



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 24, 2014

IN REPLY REFER TO

Jeff Ruch
Public Employees for
Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, DC 20036

Dear Mr. Ruch:

This responds to the August 19, 2013, Freedom of Information Act (“FOIA”) appeal (“appeal”) (No. **2013-138**) that you filed with the Department of the Interior (“Department”) on behalf of Public Employees for Environmental Responsibility (“PEER”). Your appeal concerns PEER’s May 1, 2013, FOIA request to the Fish and Wildlife Service (“FWS”) that sought three categories of documents concerning activities of the Office of Science Advisor. You filed the appeal to challenge the FWS’s decision to invoke the attorney-client, attorney work-product, and deliberative process privileges of FOIA exemption (5)¹ as bases to redact information from responsive documents and to withhold 57 pages in their entirety. You also challenge the adequacy of the FWS’s search for responsive documents, as you state the FWS’s response to the FOIA request did not address or include documents related to one case alleging misconduct (Case # ESO-S0000340) that you assert is responsive.

After fully reviewing the issues presented in the appeal, the redacted information and withheld pages, and current case law, the Department concludes that the appeal will be **GRANTED IN PART**, as most of the information is not protected from disclosure by exemption (5), and **DENIED IN PART** in that some of the information is protected from disclosure by the exemption. Additionally, the Department is denying the appeal in part in that it is invoking FOIA exemptions (6) and (7)(C)² as bases to continue to withhold some of the information. The appeal will also be **REMANDED** to the FWS for further action consistent with this decision, discussed in detail below. The rationale for this decision follows.

The appeal is **GRANTED IN PART** with regard to the FWS’s invocation of exemption (5) as a basis to withhold most of the information at issue in the appeal. The FWS invoked the exemption to redact information and withhold pages from “Final” and “Supplemental Final” reports for a case alleging misconduct, Case # ESO-S0000328, which were prepared by a Scientific Integrity Review Panel (“SIRP”). The SIRP in this case was convened to determine whether misconduct alleged against particular employees “does or does not constitute a serious deviation from accepted practices under institutional or general scientific and scholarly

¹ 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).

² There is nothing that precludes the Department from invoking additional FOIA exemptions on appeal.

standards”³ in accordance with the policy set forth in the Departmental Manual (“DM”) at 305 DM 3, Integrity of Scientific and Scholarly Activities. The FWS also invoked exemption (5) to withhold information from “Summary” and “Supplemental Summary” reports prepared by the FWS’s Scientific Integrity Officer (“FWS SIO”), which summarized the content of the SIRP’s reports.

Further, the Department’s review of the redacted information and withheld pages reveals that 18 of them (three redacted and 15 withheld in full) pertain to Case # ESO-S0000340,⁴ which is the case you state in the appeal that the FWS did not address.⁵ The FWS invoked exemption (5), among other exemptions (discussed later in this decision), to redact information and withhold pages from a “Final” report for the case that was prepared by the FWS’s SIO, who conducted an inquiry into whether particular employees committed other alleged misconduct,⁶ and a “Summary” that he prepared of his report.

As to the applicability of particular exemption (5) privileges to the above materials, the Department concludes that none of the withheld information is protected from disclosure by the attorney-client privilege of exemption (5),⁷ as it does not reflect confidential communications between an attorney and his/her clients. Nor is any of the withheld information protected from disclosure by the attorney work-product privilege of exemption (5),⁸ as none of the documents were prepared by or for a party or its attorney in anticipation of litigation. Finally, as to the FWS’s withholding of the information pursuant to the deliberative process privilege of exemption (5),⁹ the Department concludes that it also does not apply to most of the information in the documents, particularly the findings made by the SIRP and the FWS’s SIO on whether any misconduct occurred.

³ 305 DM 3, Appendix D, Scientific and Scholarly Misconduct Review Panel. *See also* 305 DM 3, 3.8E.(1)(c) (authorizing a bureau head to establish a SIRP).

⁴ These pages are numbered 53 – 70 at the top of the packet of materials that the FWS released to PEER.

⁵ The FWS inadvertently redacted information from the heading of these pages that would have indicated for you that it did address Case # ESO-S0000340 but was withholding most of the information. Since the FWS’s response did address documents related to this case, there is no action for the Department to take on the issue you raise in the appeal regarding the adequacy of its search for these materials.

