Attachment 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,	)	
Plaintiff,	)	
v.	)	**Civ. No. 00-2387 (TFH)**
UNITED STATES MARINE CORPS,	)	
Defendant.	)	

MEMORANDUM OPINION

Pending before the Court are cross-motions for summary judgment by Plaintiff, Center for Biological Diversity, and Defendant, the United States Marine Corps. Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Plaintiff seeks the release of documents regarding the impact of military activities on endangered and threatened species at Marine Corps Base Camp Pendleton in San Diego County, California. Defendant has refused to release most of the documents, invoking Exemption 5 of the FOIA. Upon careful consideration of both motions, the statements of material facts, the oppositions and replies thereto, and the entire record herein the cross-motions for summary judgment will be denied. Furthermore, this Court will order Defendant to turn over all withheld documents that are responsive to Plaintiff's request for in camera inspection to determine whether they have been properly withheld.

I. BACKGROUND

A. Endangered Species Act

The Endangered Species Act ("ESA") requires that federal agencies "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the

continued existence of any endangered species or threatened species" listed in accordance with the Act." 16 U.S.C. § 1536 (a)(2) (2003). To comply with this mandate, "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required . . ." 50 C.F.R. § 402.14 (2003). Formal consultation "is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation . . . and concludes with the Service's issuance of the biological opinion . . . " 50 C.F.R. § 402.02 (2003). Prior to commencing formal consultation, the federal agency must conduct a biological assessment:

> A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation . . . is necessary.

50 C.F.R. § 402.12(a) (2003). While the federal agency is required to use the biological assessment in determining whether to initiate formal consultation, the Service "may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation . . . , [or] (ii) formulating a biological opinion . . ." 50 C.F.R. § 402.12(k)(1) - (2) (2003) (emphasis added). The biological opinion issued at the conclusion of the formal consultation is "the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02 (2003).

Camp Pendleton ("Base") is home to seventeen species listed as endangered or threatened pursuant to the ESA. Defendant "has pursued a programmatic, habitat-based approach to the

management of these listed species in consultation with the U.S. Fish and Wildlife Service" ("Service" or "FWS"). (Mem. P. & A. Supp. Def.'s Mot. Summ. J. at 2.) The "programmatic" approach allows Defendant to consult with the Service on its activities in general within a habitat, rather than consult on each of its military activities separately. In accordance with this plan, Defendant completed a formal consultation with the Service in 1995 that resulted in the issuance of a biological opinion pertaining to species that use the Base's riparian and estuarine ecosystems. The Base formally began preparation of an uplands biological assessment in 1997 to evaluate all ongoing and future activities occurring on the Base, including "military training, fire management, facilities maintenance, recreation, selected real estate agreements, natural resource management programs, and conceptual management plans (including a proposed uplands endangered species management plan)." (Mem. P. & A. Supp. Def.'s Mot. Summ. J. at 2-3.) Defendant submitted the uplands biological assessment to the Service on March 30, 2000 along with Defendant's written request for formal consultation.

B. Plaintiff's Freedom of Information Act Request

By letter dated June 7, 2000, Plaintiff prefaced its FOIA request to Defendant with this statement of purpose:

> [T]o determine the extent and subject matter of informal and/or formal Endangered Species Act (ESA) consultation which has occurred between the U.S. Marine Corps Camp Pendleton (Marines) and the U.S. Fish and Wildlife Service (Fish and Wildlife) with regard to the Marines ongoing operations and future activities in upland habitats occupied by threatened or endangered species.

(Pl.'s Ex. A at 1.) The letter went on to request both the uplands biological assessment and "[a]ny other documents, and documentation of inter- and intra-office communications relating to

this ESA consultation." (Pl.'s Ex. A at 1.) In response, Defendant sent a letter dated June 27, 2000 denying Plaintiff's request. (Pl.'s Ex. B.) Plaintiff administratively appealed the denial on August 11, 2000, (Pl.'s Ex. C), and was again denied by letter dated October 24, 2000 (Pl.'s Ex. D).[1]

