

FOIA APPEAL - REQUEST FOR RELEASE OF WITHHELD AGENCY RECORDS AND  
FULL DISCLOSURE OF REDACTED AND REFERRED RECORDS

FILE Control Number 05-05

By Email and Fax

May 10, 2005

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Dear Jack O'Brian,

This letter constitutes an appeal of the National Park Service's response to our Freedom of Information Act request, 5 U.S.C. s 551, et seq. ("FOIA" or "Act") FILE Control Number 05-05.

By this letter, and for all of the reasons set forth below, we are appealing the National Park Service's decisions to withhold and redact public records by claiming that the information is exempt from the FOIA's disclosure mandate pursuant to the Act's narrow statutory exemptions.

We submit the following facts and legal principles in support of our appeal:

1) The extant of the agency's reasoning for withholding public records is based on the claim that "inter- and intra-agency communications protected by the deliberative process privilege and attorney-work product privilege have been withheld." (April 6, 2005 letter from Kerrie McCartney Freedom of Information Act Coordinator, Yellowstone National Park)

In withholding these records Yellowstone National Park failed to follow Department of Interior FOIA regulations:

§ 2.21 (d) If a bureau denies your request for records in whole or in part, the bureau's response will include:

- (1) A reference to the specific exemption or exemptions authorizing the withholding;
- (2) An explanation of the reason(s) for the denial;
- (3) An estimate of the volume of information being withheld. The bureau will make a reasonable effort to estimate the volume of any records denied, or portions of records (e.g., 100 pages, 4 Federal Record Center boxes, 1,000 kilobytes, etc.), unless such an estimate would harm an interest protected by the exemption used to withhold the information.
- (4) The name(s) and title(s) of the person(s) responsible for the denial;
- (5) The name and title of the Office of the Solicitor attorney consulted;

And,

§ 2.21 (f) The bureau must consult with the Office of the Solicitor if it is considering withholding a requested record or denying a fee waiver.

See: Federal Register / Vol. 67, No. 203 / Monday, October 21, 2002 / Rules and Regulations (pages 64537-64538)

In this instant, the government simply stated a reason without offering an explanation for why it felt the records it withheld fell within the deliberative process or attorney-work product privilege (Exemption 5). Nor did it name the attorney consulted within the Office of the Solicitor to reach such a claim. The agency simply offers its decision without providing any reasoning or explanation for why it withheld the information. Such an action is arbitrary and capricious, making a mockery of the appeals process by forcing us to divine the agency's reasoning.

The National Park Service has failed to clear the threshold for its Exemption 5 claims under the FOIA. As the Department of Justice's Freedom of Information Guide (May 2004) provides:

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. (73) First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." (74) Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." (75) The burden

is upon the agency to show that the information in question satisfies both requirements." (76)

See: <http://www.usdoj.gov/oip/exemption5.htm#deliberative>

The National Park Service has not shown any burden it would suffer to its deliberative process by releasing the withheld records. Rather, it has simply parroted existing Department of Justice guidelines that allow an exemption claim as its basis for withholding records.

The public records withheld by the agency involve a land conservation agreement reached in 1999 in which the US Forest Service – not the National Park Service – gained legal title and possession and a public trust responsibility. The deliberative process involving the US Forest Service – not the National Park Service – has reached its end. Releasing the records poses no injury to the National Park Service's deliberative process, but can clarify for the public – who financed the agreement – what we got out of the land deal, and how the agency represented the public interests at stake.

Insofar as this exemption may lawfully apply to consultants, lawyers or other parties acting on behalf of the private parties involved -- such as, here, Rocky Mountain Elk Foundation, Church Universal and Triumphant -- the Supreme Court has held in Department of the Interior v. Klamath Water Users Protective Ass'n. that information provided by these parties may be lawfully withheld under Exemption 5 only in very limited circumstances that do not apply here. 532 U.S. 425 (2001).

The withheld information also fails to qualify for a valid exemption under the attorney-client or "work-product" privileges that are codified by Exemption 5. There are no proceedings implicated by the records that would reveal a litigation strategy or legal theory or any legal case brought over the Royal Teton Ranch land conservation project. Furthermore, attorney-client privilege is intended to protect confidential communications between an attorney and their client. If the records withheld by the National Park Service were submitted by the attorneys acting on behalf of the private parties to inform the agency of its positions on the land agreement, then those positions, whether submitted by attorneys or the private parties themselves, are not privileged information and are properly the public's business. Disclosing these records would shed light on the government's decision to proceed with the land agreement.

