 5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
> phone: 703-358-1954; fax: 703-358-1735
> email: Carey_Galst@fws.gov
>
> On Fri, Jan 26, 2018 at 11:48 AM, Harke, Eileen <eileen_harke@fws.gov> wrote:
>
>> Parks -
>>
>> I did provide some feedback to the comments/questions from you and Linus. I didn't "edit" the document though as some of the minor edits would best be done in MS Word (in my opinion).
>>
>> I think the document looks great, but I'm not sure it's really enough to help staff actually doing the AR/FOIA compilations understand how to actually apply it. I have a lot of ideas about it which I'm having hard articulating here (I've tried and deleted several attempts!) so perhaps we should plan a time to talk next week so I can prepare some thoughts that might be helpful to this effort.
>>
>> ~~~~~~~~~~~~~~~~~~~~~~~~~~
>>
>> Eileen Harke, CRM and ERM[M]
>> Government Information Specialist
>> Branch of Listing Policy and Support, Division of Conservation and Classification
>> 5275 Leesburg Pike
>> Falls Church, VA 22041-3803
>> eileen_harke@fws.gov
>> 703-358-2096
>>
>> On Tue, Jan 23, 2018 at 10:06 AM, Gilbert, Parks <parks_gilbert@fws.gov> wrote:

Hey Tyson and Sharon,

HQ and SOL-DPW have been working on guidance for FWS ES staff following the skinny AR memo from DOJ. The google doc I'm making available to you now represents the current draft, with input from Larry, Linus, and me. We discussed a need for this type of guidance on a call a couple of months ago, b5-ACC [redacted]

With that in mind, it would be great to please get your input on the draft. And hopefully by mid-week next week (let's say Wed. 1/31), if you can. I'm also sharing a PDF from the DOI FOIA officer that the google doc references. Once we get your input and I am able to clean up the document, I want to ask some FWS regional staff if it's sufficient, or if they need more guidance. Then I hope to get it approved in HQ.

I think Linus intends to provide further comments, so the Google doc will facilitate that, and if Eileen also has input at this time, she can provide it, too.

Thanks all -

Parks

20180123_Decisional File FOIA Release Determina...

Foreseeable Harm Memo final.pdf

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
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Falls Church, VA 22041
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parks_gilbert@fws.gov

Attachment E

From:	Gilbert, Parks
To:	Hyde-Michaels, Carrie
Cc:	Carey Galst; Harke, Eileen
Subject:	Re: for review by M 3/5: version of FOIA/skinny AR doc after some regional feedback
Date:	Tuesday, March 13, 2018 5:26:25 PM

Thanks for sharing this, Carrie. Was this an ES office in R7, people from other programs, multiple programs...? I know that the ES staff in R7 knows about the skinny AR guidance, because we talked to them about a FOIA they have on walrus. In any case, your point is well-taken, and when we get the document in shape, we will send it to regional ES staff, along with DOJ's memo and Cindy Cafaro's memo.

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(703) 358-1758
parks_gilbert@fws.gov

On Fri, Mar 9, 2018 at 2:02 PM, Hyde-Michaels, Carrie <carrie_hyde-michaels@fws.gov> wrote:

> Just thought I would mention that I was in R7 last week and folks in a FOIA meeting were asking questions about administrative records. I initially thought they were asking about the new skinny AR guidance, but then it turned out they didn't even know what I was talking about. I'm not sure how that was actually distributed, as I just received it from you and a few of my regional FOIA folks, but I was kind of surprised. They were pretty concerned that their courts out there would not be ok with receiving a skinny AR. It was a mix of folks from different programs, but some were definitely from ES. So I guess just heads up that when this goes out people may be hearing about the skinny ARs for the first time.
>
> Carrie Hyde-Michaels
> FWS FOIA Officer
> Chief, Branch of FOIA, Records, Privacy
> US Fish & Wildlife Service Headquarters
> 703-358-2291 (direct)
>
> On Mon, Mar 5, 2018 at 4:05 PM, Gilbert, Parks <parks_gilbert@fws.gov> wrote:
>
>> All, here is where we landed. Carey, this is ready for your review and then advancement to Bridget when you're good with it.
>>
>> Thanks again for everyone's help!!
>>
>> Parks
>>
>> Parks Gilbert
>> Endangered Species Act Litigation Specialist
>> U.S. Fish and Wildlife Service
>> 5275 Leesburg Pike, MS:ES
>> Falls Church, VA 22041
>> (703) 358-1758
>> parks_gilbert@fws.gov

On Mon, Mar 5, 2018 at 1:09 PM, Gilbert, Parks <parks_gilbert@fws.gov> wrote:

OK, thanks for the clarification!

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Mon, Mar 5, 2018 at 1:06 PM, Mellinger, Larry <larry.mellinger@sol.doi.gov> wrote:

What Eileen just explained, is exactly what I was trying to say. If this could be succinctly stated at an appropriate place in the memo, I think it would be beneficial.