⁶ *See* 305 DM 3, 3.8D., 3.8E.(1)(a)-(b) (authorizing a bureau Scientific Integrity Officer to conduct an “inquiry” into an allegation of scientific or scholarly misconduct).

⁷ The attorney-client privilege of exemption (5) protects confidential communications made by a client to his/her attorney and also protects from disclosure certain communications provided by an attorney to his/her client. *See Maine v. United States Dep’t of the Interior*, 298 F.3d 60 (1st Cir. 2002).

⁸ The attorney work-product privilege protects from disclosure any materials prepared by or for a party or its attorney or by or for a party’s representative in anticipation of litigation that reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 75 (D.D.C. 2003).

⁹ 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).

The Department's decision that the deliberative process privilege does not apply to the SIRP's or the FWS's SIO's findings here stems from the provisions in the DM that discuss how SIRPs and Bureau Scientific Integrity Officers ("BSIO") conduct reviews of allegations of misconduct. The provision in the DM that discusses how SIRPs conduct "formal review[s]" and "fact finding[s]" makes clear the finality of a SIRP's determination on whether any misconduct occurred: when a SIRP finds no misconduct, "no further action will be taken" and the case is closed; when a SIRP finds misconduct, the provision requires certain officials "to determine corrective or disciplinary action."¹⁰ As for the BSIO, when he/she conducts the inquiry into an allegation of scientific or scholarly misconduct instead of a SIRP, the DM similarly makes clear the finality of the determination reached: if no misconduct is found, the case is "dismissed and closed"; if it is determined that "an incident occurred" or misconduct is found, the BSIO will work with certain officials "to determine appropriate corrective action, as necessary" and "close the case."¹¹

There is nothing in the above provisions that indicates that a SIRP's or BSIO's findings are recommendatory in nature or tentative and subject to change upon further review by others, which are among the requirements for the application of the deliberative process privilege of exemption (5). Instead, the DM makes clear that these determinations on whether any misconduct occurred are final. As such, the Department concludes that the SIRP's findings in Case # ESO-S0000328 and the FWS's SIO's findings in Case # ESO-S0000340 are not subject to protection under the deliberative process privilege of exemption (5).

In reaching the decision that the deliberative process privilege does not apply to the SIRP's findings on whether any misconduct occurred, the Department takes note of section 3.8F.(3) in 305 DM 3, which states:

The report produced by [a SIRP]...will constitute pre-decisional deliberative material containing analysis and recommendations related to Agency policy. These reports are intended to provide advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of the Department.¹²

While this provision in the DM evokes all of the key words used to describe the purpose behind the deliberative process privilege, its use of such terms to cover the entirety of a report produced by a SIRP is overbroad. The actual function the material serves and its actual use are the determining factors on whether the privilege applies to the information. As discussed above and pursuant to section 3.8F.(4) of 305 DM 3, a SIRP's determination on whether any misconduct occurred is final and, therefore, is not subject to protection under the deliberative process privilege of exemption (5).

¹⁰ 305 DM 3, 3.8F.(4), "Formal Review and Fact Finding by Scientific and Scholarly Integrity Review Panel (Employees and Volunteers Only)."

¹¹ 305 DM 3, 3.8E.(1)(a)-(b), "Potential outcomes of inquiry into an allegation of scientific and scholarly misconduct." "Employees and Volunteers."

¹² There is no similar provision in the DM that addresses any of the materials that a BSIO produces in connection with his/her inquiry.

However, there may be instances where portions of a report produced by a SIRP contain advice, recommendations, and opinions, which is information that qualifies for protection under the deliberative process privilege. Indeed, here, there are instances in the documents where the SIRP expressed opinions on certain issues or made recommendations to the recipients of the reports on the actions they believed the officials should take in light of the SIRP's findings. This information qualifies for protection under the deliberative process privilege in that it was developed and designed to aid and guide the FWS decisionmaker who received the reports (i.e., the bureau head) in determining the corrective action he should take to remedy the violations found.

Further, unlike a SIRP's determination on whether any misconduct occurred (which is final), these opinions and recommendations were not final determinations on how to resolve the issues and could have been accepted, rejected, or modified by the decisionmaker. Moreover, disclosure of this information could confuse the public by revealing opinions and recommendations that may not have been adopted by the agency. In light of this, the Department will continue to withhold, pursuant to the deliberative process privilege of exemption (5), the SIRP's opinions and recommendations reflected in the reports pertaining to Case # ESO-S0000328.¹³

Likewise, there are areas in the documents that the FWS's SIO prepared for Case # ESO-S0000340 where he expressed his opinions on certain issues and made recommendations on the actions he believed the recipients of his reports should take in light of his findings. Since none of the FWS's SIO's opinions or recommendations represented a final decision on any of the issues discussed and could have been accepted, rejected, or modified by the decisionmaker, the Department concludes that they too are protected from disclosure by the deliberative process privilege of exemption (5) and will continue to be withheld.

