



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240



April 19, 2024

Ramin Skibba
WIRED Magazine
1117 Keith Ave.
Berkeley, CA 94708

REF: DOI-FWS-2024-000170

Dear Mr. Skibba:

The United States Fish and Wildlife Service (FWS) Freedom of Information Act (FOIA) office received your request dated November 22, 2023 and assigned it tracking number DOI-FWS-2024-000134, further changed by the system to DOI-FWS-2024-000170. Please cite this number in any future communications with our office regarding your request. You have requested the following:

I request a copy of all communications to and from FWS Director Martha Williams, and to and from Acting Deputy Director Amy Lueders, involving the potential environmental impacts on ESA-listed species and designated critical habitats of SpaceX's new water deluge system at its Boca Chica, Texas launch site. The system is sometimes called a water-cooled steel flame deflector or flame diverter. I already have a copy of the publicly released Biological Opinion.

On November 30, 2023, we have contacted you via email to clarify time range for your request. We agreed to the following date range: January 1, 2023 to November 22, 2023 (your request date).

Response

On January 26, 2014 we provided you our first interim response with 176 records (1,672 pages), which were released to you in full. For this final response, we processed 15 records (199 pages). These records include redactions under FOIA "Exemption 4," "Exemption 5" and "Exemption 6". Three records (152 pages) are being withheld in full under "Exemption 5". A ShareFile link to access the responsive documents will be provided to you in a separate email.

Exemption 4—43 C.F.R. §§ 2.23, .24

We are withholding 2 documents (23 pages) in part under FOIA Exemption 4. 5 U.S.C. § 552(b)(4). Exemption 4 protects "trade secrets and commercial or financial information obtained from a person (SpaceX) that are privileged or confidential. The entity that supplied this information (the submitter/SpaceX) is considered a person, because the term "person," under the FOIA, includes a

wide range of entities including corporations. Also, the submitter does not customarily release this information to the public, so the information is confidential for the purposes of Exemption 4. The identified information is “commercial or financial information” and it is “confidential” and, therefore, is exempt from disclosure.

Pursuant to 43 C.F.R. § 2.31, SpaceX certifies that the designated information is confidential, SpaceX has not disclosed the information to the public, and the information is not routinely available to the public from other sources.

The identified information is SpaceX “commercial or financial” information. Courts have interpreted “commercial or financial” broadly. Information is “commercial” for purposes of Exemption 4 “when the provider of the information has a commercial interest in the information submitted to the agency.” The identified information in the Mishap Report pertains directly to the core of SpaceX’s business—developing and launching next generation rockets. In particular, the detailed description of Critical Key Events reveals detailed information about SpaceX’s design of the Starship rocket. The information in this report would also reveal SpaceX’s process for conducting a mishap investigation, which is a process that few countries or companies in the world has developed. Mishap investigation processes are incredibly difficult given the lack of physical evidence and complexity of launch vehicle systems. SpaceX developed this process over two decades of test and flight experience to precisely identify root cause, and its development has involved thousands of engineering hours. Additionally, launch failure analysis is reverse engineering and provides information on “how to” better design and operate a launch vehicle and launch pad.

Second, the identified information in the Overview of BA Addendum contains detailed design information regarding the deluge system that SpaceX implemented as part of its launch pad design improvements. Launch infrastructure is a critical element in the design and development of Starship rocket, and therefore pertains directly to SpaceX launch vehicle business. This document also contains internal expert synthesis of the methodology and assumptions SpaceX utilizes in its environmental analysis. This analysis reflects SpaceX’s efforts to overcome any questions or concerns in the environmental approvals and its measures to minimize environmental effects of its development. This analysis part of its permitting and is therefore critical to SpaceX’s ability to obtain and maintain launch licenses and authorizations necessary to conduct income-producing aspects of its business. As such, the designated information is commercial under Exemption 4. In sum, the identified information in these two documents plainly “reveal basic commercial operations” and “relate to income-producing aspects” of SpaceX’s business.

The identified information is SpaceX “confidential” information. Information is confidential if it is “of a kind that would customarily not be released to the public by the person from whom it was obtained.” Mishap investigation analysis, rocket design details, launch infrastructure designs, and environmental analysis are types of information SpaceX customarily and actually keeps confidential. Though some of SpaceX’s environmental analysis has been made public and SpaceX does not object to the release of the same information contained within this document, the proposed redactions cover more detailed synthesis of the environmental analysis of the type that SpaceX does not ordinarily release.

SpaceX goes to great lengths to prevent the release of its confidential commercial information—including prohibiting employees from disclosing it and requiring third parties who access the information to sign NDAs. These documents and similar information are maintained within SpaceX’s secure IT networks, protected by passwords and multi-factor authentication.

This alone is sufficient to support redaction of the identified information as confidential.