Before receiving the final denial, but after expiration of the twenty working days in which Defendant was obligated to respond to Plaintiff's administrative appeal, Plaintiff commenced the instant lawsuit seeking an order that Defendant disclose the pertinent documents. Defendant refuses to disclose the uplands biological assessment and other documents relating to its consultation with the Service, citing Exemption 5 of the FOIA, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5)(2003). Although Defendant initially identified only two responsive documents – the biological assessment and its transmittal letter – it has since filed a Vaughn index identifying seven responsive documents, three of which it disclosed with the index, while claiming that Exemption 5 protects the remaining four. (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J.; Corrected Vaughn index.)[2] Defendant acknowledges that there are documents related to the consultation in addition to these seven but contends that only

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[1] This final denial letter claimed that Plaintiff's request encompassed two documents: the March 30, 2000 letter from the Base to the Service, initiating formal consultation, and the enclosed uplands biological assessment. Defendant released the cover letter without the accompanying biological assessment and included it with this October 24, 2000 letter.

[2] The biological assessment is not listed on the Vaughn index. There are a total of five documents that Defendant has withheld and identified as responsive to Plaintiff's request: the four listed on the Vaughn index, and the uplands biological assessment. Since producing the Vaughn index, Plaintiff has obtained one of the withheld documents from the Service pursuant to a separate FOIA request. (Supplemental Memo. Supp. Pl. Mot. Summ. J. at 1.)

documents created before Plaintiff's request on June 7, 2000 are responsive. Both parties have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56.[3] The Court conducted a hearing on parties' cross motions for summary judgment on September 25, 2001 and took the matter under advisement.

II. DISCUSSION

A. Legal Standard

Summary judgment is the usual means for disposing FOIA cases, but the Court will grant summary judgment only if the moving party proves that no substantial and material facts are in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983); Founding Church of Scientology v. NSA, 610 F.2d 824, 836 (D.C. Cir. 1979); Nat'l Cable Television Ass'n, Inc., v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973). To prevail on summary judgment under the FOIA, "the defending agency must prove that each document . . . either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980) (quoting Nat'l Cable Television Ass'n, Inc., 479 F.2d at 186).

The FOIA imposes a general rule of disclosure of records generated by federal agencies

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[3] It is unclear which documents are encompassed by Defendant's motion and Plaintiff's cross-motion for summary judgment. Defendant moved for summary judgment "on all claims raised in Plaintiff's complaint." (Mem. P. & A. Supp. Def.'s Mot. Summ. J. at 1.) At the time Defendant's motion was filed, however, it had only identified the uplands biological assessment and transmittal letter as documents responsive to Plaintiff's request. Plaintiff filed its cross-motion for summary judgment along with its motion for a Vaughn index, but requested summary judgment with respect to all responsive documents (including any documents Defendant had not yet identified). Once Defendant produced a Vaughn index, it was clear that there were responsive documents in addition to the uplands biological assessment. This opinion treats both motions for summary judgment as if they encompass all responsive and withheld documents.

when requested by a member of the public. 5 U.S.C. § 552(a)(2); Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 602 (D.C. Cir. 2001); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136-37 (1975) (citing EPA v. Mink, 410 U.S. 73, 79-80 (1973)). However, an agency may withhold information that falls within one of FOIA's nine exemptions. 5 U.S.C. § 552(b); Sears, Roebuck & Co., 421 U.S. at 137. A district court determines de novo the question of ordering or enjoining a government agency's production of documents, and the agency bears the burden of justifying its withholding. 5 U.S.C. § 552(a)(4)(B); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989). In this case, Defendant has invoked Exemption 5 to justify withholding the documents sought by Plaintiff.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5)(2003). The Supreme Court has construed this language "to exempt those documents, and only those documents, normally privileged in the civil discovery context." Sears, Roebuck & Co., 421 U.S. at 149; accord Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987). One privilege incorporated into Exemption 5, and relied upon by Defendant, is the deliberative process, or executive, privilege, which serves "to prevent injury to the quality of agency decisions." Sears, Roebuck & Co., 421 U.S. at 151; accord Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047-48 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 858 n.2, 866-69 (D.C. Cir. 1980). Three policy concerns underlie this privilege:

> First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure

> to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided(,) not for matters they considered before making up their minds."

Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (footnotes omitted), quoted in Russell, 682 F.2d at 1048, overruled by Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981). Consistent with the FOIA's underlying policy of disclosure, however, "Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting EPA v. Mink, 410 U.S. 73, 87 (1973)).