Accordingly, the appeal is **DENIED IN PART** with respect to the continued withholding of some information under the deliberative process privilege of exemption (5).

While most of the information in the materials is not protected from disclosure by exemption (5), the Department cannot release all of the information in the documents that is not protected from disclosure by this exemption because some of it is protected from disclosure by FOIA exemption (6).¹⁴

The Department is invoking exemption (6) to withhold the names and other personal identifying information of the individuals who filed the complaints alleging misconduct ("Complainants"), witnesses who were interviewed, and certain other individuals who are mentioned in the

¹³ In the "Summary" and "Supplemental Summary" reports that the FWS's SIO prepared for Case # ESO-S0000328, he restated some of the SIRP's opinions and recommendations that the Department determined is protected from disclosure by exemption (5). Thus, the Department will use the exemption to also withhold this protected information from these Summary reports.

¹⁴ Exemption (6) allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

documents.¹⁵ The Department is also invoking the exemption to withhold certain information concerning the subjects of each case who were accused of misconduct (“Subjects”). Further, since the documents at issue in the appeal were compiled for law enforcement purposes, the Department is also invoking FOIA exemption (7)(C)¹⁶ as a basis to withhold this information.

To qualify for protection under exemptions (6) and (7)(C), the documents must first meet each exemption’s threshold requirement. The threshold requirement of exemption (6) that the information be contained in a personnel, medical or similar file has been construed by the United States Supreme Court (“Supreme Court”) to extend the coverage of the exemption to any agency records containing information about a particular individual that can be identified as applying to that individual.¹⁷

In this case, the documents at issue in the appeal identify the names and other personal identifying information, e.g., job titles of the Complainants, witnesses, Subjects, and other individuals. This information clearly meets the exemption (6) threshold, as each person’s name and job title can be identified as applying to him or her. In addition, the Department concludes that the individuals’ statements constitute personal identifying information, because what constitutes identifying information is weighed from both the public viewpoint and from the vantage point of those familiar with the mentioned individuals.¹⁸ Therefore, the individuals’ statements also meet the exemption (6) threshold.

The threshold requirement for a record to be protected under exemption (7) is that the record must have been compiled for law enforcement purposes. An agency’s investigation of its own employees is for law enforcement purposes only if it focuses directly on specifically alleged illegal acts of particular identified officials, which could, if proved, result in civil or criminal sanctions.¹⁹ Civil sanctions include internal disciplinary action that an agency takes against its employees, e.g., reprimands, suspensions, or removals.

Here, the documents at issue in the appeal were compiled in connection with reviews by a SIRP and the FWS’s SIO into whether particular employees engaged in specific alleged misconduct. Further, the allegations in the cases, if proven, could have resulted in civil sanctions (ranging

¹⁵ While the FWS did invoke exemption (6) in conjunction with exemption (5) as a basis to withhold some of the information, you state in the appeal that you are not challenging its use of exemption (6). However, since the Department is again invoking the exemption, it must address in this decision the applicability of exemption (6) to the information that it will continue to withhold.

¹⁶ 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).

¹⁷ See *U.S. Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (“*Washington Post*”).

¹⁸ See *Department of the Air Force v. Rose*, 425 U.S. 352, 380 (1976).

¹⁹ *Rural Housing Alliance v. U.S. Department of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974); *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984) (“*Stern*”).

from a reprimand to removal).²⁰ These facts lead the Department to conclude that the documents meet the exemption (7) threshold of being compiled for law enforcement purposes.

Once the threshold requirements of exemptions (6) and (7)(C) are met, the Department is required to determine whether release of the requested information would constitute a clearly unwarranted invasion of personal privacy.²¹ This determination requires the Department to balance the individual's right to privacy against the public's right to disclosure.²² Under the FOIA, the public interest to consider under the two exemptions is limited to the FOIA's "core purpose" of "shedding light on an agency's performance of its statutory duties."²³ When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.