But the application of Exemption 4 is further supported because there was an assurance of confidentiality and release of this information would foreseeably cause SpaceX substantial economic harm.

First, while the government's assurance of confidentiality is not legally required, the circumstances under which SpaceX submitted this information supports that there was both an express and implied assurance of confidentiality. Both documents were only provided to a limited distribution. SpaceX labeled the Mishap Investigation Report on its cover page as "Proprietary Information" which is "provided in confidence." The footer on each page is also labeled "SpaceX Proprietary and Competition-Sensitive Information." Likewise, the Overview of the BA Addendum includes a footer on each page with the label "SpaceX Proprietary Information." SpaceX included these markings in compliance with DOI's internal FOIA regulations encouraging, but not requiring, submitters to make a good faith effort to identify their submission of confidential information. *See* 43 C.F.R. § 2.26.

Second, though also not required for Exemption 4 to apply, the information at issue would foreseeably cause substantial economic harm to SpaceX's competitive position if released. Information about planned launch facility development, mishap investigation, and environmental analysis is highly competitively sensitive, because it provides a window into how SpaceX develops its launch vehicles and secures permits for its launch. The launch services industry is highly competitive. SpaceX has numerous competitors including United Launch Alliance, Blue Origin, Northrop Grumman, Boeing, Rocket Lab, and others who compete fiercely for the same government contracts and commercial business as SpaceX and who, like SpaceX, are developing their own next generation launch vehicles and launch facilities. If the details of SpaceX's development, investigation, and permitting efforts were released to the public, competitors or opponents of SpaceX's operations in Boca Chica are likely to use that information to interfere with SpaceX's efforts to maintain licenses and permits to conduct its operations, to disparage SpaceX's reputation, or otherwise to undermine SpaceX's competitive advantage. In such a competitive environment, any delay or distraction from the development process would cause SpaceX substantial competitive harm.

Exemption 5—43 C.F.R. §§ 2.23, .24

Exemption 5 allows an agency to withhold "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). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. We are withholding 3 documents (8 pages) in part and 3 documents (152 pages) in full under Exemption 5 because they qualify to be withheld under the Exemption 5 threshold of being inter-agency or intra-agency and under the following privilege:

Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an attorney and their client relating to a legal matter for which the client has sought professional advice and is not limited to the context of litigation. Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, related to legal matters for which the client sought professional legal assistance and services. It also encompasses opinions given by attorneys to their clients based on client-supplied facts. Additionally, the Service employees

who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated, and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice. Finally, the Service has held this information confidential and has not waived the attorney-client privilege.

Deliberative Process Privilege

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fishbowl. A number of policy purposes have been attributed to the deliberative process privilege, such as: (1) assuring that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protecting against premature disclosure of proposed policies; and (3) protecting against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency's deliberative processes; expose the agency's decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Exemption 6—43 C.F.R. §§ 2.23, .24

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). We are withholding 8 documents (17 pages) in part under Exemption 6.

The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information.

Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens ‘know what their government is up to. The burden is on the requester to establish that disclosure would serve the public interest. 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. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

The information that has been withheld under Exemption 6 consists of names and email addresses, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, you have not provided information that explains a relevant public interest under the FOIA in the disclosure of this personal

information and we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals, and we are withholding it under Exemption 6.

The decision to withhold this information was made by the undersigned and approved by Ranita Jackson, FWS FOIA Officer, Division of Information Resources & Technology Management (IRTM). Joan Marsan, Attorney-Advisor, in the Office of the Solicitor was consulted.

Mediation/Dispute Resolution

If after contacting us as described below, you need further information or assistance with your request, you may wish to seek dispute resolution services from the Department's FOIA Public Liaison, Natasha Jones by email at doifoiapublicliaison@sol.doi.gov.

If you need further information or assistance after contacting the Department's FOIA Public Liaison, you may wish to seek dispute resolution services from the Office of Government Information Services (OGIS). The 2007 FOIA amendments created the OGIS to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://www.archives.gov/ogis>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

Appeal Rights

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal no later than 90 workdays from the date of this final response. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM

OF INFORMATION APPEAL." You must include an explanation of why you believe this response is in error. You must also include with your appeal copies of all correspondence between you and FWS concerning your FOIA request, including your original FOIA request and this response. Failure to include with your appeal all correspondence between you and FWS will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, DC 20240
Attn: FOIA/Privacy Act Appeals Office
Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

Conclusion

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. See [5 U.S.C. 552\(c\)](#). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This is our final response and closes your request DOI-FWS-2024-000170. If you have any questions about our response to your request, you may contact me at FOIA_FWHQ@fws.gov, or by mail at U.S. Fish and Wildlife Service; ATTN: FOIA Office; 5275 Leesburg Pike; MS: IRTM; Falls Church, VA 22041.

Sincerely,

Monika Malnowicz
FWS FOIA Coordinator