Thanks, Eileen!

Larry

On Mon, Mar 5, 2018 at 12:59 PM, Harke, Eileen <eileen_harke@fws.gov> wrote:

As Larry mentioned, for the 316(b) I provided all documents to Shawn Finley for her review before following the normal FOIA process of sending it to the FOIA Officer//Larry for their review. This is true of any FOIA we have on a policy matter where a Solicitor served on the policy development team. It's also true for FOIAs on Pesticides where Linus is reviewing all documents before they will be sent to Carrie/Larry.

In the field, this sometimes happened, but rarely. If I had a FOIA with no ongoing litigation (which was more typical at that level), then I would submit the legal review submission to the Regional FOIA Coordinator through the normal FOIA process. If I had a FOIA were there was an active litigation, then the attorney working on the admin record review might be the one reviewing all documents either in lieu of or in tandem with the Regional FOIA Solicitor review.

Hopefully this makes sense.

~~~~~~~~~~~~~~~~~~~~~~~~~

Eileen Harke, CRM and ERM[M]
Government Information Specialist
Branch of Listing Policy and Support, Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803
eileen_harke@fws.gov
703-358-2096

On Mon, Mar 5, 2018 at 9:45 AM, Gilbert, Parks <parks_gilbert@fws.gov> wrote:

Thanks for the review and the quick turn around, Larry. In response to the questions:

b5-DPP [redacted]
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2) If I remember correctly, we added this language because I *think* Carrie mentioned that we must consult with SOL whenever we withhold. I also think I remember talking to Eileen about how a SOL attorney assigned to the FOIA matter may not be the same attorney who reviewed/worked with us on the underlying action, so to avoid confusion and suggesting that the responding office go to the wrong attorney, we just said that the responding office needs to talk to SOL about withholdings. I can try to clarify this in the text as well. **But - can anyone speak to this issue of having different attorneys involved? Is it OK to mention working with the attorney for the underlying matter?**

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Mon, Mar 5, 2018 at 12:21 PM, Mellinger, Larry <larry.mellinger@sol.doi.gov> wrote:

Carrie:

b5-ACP [redacted]

Thanks.

Larry

On Mon, Mar 5, 2018 at 11:43 AM, Hyde-Michaels, Carrie <carrie_hyde-

michaels@fws.gov> wrote:

Larry, I have a question for you. This only just occurred to me while reading your second point below. b5-ACP [redacted]

Thanks,

Carrie Hyde-Michaels
FWS FOIA Officer
Chief, Branch of FOIA, Records, Privacy
US Fish & Wildlife Service Headquarters
703-358-2291 (direct)

On Mon, Mar 5, 2018 at 6:57 AM, Mellinger, Larry <larry.mellinger@sol.doi.gov> wrote:

Parks:

b5-ACC [redacted]

[redacted]

[redacted]

[redacted].

Thanks.

Larry

On Tue, Feb 27, 2018 at 8:55 AM, Gilbert, Parks <parks_gilbert@fws.gov> wrote:

Hey Larry and Carrie,

We have gotten feedback from a couple of regional contacts and made a few changes. We think the next step is for you to take a look before we

put it on review here, please, if you don't mind. Do you think you could look at it before Monday (3/5)?

Thank you,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
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--
Lawrence P. Mellinger
Attorney-Advisor
Division of Parks and Wildlife
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410-252-5442
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--
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--
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U.S. Department of the Interior
410-252-5442
202-208-3062

Attachment F

From: Galst, Carey
To: Stacey Cummins
Cc: Parks Gilbert
Subject: Re: FW: Review Requested: FOIA and Skinny AR guidance - Comments Due COB May 22
Date: Monday, May 21, 2018 7:15:31 PM

Thank you for the comments, Stacey. We will review and let you know if we need any clarification. We appreciate your feedback!

><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante
Chief, Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
phone: 703-358-1954; fax: 703-358-1735
email: Carey_Galst@fws.gov

On Wed, May 16, 2018 at 11:49 AM, Stacey Cummins <stacey_cummins@fws.gov> wrote:

> Hello-
>
> I think I previously provided input to Parks, however I have a couple of questions:
>
> - Is the purpose of this guidance to try to have FOIA requests match the skinny AR guidance or is it to ensure the foreseeable harm in releasing deliberative documents prior to being released? I ask because the way it is written makes it seem as if we need to be processing FOIA requests as if they were skinny ARs. FOIA and APA are not the same process and that needs to be emphasized.
> - Is this for the ES program only? b5-DP [redacted]
>
> Thanks!
>
> Stacey
>
>
> Stacey Cummins
>
> FOIA Coordinator/Records Manager
> USFWS Mountain Prairie Region
> 134 Union Blvd.
> Lakewood, CO 80228
> 303-236-4473
>

From: Harke, Eileen <eileen_harke@fws.gov>
Sent: Tuesday, May 15, 2018 11:59 AM
To: John DeClerck <john_declerck@fws.gov>; Melanie Ruiz <melanie_ruiz@fws.gov>; Connie Rose <connie_rose@fws.gov>; Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov>; Stacey Cummins <stacey_cummins@fws.gov>; Mcvey, Eleanor <eleanor_mcvey@fws.gov>; Rivero, Maria <maria_rivero@fws.gov>
Cc: Carrie Hyde-Michaels <carrie_hyde-michaels@fws.gov>; Carey Galst <carey_galst@fws.gov>; Carey Gilbert <parks_gilbert@fws.gov>
Subject: Fwd: Review Requested: FOIA and Skinny AR guidance - Comments Due COB May 22

Regional FOIA Coordinators -

Please see email below regarding the Skinny AR guidance that some of you may be aware of. Comments can be sent directly to Parks Gilbert and Carey Galst.