Since the balancing of the interests concerning the Subjects and that of the Complainants, witnesses, and other individuals mentioned in the documents is different, the Department will separately address and assess the withholding of information concerning each of these categories of individuals.

The Subjects of the Cases

The Department begins with an assessment of the Subjects' privacy interests in withholding information that identifies them and the details concerning the alleged misconduct.

Public employees generally have an expectation that information gathered in the course of internal investigations will remain private.²⁴ The United States Court of Appeals for the District of Columbia Circuit has explained that it would be grossly unfair to release such information and subject public servants to unnecessary scrutiny for every complaint that has been filed, regardless of the merits.²⁵ In addition, the Supreme Court has found that "[a] government employee has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline or censure."²⁶

Even when allegations of misconduct are known, the accused party still has a privacy interest in avoiding disclosure of the details of the investigation into her alleged misconduct and any

²⁰ See Item 30 in the *Table of Penalties* in the *Department's Handbook on Charges and Penalty Selection for Disciplinary and Adverse Actions* ("Violating the Department's Code of Scientific Conduct"). See also section 3.8G. of 305 DM 3.

²¹ *Washington Post*, *supra*.

²² See *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

²³ *Id.* at 773-775.

²⁴ *Kimberlin v. Department of Justice*, 139 F.3d 944, 948 (D.C. Cir. 1998) ("*Kimberlin*") (citing *Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993)).

²⁵ *Kimberlin*, *supra*.

²⁶ *Department of the Air Force v. Rose*, 425 U.S. 352, 376-77 (1976).

punishment received.²⁷ The accused party also has a privacy interest in preventing speculative reports about her misconduct from receiving authoritative confirmation from an official source.²⁸ These cases leave no doubt that the employees have strong privacy interests in any records regarding investigations into their conduct.

On the public interest side of the balancing test, when determining the weight of the public interest in disclosure of information pertaining to internal investigations, agencies must consider the rank of the public official involved and whether any proven misconduct was serious and intentional.²⁹ The courts have generally found that there is a high level of public interest in disclosure of the identities of high-level government officials and certain mid-level employees found to have committed serious and intentional governmental wrongdoing and the details surrounding the incidents.³⁰ An evaluation of the responsibilities vested in the individual and her decisionmaking authority over the matter that is the subject of the investigation helps in determining whether the employee is a mid- to high-level official whose actions may increase the level of public interest in disclosure of information about proven serious and intentional misconduct.³¹

Thus, the analysis now turns to an assessment of the public interest, if any, in disclosure of information concerning each of the subjects.

Subject No. 1 of Both Cases

At the time of the alleged misconduct, one of the subjects of both cases, Dixie Porter, was a GS-14 FWS employee who served as the Field Supervisor for the FWS's Oklahoma Ecological Services Field Office ("OKESFO"). Further, at that time, Ms. Porter had management responsibility over the programs, activities, and staff of the office. She also had independent decisionmaking authority over the OKESFO's programs and activities. Additionally, Ms. Porter was the point of contact for inquiries from other Federal and State agencies and members of the public about the OKESFO's activities. The level of responsibility and authority that the FWS entrusted to Ms. Porter lead the Department to conclude that she is a mid- to high- level official whose position may garner a higher public interest in disclosure of information about misconduct alleged against her.

The next issue for the Department to examine to determine the level of public interest in disclosure of information concerning allegations made against Ms. Porter is whether there was a finding of serious and intentional wrongdoing on her part. For some of the allegations lodged

²⁷ *Kimberlin*, 139 F.3d at 949; *Mueller v. Department of the Air Force*, No. 99-194-A, 1999 U.S. Dist. LEXIS 14331, at *12 (E.D. Va. Sept. 16, 1999) ("*Mueller*").

²⁸ *Kimberlin*, *supra*; *Mueller*, *supra*.

²⁹ *See Stern*, 737 F.2d at 92-93; *Kimberlin*, *supra*.

³⁰ *See, e.g., Lurie v. Department of the Army*, 970 F. Supp. 19, 39-40 (D.D.C. 1997) (ordering disclosure of information concerning "mid- to high-level" Army medical researcher found to have engaged in misconduct); *Stern*, 737 F.2d at 94; *Sullivan v. VA*, 617 F. Supp. 258, 260-61 (D.D.C. 1985).

