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.