Additional supporting evidence for disclosure is found in the Department of Justice's Freedom of Information Act Guide, May 2004:

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. (166) As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny, (167) the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. (168)

See: <http://www.usdoj.gov/oip/exemption5.htm>

Citing Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure); Jordan v. United States Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc); and Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

In light of the public interest at stake in opening to scrutiny the government's lead role in this \$13,000,000 land agreement, the National Park Service has failed to establish any factual argument or basis to support its Exemption 5 claim under the FOIA, and we ask that the Department of Interior not allow this claim to stand, and to release all of the records withheld from the public.

2) Requested information that has been redacted by the National Park Service also fails to meet the threshold requirements for withholding or redacting records pursuant to Exemption 6 under the FOIA. No request was made for personnel or medical files. It is unclear that the agency's redaction of records is clearly personnel or medical related information. From our observation of released records with redactions (See Citations 2-8), it appears the redacted records are substantive, and unrelated to information that is of a personal nature.

For example, the nature of the redacted information appears to be related to positions adopted by various agencies on what terms of the land agreement would be acceptable to them:

CATTLE GRAZING MOU ON ROYAL TETON RANCH (June 28, 2004)  
· We sent the agreements to Debra Hecox in the Regional Solicitor's Office and asked for an informal review. Her assessment (attached) [REDACTED]

- Park staff met with the Assistant Superintendent and it is our view [REDACTED]
- The Forest staff will be meeting again with the Church in early May. They have had the MOU reviewed by their OGC and their attorneys, as well as those of the Rocky Mountain Elk Foundation, [REDACTED]
- The Gallatin Forest Supervisor will be with you next week and wishes to speak with you about it. [REDACTED]

Additionally, the agency redacted information to prevent disclosure of the identity of a person who has at minimum, a contractual relationship with the Church Universal and Triumphant to graze cattle on Devil's Slide – part of the lands protected under easement with taxpayer funds. This relationship bears directly on the substantive terms of the land acquired and under easement by the government, and how this land will be managed for its public benefit. On this matter, the public has an interest in this person's identity equivalent to that of the Church Universal and Triumphant, as these parties are the beneficiaries of taxpayer funds used to conserve this land in the public trust. There is no shield behind which this person can legally hide their identity. This person is both a participant in, and a beneficiary of, the \$13,000,000 Royal Teton Ranch land conservation agreement.

Exemption 6's application is very narrow. Exemption 6 of the FOIA exempts from disclosure records that are "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). To lawfully withhold records from a requester under Exemption 6, an agency must balance the "individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act," which is "to open agency action to the light of public scrutiny." Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); accord, Department of State v. Ray, 502 U.S. 164 (1991); U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) ("a democracy cannot function unless the people are permitted to know what their government is up to").

In applying this balancing test, the phrase "clearly unwarranted" means that the balance must "tilt . . . in favor of disclosure," Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971), stay denied, 404 U.S. 1204 (1971); see also Rose, 425 U.S. at 378 n.16 (phrase is the major restraining feature of Exemption 6 which controls the ability of the agency to withhold information); United Assn. of Journeymen and Apprentices of Plumbing and Pipefitting Industry, Local 598 v. Dep't of the Air

Force, Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir. 1988) ("particularly under Exemption [6], there is a strong presumption in favor of disclosure"). Under this test, "corporations, businesses and partnerships have no privacy interest whatsoever." Washington Post Co. v. Department of Agriculture, 943 F. Supp. 31, 37 n.6 (D.D.C. 1996).

In defending all decisions to invoke one or more of the FOIA's exemption claims, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). Thus, in invoking Exemption 6, the agency must prove both that the records reveal a "significant or substantial" individual privacy interest, and that disclosure of that interest is "clearly unwarranted" – i.e., that protection of the interest clearly outweighs the public's interest in "knowing what the Government is up to." Reporters Committee, 489 U.S. at 772-73.

Here, the National Park Service has not demonstrated that it may lawfully redact the requested information pursuant to Exemption 6. Simply stating that the National Park Service has made a determination that an exemption applies does not make it a valid exemption. Nowhere does the National Park Service offer proof or precedent to back its Exemption 6 claim, or shown that it has considered the public interest at all in its determination to redact records.

Thus, the National Park Service violated the FOIA by redacting information.