³¹ *Stern*, *supra*.

against Ms. Porter for Case # ESO-S0000328, the SIRP found that she committed misconduct, a loss of scientific integrity occurred, and her actions were intentional. However, for most of the allegations against Ms. Porter, the SIRP found that either they had no merit or there was insufficient information for it to reach a decision. As to Case # ESO-S0000340, the FWS's SIO sustained all of the allegations against Ms. Porter and found that her actions were intentional. Further, the Department finds that Ms. Porter's violations in each case of Departmental guidelines relating to scientific misconduct and integrity were serious.

Since Ms. Porter is a mid- to high-level official in the FWS who committed serious and intentional wrongdoing, the Department concludes that there is a high level of public interest in disclosure of not only her identity but also the investigative details of the substantiated allegations of misconduct against her. However, for the allegations lodged against Ms. Porter where the SIRP found no wrongdoing or where there was insufficient information for it to reach a decision, the Department concludes that the public interest in disclosure of these unproven allegations is minimal at best,³² despite Ms. Porter's position in the FWS.

Having assessed Ms. Porter's privacy interest in withholding and the public interest in disclosure, the final step in the Department's analysis is a balancing of the two interests to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.

The Department concludes that the high public interest in disclosure of information pertaining to the proven misconduct of a serious and intentional nature by Ms. Porter outweighs the privacy interest she has in withholding such information. Disclosure of this information will further one of the basic purposes of the FOIA: "to hold the governors accountable to the governed."³³ Accordingly, the Department concludes that the portions of the documents for both cases that discuss the substantiated misconduct against Ms. Porter are not protected from disclosure by exemption (6) or (7)(C).

However, the Department will continue to withhold, pursuant to exemptions (6) and (7)(C), the information in the documents concerning the unproven allegations of misconduct against Ms. Porter or where the SIRP reached no finding, as Ms. Porter's strong privacy interest in withholding this information outweighs the minimal public interest in disclosure.

Subject No. 2 of Both Cases

At the time of the alleged misconduct, a second subject of both cases, Luke Bell, was a GS-12 FWS employee in the OKESFO and he served as the Branch Chief of Threatened and Endangered Species and Contaminants in a supervisory role. Further, the Department finds that

³²While disclosure of information that informs the public of violations of the public trust has been found to serve a strong public interest, such an interest is diminished when there is no finding or evidence of wrongdoing. See *Hunt v. FBI*, 972 F.2d 286, 290 (9th Cir. 1992) ("*Hunt*") (citing *Dunkelberger v. Department of Justice*, 906 F.2d 779, 782 (D.C. Cir. 1990); *Stern, supra.*).

³³ *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

the significant responsibility and decisionmaking authority that Mr. Bell had over the projects that were the subject of each case are sufficient to thrust him to that of a mid-level official whose position may garner a higher public interest in disclosure of information about misconduct alleged against him.

As to whether there was proven, intentional, and serious misconduct, for some of the allegations lodged against Mr. Bell in Case # ESO-S0000328, the SIRP found that he committed misconduct, a loss of scientific integrity occurred, and his actions were intentional. However, for most of the allegations against Mr. Bell, the SIRP found that either they had no merit or there was insufficient information for it to reach a decision. For Case # ESO-S0000340, the FWS's SIO sustained all of the allegations against Mr. Bell and found that his actions were intentional. Further, the Department finds that Mr. Bell's violations in each case of Departmental guidelines relating to scientific misconduct and integrity were serious.

Based on the above facts, the Department concludes that there is a high level of public interest in disclosure of the investigative details about the substantiated allegations of serious and intentional misconduct against Mr. Bell. However, the Department finds, at best, a minimal public interest in the disclosure of information concerning the allegations lodged against Mr. Bell where the SIRP found no wrongdoing or where there was insufficient information for it to reach a decision.

In the balancing of Mr. Bell's privacy interest in withholding information pertaining to the proven misconduct of a serious and intentional nature against the high level of public interest in disclosure, the Department concludes that the public interest prevails, as disclosure will allow the public to hold the governors accountable to the governed. Accordingly, the Department concludes that the portions of the documents for both cases that discuss the substantiated misconduct against Mr. Bell are not protected from disclosure by exemption (6) or (7)(C). However, the Department will continue to withhold information concerning the unproven allegations of misconduct pursuant to exemptions (6) and (7)(C).

