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Washington, D.C. 20230

Sent via Email

FOIAAppeals@doc.gov

Re: Freedom of Information Act Appeal –
FOIA Request DOC-NOAA-2017-0001730

To whom it concerns:

We represent Inter-Cooperative Exchange (ICE), a cooperative formed under the Bering Sea/Aleutian Islands (BS/AI) crab rationalization program administered by the National Marine Fisheries Service (NMFS). As more fully described below, ICE hereby appeals the NMFS decision not to review or produce Mr. Glenn Merrill's text messages, social media messages and voice mail messages that may be within the scope of the ICE FOIA request referenced above, and appeals the NMFS decision to redact April 6, 2017 email correspondence among Mr. Merrill and Mss. Smoker, Sullivan and Marrinan.

1. NMFS Decision Not to Review or Produce Text Messages, Social Media Messages and Voice Mail Messages. The ICE FOIA request referenced above requested copies of Mr. Merrill's correspondence relating to (a) interpretation and application of the binding arbitration system standards set forth at 50 CFR § 680.20(g) and/or (b) the Alaska state minimum wage increase approved by voters in November 2014. The ICE FOIA request defines "correspondence" as including without limitation emails, text messages, social media messages, voice mails, facsimiles and letters, regardless of whether sent from or received on government or personal devices or transmitted through some other means.

The documents produced by NMFS in response to the ICE FOIA request do not include any text messages, social media messages or voice mail messages. On October 5, 2017, I met with Ms. Lauren Smoker of the NOAA General Counsel Alaska Region office about NMFS production in response to the ICE FOIA request. She informed me that NMFS did not review Mr. Merrill's text messages or social media messages in response to the ICE FOIA request. While the basis for that decision was not entirely clear, it seems NMFS is assuming that text messages, social media messages and voice mail messages are not "agency records" which would be subject to production under the FOIA.

The Federal Records Act defines "records" to include all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in

connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor. See 44 U.S.C. § 3301. The term "recorded information" is defined as including all traditional forms of records, including information created or stored in digital or electronic format. Id. Given the breadth of this description, we see no basis for excluding text, social media or voice mail messages from the scope of records within the ICE request.

The Federal Records Act also provides that an officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record or forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record. See 44 U.S.C. § 2911. The Federal Records Act defines "electronic messages" as electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals. Id. This definition has been interpreted by the National Archivist to include chat/instant messaging services, text messages, voicemail messages and other messaging platforms, such as social media. See attached National Archives Bulletin 2015-02 (July 29, 2015).

Per the Federal Records Act and the attached guidance from the National Archivist, all text messages and social media messages Mr. Merrill sent or received and all voice mails left for him in connection with the transaction of public business during the relevant time period should have been reviewed to determine whether they fell within the scope of the ICE FOIA request, and the messages that did should have been produced unless they fell within the scope of a FOIA production prohibition or properly exercised exemption. We see no basis in law for the agency to have done otherwise, and we appeal the NMFS decision not to review or produce those records.

2. Records Redacted in Part under Exemption 5 U.S.C. § 552(b)(5). As stated above, we are appealing the NMFS decision to not disclose the redacted portions of email correspondence among Mr. Merrill and Mss. Smoker, Sullivan and Marrinan of April 6, 2017. The agency asserts it is not disclosing the redacted portions of that correspondence under the exemption cited above, because "the records contain deliberations and legal advice between NMFS staff and attorneys".

Ms. Marrinan is not a NMFS staff person. She is employed by the North Pacific Fishery Management Council (NPFMC), which is a separate, independent body. On April 9, 2017, Ms. Marrinan made a presentation to the NPFMC which addressed procedural options for action on the arbitration standard issue before it. Following her presentation and public comment, Mr. Merrill, acting as a voting NPFMC member, made a motion proposing the NPFMC procedure he considered appropriate for addressing the arbitration standard issue, and commented extensively on the legality and appropriateness of that procedure during NPFMC deliberations.

Pursuant to 16 U.S.C. 1852(i)(2)(F), the administrative record for each Council meeting, including records or other documents which were made available to or prepared for the Council, shall be made available for public inspection and copying at a single location. (Emphasis added.) The emails ICE is requesting were provided to Mr. Merrill in connection with an issue on which he took action as a voting NPFMC member and Ms. Marrinan as NPFMC staff. In this context, the correspondence in question is properly part of the administrative record for the April

2017 NPFMC meeting, and is therefore public information. By participating in deliberations with and providing legal advice to Mr. Merrill and Ms. Marrinan under these circumstances, the agency waived its right to assert confidentiality pursuant to 5 U.S.C. § 552(b)(5).

As a separate but related matter, the "FOIA Improvement Act of 2016", which was signed into law on June 30, 2016, codified the "foreseeable harm" standard for non-disclosure. Under that standard, agencies shall withhold information under FOIA only if the agency reasonably foresees that disclosure would harm an interest protected by the exemption, or disclosure is prohibited by law. See 5 U.S.C. § 552(a)(8)(A)(i) (Emphasis added.)

We do not believe this threshold is met in connection with the agency's decision to withhold the redacted portions of the correspondence at issue. It appears that the guidance Ms. Marrinan sought and obtained concerns the Magnuson-Stevens Fishery Conservation and Management Act and Administrative Procedures Act procedural requirements implicated by a potential NPFMC decision to issue a written interpretation of an arbitration standard. We fail to see any foreseeable harm related to releasing that guidance to the public. On the contrary, we firmly believe that providing such guidance to the public is important to help participants in the NPFMC process understand the appropriate parameters for choosing among various procedural options the NPFMC may have with respect to a specific issue. This function has traditionally been served by the office of NOAA General Counsel, and we note that NOAA General Counsel attorneys perform that function on the public record at NPFMC meetings on a regular basis. We fail to see any reason why the guidance in the correspondence at issue should be treated differently. We therefore request that the records which were redacted under exemption 5 U.S.C. § 552(b)(5) be produced in their full, unredacted form.

Sincerely,

Joe Sullivan Law Office PLLC

s / *Joe Sullivan*

Joseph M. Sullivan

cc: Dr. James Balsiger (via email)
Ms. Lauren Smoker (via email)