3) Yellowstone National Park also appears to be improperly referring records to other agencies for review that do not meet Department of Interior FOIA criteria for such referrals. For example, we received the 3 documents totaling 10 pages from Ms. Kathy Oelke US Forest Service that were referred by Kerrie McCartney Yellowstone National Park in her FOIA response. In each instance, the letters are addressed to Yellowstone National Park and its officials (August 4, 1999 Mike Finley, Superintendent, Yellowstone National Park; August 3, 1999 Mike Finley, Superintendent, Yellowstone National Park; January 4, 1999 Karen Kovacs, Pat Graham, Marv Jensen, et al). Surely, Yellowstone National Park would consider letters received by, and addressed to, Yellowstone National Park to be part of the agency's file record system. We find it hard to believe that the agency cannot make a determination on its own that a letter addressed to its officials, in their official capacities as representatives of Yellowstone National Park, is in fact, a record of Yellowstone National Park.

Despite calls made to Mr. Matt Roper, Department of Justice and Ms. Diane Cooke, Department of Interior, we have yet to receive these referred records or get any acknowledgement from Ms. Diane Cooke, Department of Interior, that they are in fact, in receipt of such referrals or will act on them.

This matter of referrals is but a goose-chase let loose by Yellowstone National Park which has taken no action we are aware of to see that our FOIA request has been properly followed up on.

4) The public clearly has a compelling interest in complete disclosure of records gathered, maintained, and collected by the National Park Service in a \$13,000,000 taxpayer financed project to protect native wildlife and the ecosystems upon which they depend in Yellowstone. Full and complete public disclosure would shed light on the government's action, and enable the public to gather more information about the substance, context and purpose of this important taxpayer financed land conservation agreement. Withholding the records may have adverse implications for how the land was intended to be, and or will be, managed for decades to come. Withholding vital information from the public impairs our ability to monitor the land agreement and ensure that the government fulfills the public benefits enumerated in the agreement.

5) The records are part of the National Park Service's project or administrative record for the Royal Teton Ranch land agreement subject to public disclosure and scrutiny under the FOIA.

The American people have a long tradition supporting the conservation of wildlife habitat, native wildlife and the ecosystems upon which they depend. The acquisition of land and conservation easements with taxpayer money appropriated by Congress is rightly the public's business. The records gathered, submitted, and shared with the National Park Service in its cooperating role as a government agency in pursuit of such endeavors is rightly in the public domain subject to disclosure under the FOIA.

We ask that the National Park Service expeditiously grant our appeal and resolve this dispute by disclosing the withheld records, releasing in full, redacted records, release the referred records to us directly, and resolve this issue on the side of public disclosure. We look forward to receiving your determination on this appeal within 20 working days, as required by the FOIA, 5 U.S.C. § 552(a)(6)(B).

Sincerely,

/s/

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/s/

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**Citations:**

- 1) April 6, 2005 letter from Kerrie McCartney, Freedom of Information Act Coordinator, Yellowstone National Park.
- 2) June 28, 2004 note from Wayne Brewster to Suzanne Lewis et al, "Cattle Grazing MOU on Royal Teton Ranch".
- 3) June 25, 1999 fax from Karen Kovacs Office of the Assistant Secretary for Fish, Wildlife and Parks to Sarah Bransom and John Mack (NPS), summary of livestock operations on the Royal Teton Ranch 1999.
- 4) June 21, 1999 fax to Donald Barry Assistant Secretary US Fish & Wildlife Service from Superintendent's Office, Yellowstone National Park of "History of Cattle Use by Leasee on RTR"; and copy of June 20, 1999 email from Marv Jensen Assistant Superintendent Yellowstone National Park to Wayne Brewster (NPS)
- 5) January 22 1999 handwritten notes from meeting with Royal Teton Ranch; January 21, 1999 handwritten notes from phone call with Dave Garber (USFS); January 22, 1999 handwritten notes from conversation with Pat Graham, author unknown.
- 6) No date – Follow-up to Superintendent Suzanne Lewis' September 14, 2002 email on the September 24<sup>th</sup> bison meeting by Wayne Brewster.
- 7) No date (2001 or 2002) handwritten notes taken by Wayne Brewster (NPS) from conversation with Bob Dennee, Lands Program Manager, US Forest Service regarding change of administration at Royal Teton Ranch.
- 8) No date (late 1998 or early 1999) handwritten notes from conversation with Murray Steinman and Joe Sabo, author unknown.

**Enclosures:**

- 1) May 5, 2005 letter from Abigail Kimbell Regional Forester, Northern Region to Darrell Geist Buffalo Field Campaign (File Code 6270-1 R1-R0-05-076). Cover pages for the following referred records: August 4, 1999 Mike Finley, Superintendent, Yellowstone National Park; August 3, 1999 Mike Finley, Superintendent, Yellowstone National Park; January 4, 1999 Karen Kovacs, Pat Graham, Marv Jensen, et al