To qualify for withholding under the deliberative process privilege, a document must be both "predecisional" and "deliberative." Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Petroleum Info. Corp., 976 F.2d at 1434); Coastal States, 617 F.2d at 866. The Court of Appeals for this Circuit has identified several considerations for determining whether a document falls within the deliberative process privilege:

> In deciding whether a document should be protected by the privilege we look to whether the document is "predecisional" — whether it was generated before the adoption of an agency policy — and whether the document is "deliberative" — whether it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; . . . We also ask whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another.

Coastal States, 617 F.2d at 866.

The deliberative process privilege "applies only to the 'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document." Coastal States, 617 F.2d at 867 (citing EPA v. Mink, 410 U.S. 73, 93 (1973)). Where a record contains purely factual material in addition to material subject to Exemption 5, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (2003). The Court of Appeals for this Circuit has cautioned against awarding summary judgment without examining segregability:

> Summary judgment may not be appropriate without in camera review when agency affidavits in support of a claim of exemption are insufficiently detailed . . . In addition, a district court may err by "'simply approv[ing] the withholding of an entire document without entering a finding on segregability, or lack thereof.'"

Armstrong v. Executive Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996) (quoting Schiller v. Nat'l Labor Relations Board, 964 F.2d 1205, 1210 (D.C. Cir. 1992)) (internal citations omitted). In support of an agency's claim that a document is exempt from disclosure, it must not only supply "a relatively detailed justification" for withholding the document, but also correlate that claim "with the particular part of a withheld document." Schiller v. Nat'l Labor Relations Board, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (citing King v. U.S. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987)).

B. The Uplands Biological Assessment

The crucial disagreement between Plaintiff and Defendant stems from divergent characterizations of the function of a biological assessment within the formal consultation

process. Defendant characterizes the biological assessment as a preliminary step in a process leading to "the formulation of an uplands management program and policy for Camp Pendleton," based on consultation with the Service and its biological opinion. (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J. at 5.) The Base's Commanding General will make the ultimate decision to adopt that program, and "[i]t is *that* decision to which the [b]iological [a]ssessment and the other requested documents are pre-decisional and deliberative." (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J. at 5.) Defendant likens the biological assessment to a "draft document since the initial assessment of impacts continues to change as a result of the ongoing dialogue between both agencies and through the introduction of additional information requested by the Service." (Def.'s Mot. Summ. J. at 8.)

Whereas Defendant describes a multi-step process leading to one decision, Plaintiff takes a more discrete view of the relevant decision-making process:

> [T]he only decisionmaking process involved here is the Corps' determination of whether its actions are likely to adversely affect listed species or their habitats located in the action area, and whether it is required by law to request "formal consultation" with the Service. And, since that decision – referred to in the [b]iological [a]ssessment – is final, this document cannot be withheld from [P]laintiff as a "predecisional" document.

(Mem. Supp. Pl.'s Cross-Mot. Summ. J. & Opp'n Def.'s Mot. Summ. J. at 16-17 (citing Coastal States, 617 F.2d at 868).) Plaintiff emphasizes that a biological assessment is a "straightforward document which has two functions – to determine (a) whether an agency's actions are likely to adversely affect listed species, and (b) whether to initiate formal consultation with the Service." (Reply Mem. Supp. Pl.'s Cross-Mot. Summ. J. at 6.) Because "the statutory purpose and functions that a final [b]iological [a]ssessment are lawfully required to serve are plainly defined both by the ESA itself and by its implementing regulations," Defendant's characterization of its

use or non-use of the assessment in formulating its management plan is irrelevant. (Reply Mem. Supp. Pl.'s Cross-Mot. Summ. J. at 4.)

Plaintiff and Defendant also disagree about the nature of the contents of the assessment. Plaintiff contends that biological assessments are regularly disclosed to the public and typically include factual information such as a "description of the agency's activities, the geographical area where such activities take place, a description of the effects of those activities on listed species, an exhaustive list of scientific literature concerning those effects, and similar biological data." (Mem. Supp. Pl.'s Cross-Mot. Summ. J. & Opp'n Def.'s Mot. Summ. J. at 5.) Defendant contends, however, that the uplands biological assessment is "substantially more than a listing of the mere effects of an activity on listed species. Rather, [it] encompasses proposals for a comprehensive uplands management program for Camp Pendleton." (Def.'s Opp'n Pl.'s Supplemental Mem. Supp. Pl.'s Cross-Mot. Summ. J. at 6.)