Other Subjects of the Cases

Other employees who are the subjects of Case # ESO-S0000328³⁴ served as low-level employees in the OKESFO. Further, none of these individuals had independent decisionmaking authority over the projects at issue in the cases. Regardless of the outcome of the SIRP's findings on whether they committed misconduct, the courts have consistently held that the public interest in disclosure of information concerning alleged misconduct against low-level employees is not sufficient to outweigh their privacy interests in withholding such information.³⁵ In light of this, the Department will continue to withhold, pursuant to exemptions (6) and (7)(C), the identifying

³⁴ Ms. Porter and Mr. Bell are the only Subjects of Case # ESO-S0000340.

³⁵ See *Hunt, supra*; *Stern, supra*; *Kimberlin, supra*; *Mueller, supra*.

information of the low-level employees accused of misconduct and all of the details concerning the allegations against them.³⁶

Identifying Information of the Complainants, Witnesses, and Others

The Department's analysis turns to the information in the documents pertaining to the Complainants, witnesses, and individuals other than the subjects of the cases who are mentioned in the documents. The Department will first assess their privacy interests in withholding information that identifies them.

The courts have consistently concluded that individuals named in law enforcement files have substantial privacy interests in the nondisclosure of their personal identifying information, because such revelation could result in embarrassment, harassment, unofficial questioning, or unwanted public attention.³⁷ The Department concludes that the individuals identified in the documents here also have significant privacy interests in the nondisclosure of any information that could uncover their identities.

On the public interest side of the balancing test, the courts have consistently concluded that the public interest in disclosure of information in law enforcement files that identifies individuals is not significant, unless the information is needed to confirm or refute compelling evidence of agency misconduct.³⁸ These courts concluded that, absent such evidence of agency misconduct, the privacy interests in withholding identifying information in law enforcement files will always outweigh the insubstantial public interest in disclosure, and have authorized agencies to withhold this information based on exemptions (6) and (7)(C).³⁹

Since you have not put forth any compelling evidence of agency misconduct, the Department concludes that, on balance, the privacy interests the Complainants, witnesses, and individuals other than the subjects of the cases have in withholding their identifying information outweigh the insubstantial public interest in disclosure. Therefore, the Department concludes that this

³⁶ The allegations made against the low-level employees are specific and detailed enough that disclosure of any portion would reveal the employees' identities. Thus, the Department concludes that it is not possible to redact the details of the allegations in a way that would protect their privacy.

³⁷ See, e.g., *Schrecker v. United States Dep't of Justice*, 349 F.3d 657 (D.C. Cir. 2003) ("*Schrecker*") (recognizing that "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation."); *Franklin v. Department of Justice*, No. 97-1225, slip op. at 10 (S.D. Fla. June 15, 1998) (stating law enforcement officers, witnesses, innocent third parties, and individuals named in investigative files have substantial privacy interests in nondisclosure (citing *Wichlacz v. Department of the Interior*, 938 F. Supp. 325, 330 (E.D. Virginia 1996))).

³⁸ See *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991). See also *Nation Magazine v. United States Customs Service*, 71 F.3d 885 (D.C. Cir. 1995); *Schrecker*, *supra*; *AFL-CIO v. Federal Election Commission*, 177 F. Supp. 2d 48 (D.D.C. 2001) *aff'd on other grounds*, 333 F.3d 168 (D.C. Cir. 2003).

³⁹ *Id.*

information is protected from disclosure by exemptions (6) and (7)(C) and will continue to be withheld.

Accordingly, based on the foregoing, the appeal is **DENIED IN PART** with respect to the information pertaining to Case # ESO-S0000328 and Case # ESO-S0000340 that the Department will continue to withhold pursuant to exemptions (6) and (7)(C) – i.e., the names and other identifying information of the Complainants, witnesses, low-level employees, and individuals other than Ms. Porter and Mr. Bell, and the unproven allegations of misconduct against Ms. Porter and Mr. Bell.

Attached to this decision is another copy of the documents pertaining to Case # ESO-S0000328 with additional non-exempt information disclosed. The Department has redacted the information from 9 pages that it determined is protected from disclosure by the deliberative process privilege and marked the areas of the deletions with the code “EX5(DPP).” The Department has also redacted the information from 50 pages that it determined is protected from disclosure by exemptions (6) and (7)(C) and noted at the top of each page that all redactions were made under these exemptions, “unless otherwise noted.”