~~~~~~~~~~~~~~~~~~~~~~~~~

Eileen Harke, CRM and ERM[M]

Government Information Specialist

Branch of Listing Policy and Support, Division of Conservation and Classification

5275 Leesburg Pike

Falls Church, VA 22041-3803

eileen_harke@fws.gov

703-358-2096

---------- Forwarded message ----------
From: **Galst, Carey** <carey_galst@fws.gov>
Date: Mon, May 7, 2018 at 10:03 AM
Subject: Review Requested: FOIA and Skinny AR guidance - Comments Due COB May 22
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Susan Jacobsen <susan_jacobsen@fws.gov>, Alisa Shull <Alisa_Shull@fws.gov>, Martin Miller <Martin_Miller@fws.gov>, Robert Tawes <robert_tawes@fws.gov>, Marjorie Nelson
~~~~~~~~~~~~~~~~~~~~~~~~~

<Marjorie_nelson@fws.gov>, Drew Crane <drew_crane@fws.gov>, Angela Picco <angela_picco@fws.gov>
Cc: Carey Gilbert <parks_gilbert@fws.gov>, "martha_balislarsen@fws.gov" <Martha_BalisLarsen@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Bridget Fahey <bridget_fahey@fws.gov>, Craig Aubrey <Craig_Aubrey@fws.gov>

ARDs and ES Chiefs -

Following the direction from DOJ that we should compile "skinny" administrative records for all litigation, there was a request for guidance regarding how this DOJ direction may impact FOIA releases. The Branch of Listing Policy and Support has developed the attached guidance that addresses the DOJ direction and consideration of deliberative process and assessing foreseeable harm when completing FOIA requests.

We request your review and staff that may direct or complete FOIA requests or ARs. This document has been reviewed by the staff and leadership at ES-HQ, FWS FOIA officer, and DOI FOIA and DPW attorneys. Therefore, we request that your review provide high-level comments and any glaring omissions or inaccuracies, instead of red-line edits.

For reference, I have attached the memo from DOJ regarding AR development and also included the memo from the DOI FOIA officer that includes direction on withholding deliberative information from FOIA releases due to foreseeable harm.

We intend on developing tools that RO and FO staff can use when compiling materials for FOIA requests and ARs. If you or your staffs have suggestions, please send those along too.

Please send any comments to Carey Galst and Parks Gilbert. Additionally, if you would like to have a discussion on an upcoming call, please let us know.

Thank you,

Carey

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Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services

U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803

phone: 703-358-1954; fax: 703-358-1735

email: Carey_Galst@fws.gov

Attachment G

From:	Gilbert, Parks
To:	Carey Galst
Subject:	new draft of skinny AR options memo
Date:	Friday, December 1, 2017 9:52:31 AM
Attachments:	options for the new AR direction - v. 12-1-17.docx

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I guess I'm still unclear as to whether we want to present options to not follow the guidance, or I need to put together something else more directive that says we will follow it. But, I revised the memo to slim it down and to add a couple of things to the options, especially option 3.

I don't have an answer yet from Carrie H-M as to what the FOIA program thinks or wants to do. But she and I had a good discussion about a week ago, and she was going to talk to Larry Mellinger. I guess it's not a problem if ES as a program wants to start withholding more documents under DP in the FOIA context, as I assume the initial call is ours to make, but we would want her to communicate that to her contacts and prepare them for more review. The need for coordinating between FOIA responses and ARs does not seem to be a big deal for DOJ, but some RSOL attorneys do see it as a big need. So I don't feel we have clear direction there. Personally, I'd rather they be more tightly coordinated, but I don't want to create a crippling FOIA workload, and there may be reasons we want to consider staying in the sunshine.

It would help if you could assist me in identifying next steps. Thanks -

Parks

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