While Defendant has emphasized the ongoing nature of its talks with the Service in attempt to characterize the biological assessment as predecisional and deliberative, it has neglected the question of segregability. Defendant's claim that the biological assessment "employs specific facts out of a larger group of facts and this very act is deliberative in nature," (Pl.'s Ex. D.), rings hollow when it admits to using the "best scientific and commercial data available," (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J. at 6.), as is required by the ESA. Defendant also argues that the entire biological assessment is subject to withholding under Exemption 5 because it "proposes management plans addressing military training, infrastructure maintenance, fire management, and recreation programs," in addition to "various avoidance, minimization, compensation, and mitigation measures." (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J. at 6.) This

description of the biological assessment's contents neither "'correlate[s] claimed exemptions with particular passages'" as required by Animal Legal Defense Fund, nor explains why these proposals cannot be segregated and redacted from the purely factual portions of the assessment. Animal Legal Defense Fund, 44 F. Supp. 2d at 302 (citing Schiller, 964 F.2d at 1209). In sum, Defendant's conclusory assertion that "the factual material of the [b]iological [a]ssessment is inextricably connected with this deliberative material," (Def.'s Opp'n Pl.'s Cross-Mot. Summ. J. at 7), mirrors the "unsophisticated parroting of FOIA's statutory language" deemed "patently insufficient" by Animal Legal Defense Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301 (D.D.C. 1999).[4]

Summary judgment with respect to the biological assessment is not appropriate at this juncture because Defendant has failed to "prove that each document . . . either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980) (quoting Nat'l Cable Television Ass'n, Inc., 479 F.2d at 186). Because Defendant has not explained the applicability of the deliberative process privilege to specific portions of the document, the Court cannot make a finding on segregability to sustain summary judgment.

"[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an in camera review is necessary." Quiñon v. FBI, 86 F.3d 1222, 1229 (D.C. Cir. 1996). Because Defendant has provided so little explanation of why factual material

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[4] In Animal Legal Defense Fund, the agency claimed that "no withheld document was 'reasonably segregable because it was so intertwined with protected material that segregation was not possible or its release would have revealed the underlying protected material.'" Animal Legal Defense Fund, 44 F. Supp. 2d at 301.

within the biological assessment cannot be segregated and released, the Court has no choice but to order Defendant to disclose the document to the Court for an in camera determination of whether Exemption 5 applies to the biological assessment in its entirety.

C. Other Documents Related to the ESA Consultation

In addition to the withheld biological assessment, Defendant has withheld four documents identified and briefly described on a Vaughn index. While the justifications for withholding these documents are described in greater detail in proportion to their length than the justification for withholding the biological assessment, they are articulated in similarly conclusory language. Three of the four descriptions refer to the documents as "pre-decisional to the decision of how Camp Pendleton will manage threatened and endangered species on its uplands." The fourth description characterizes a four-page memo as "a request for additional information for the formal consultation process." As in Schiller, this Vaughn index fails to "correlate the claimed exemptions to particular passages," and instead refers to entire documents. Schiller, 964 F.2d at 1209. While classifying all four documents as "non-segregable," Defendant does not provide the Court with enough information make a finding as to segregability that would sustain summary judgment.

The Court of Appeals for this Circuit has observed that when a district court ponders whether to order in camera review, "[a]nother crude, albeit important, factor to be considered is the number of the withheld documents." Quiñon v. FBI, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (citing Carter v. Dep't of Commerce, 830 F.2d 388, 234 (D.C. Cir. 1987) ("when the requested documents 'are few in number and of short length,' in camera review may save time and money") (quoting Allen v. Central Intelligence Agency, 636 F.2d 1287, 1298 (D.C. Cir. 1980))).

These four documents total 28 pages. Given that there are relatively few pages at issue and considering the dearth of information provided by Defendant about the documents' contents, the Court will order in camera review of these four documents to determine whether they have been properly withheld in full under Exemption 5 of the FOIA.

D. Outstanding Issues

1. The Marine Corps's June 7, 2000, Cutoff Date

Plaintiff also requests Marine Corps documents generated in response to Fish and Wildlife Service's need for additional information. Pl.'s Cross-Mot. at 25. Mr. Norquist stated these documents include more detailed descriptions of certain habitats, discussions of anticipated training levels and land use changes in the future, and copies of conceptual management plans. Norquist Decl. at 3. While acknowledging these documents' existence, the Marine Corps contends they are not subject to Plaintiff's request because they did not become part of the consultation—and thus, in the Marine Corps's view, "responsive" to the request for documents "relating to" the consultation—until after June 7, 2000, the date of Plaintiff's request. Def.'s Opp'n at 7-8.