With regard to the withheld information and pages pertaining to Case # ESO-S0000340, regrettably, the Department cannot release these materials to PEER at this time, as the FWS’s processing of these materials and its response to PEER regarding them were procedurally deficient. As noted earlier, the FWS invoked more than just exemptions (5) and (6) as bases to withhold information and pages from the documents concerning this case – the FWS noted on the pages that it released to PEER that it also withheld the information pursuant to a combination of exemptions (4),⁴⁰ (7)(A),⁴¹ and (7)(E)⁴² (not always together). However, the FWS did not advise PEER in its letter responding to the FOIA request that it was invoking these other exemptions, as it was required by the Department’s FOIA regulations (“regulations”) to do.⁴³ There is also no indication that the FWS consulted with the submitter(s) of the information withheld under exemption (4) to obtain its/their views on disclosure, as is also required by the regulations.⁴⁴

⁴⁰ 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)*.

⁴¹ 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)*.

⁴² Exemption (7)(E) affords protection to “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information...would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”

⁴³ *43 C.F.R. § 2.24(b)(2)*.

⁴⁴ *43 C.F.R. § 2.27*.

The FWS's error in not consulting with the submitter(s) of the information redacted under exemption (4) leaves insufficient information on the record before the Department for it to make a determination on the applicability of the exemption to any of the withheld material pertaining to Case # ESO-S0000340. Further, the Department cannot readily ascertain through its review of the withheld material what information the FWS determined is protected from disclosure by exemptions (7)(A) and/or (7)(E) -- and its error in not addressing either of these exemptions in its response to PEER⁴⁵ leaves insufficient information on the record for the Department to make a determination on whether the exemptions apply.

Therefore, to resolve the procedural deficiencies with the FWS's response to the documents pertaining to Case # ESO-S0000340, **by copy of this letter, the Department is remanding the materials to the FWS for it to:**

- **Reassess the applicability of exemptions (7)(A) and (7)(E) to any of the withheld information;**
- **Consult with the submitter(s) of the information that the FWS withheld under exemption (4) to obtain its/their view(s) on disclosure⁴⁶ in accordance with the procedures set forth in the regulations⁴⁷; and**
- **After the consultation, determine anew whether exemption (4) applies to any information the FWS obtained from the submitter(s).**

If the FWS determines anew to invoke exemptions (4), (7)(A), or (7)(E) to withhold any of the information, the new letter it sends to PEER in connection with the remand will contain all of the information required by the regulations when a bureau withholds information, e.g., "[a] brief statement of the reasons for the denial...." a reference to the FOIA exemption(s), and notice of the right to appeal the decision.⁴⁸

- **The FWS will complete its processing of the remand within 20 workdays from the date of this decision, including releasing the non-exempt information in the documents concerning Case # ESO-S0000340.**
- **The FWS will correspond directly with PEER regarding the remand and it will provide this Office with a copy of the letter it sends transmitting the materials and a redacted version of the documents it releases.**

NOTE: For the documents concerning Case # ESO-S0000340 that the FWS releases to PEER, the FWS will only invoke the deliberative process privilege of exemption (5) to withhold

⁴⁵ See 43 C.F.R. § 2.24(b)(2) (requiring bureaus to provide requesters with, among other things, "[a] brief statement of the reasons for the denial..." when it withholds records in full or in part).

⁴⁶ Please note that the regulations require the FWS to notify the requester when it "provides the submitter with notice and an opportunity to object to disclosure." 43 C.F.R. § 2.35(a).

⁴⁷ 43 C.F.R. § 2.28.

⁴⁸ 43 C.F.R. § 2.24(b)(1)-(5).

information pertaining to the case that reflects the types of opinions and recommendations from the FWS's SIO that the Department concluded above is protected from disclosure. The FWS will also redact from the documents, pursuant to exemptions (6) and (7)(C), the names and other identifying information of the Complainant, witnesses, and other individuals mentioned in the materials who are not Ms. Porter or Mr. Bell.

This completes the Department's response to your appeal. If you are dissatisfied with the Department's decision to withhold information pursuant to exemptions (5), (6), and (7)(C), you have the right to seek judicial review under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding this matter, please call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA & Privacy Act Appeals Officer
Department of the Interior

Attachment

cc: Johnny Hunt, FOIA Officer, FWS (**FOR ACTION**, see pg. 12)
Rick Coleman, FWS Scientific Integrity Officer
Larry Mellinger, Attorney-Advisor, SOL-DPW
Timothy Murphy, Assistant Solicitor-GLS, SOL-DGL
Cindy Cafaro, Departmental FOIA Officer