"The date of the request, not the date of the response, serves as the cutoff for any obligations under FOIA." Judicial Watch Inc. v. Clinton, 880 F.Supp. 1, 10 (D.D.C. 1995), aff'd, 76 F.3d 1232, (D.C. Cir. 1996). However, such a time limit is valid only when "consistent with the agency's duty to take *reasonable* steps to ferret out requested documents." McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983). It would be "unreasonable to expect an agency to locate and determine the disclosability of documents generated subsequent to" a cutoff date, that policy is designed to avoid a "never ending process" that an unlimited request would entail. See Church

of Scientology of Texas v. IRS, 816 F.Supp. 1138, 1148 (W.D. Tex. 1993). In this case, however, requiring the Defendants to disclose documents described in the FWS request—even if prepared after June 7, 2000—will not impose "significant administrative burdens." See Judicial Watch, 880 F. Supp. at 10. In this case, Defendant need not make additional searches; the documents it must disclose are already identified by the FWS letter. Cf. Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) (upholding cutoff where all of the information requested pertained to events that occurred before the cutoff date). FWS asked for the documents—some of which already existed, as the Vaughn index notes—on May 31, 2000. Effectively, the information became "part of the consultation" at that time, and the Marine Corps's delay in providing it cannot serve as a shield against a later FOIA request. Defendant bears the burden of showing that the cutoff date relates to its obligation to conduct a reasonably thorough investigation. McGehee, 697 F.2d at 1100. In this case, the Marine Corps has not shown how this cutoff date would produce a reasonable search in response to Plaintiff's request, nor has defendant established how the absence of this cutoff date would pose any additional burden on them since the requested documents have already been identified and there is thus no need for Defendant to make any additional searches or produce any further analysis about disclosure.

Moreover, an agency's use of a cutoff date without notifying the requester is invalid. Id. at 1105. Here, the Defendant's letters denying Plaintiff's initial request and its appeal make no mention that the agency is restricting its response to documents already a part of the consultation with FWS. See Letter from Stuart to Hogan; Letter from Molzahn to Hogan. The Marine Corps suggests that the Navy's cutoff policy serves as sufficient notice, but even that policy states that "[w]here a [Navy] activity employs a particular cut[]off date, however, *it should give notice of*

that date in the response letter to the requester." 32 C.F.R. § 701.8(o)(2) (emphasis added).

Therefore, the Defendant must disclose all of the documents created in response to FWS's request for additional information, of course the Marine Corps will be afforded the opportunity to claim valid exemption for these documents.

2. Possible Additional Unidentified Documents

Finally, Plaintiff seeks access to possible other, still-unidentified documents relating to the Biological Assessment or consultation. See Pl.'s Reply at 3 n.1. Plaintiff observes that the Marine Corps failed to disclose the existence of documents other than the Biological Assessment until after Plaintiff requested a Vaughn index and argues that the refusal to release the FWS memorandum (Document 5) "strongly indicates that it is similarly refusing to release other records at issue here." Pl.'s Suppl. Memo. at 3-5. The Defendant admits it was "remiss" in failing to disclose the existence of the memorandum but insists it has now identified all documents "responsive" to CBD's request. Def.'s Opp'n II at 3-4.

Defendant's original view of what constitutes "responsive" production fails to include the full range of material it must disclose. Rather, *all* material prepared for the Biological Assessment and the consultation (before or after June 7, 2000) is responsive. Therefore, the Defendant must search for and identify these documents. It then will have the opportunity to claim a FOIA exemption.

III. CONCLUSION

For the foregoing reasons, the Court will deny the cross motions for summary judgment, but will order the Marine Corps to produce for in camera review (1) the biological assessment and (2) the additional documents listed in the Vaughn index. Further, the Court will order the Marine Corps to disclose all of the documents created in response to FWS's request for additional information. Lastly, in light of the previous restricted view as to what is responsive to CBD's request, the Court will require the Marine Corps to again search for and identify *all* material prepared for the Biological Assessment and the consultation. An appropriate Order will accompany this Opinion.

August 21, 2003

Thomas F. Hogan
Chief Judge