



National Headquarters

1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

February 7, 2018

Via email

FOIA Officer
Office of the Secretary
M. Interior Building
1849 C Street, NW
MS-7328
Washington, DC 20240
osfoia@ios.doi.gov

FOIA Officer
U.S. Fish and Wildlife Service
5275 Leesburg Pike
MS: IRTM
Falls Church, VA 22041
fwhq_foia@fws.gov

RE: Freedom of Information Act Request – Records Regarding Species Status Assessment, 5-Year Review, and Determination that Development of a Recovery Plan would not Promote Conservation of the Species for Contiguous United States Distinct Population Segment (DPS) of Canada Lynx (*Lynx canadensis*) under the Endangered Species Act (ESA)

“Other” fee requester category; fee waiver request included

Dear Madam or Sir:

On behalf of Defenders of Wildlife (Defenders), I request that the Department of the Interior Office of the Secretary (OS) and the United States Fish and Wildlife Service (FWS) (collectively, Agencies) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Department of the Interior’s (DOI) regulations at 43 C.F.R. § 2.1 *et seq.* I also request a full waiver of all search and duplication fees under the “other” fee requester category.

Defenders is a not-for-profit conservation organization with more than one million members and supporters nationally. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities. Defenders has a particular interest in conserving endangered and threatened species, and has engaged in significant policy and advocacy work as well as litigation to further this interest.

Records Requested and Definitions

Defenders asks that the Agencies provide:

- Any records, including any documents, emails, notes, presentations, briefing materials, or summaries relating to issuance of the Species Status Assessment for the Canada Lynx (*Lynx canadensis*) Contiguous United States Distinct Population Segment, Version 1.0 - Final, released in October 2017 (“SSA”);
- Any records, including any documents, emails, notes, presentations, briefing materials, or summaries relating to the issuance of the Canada Lynx (*Lynx canadensis*) 5-Year Review: Summary and Evaluation, issued Nov. 13, 2017 (“5-Year Review”);
- Any records, including any documents, emails, notes, presentations, briefing materials, or summaries relating to the issuance of the memorandum from the FWS Regional Director, Mountain-Prairie Region, to the Director, FWS, titled *4(f)(1) Determination Regarding Recovery Planning for the Canada Lynx (Lynx canadensis)*, issued Dec. 11, 2017 (“4(f)(1) Memo”); and
- Any records maintained in any form reflecting communications between the Department and any non-government individuals, organizations, or entities relating to issuance of the SSA, the 5-Year Review, or the 4(f)(1) Memo.

As used throughout this letter, the terms “record” and “records” shall mean all writings (handwritten, typed, electronic, or otherwise produced, reproduced or stored) in the Agencies’ possession, regardless of whether the record or document was originally produced by another agency, entity, or individual. This includes, but is not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, calendar or daily entries, maps, photos, reports, agendas, notices, and telefaxes.

This request includes records from all relevant field and regional offices as well as headquarters. Accordingly, this request is being sent to the FOIA Officer at the Office of the Secretary and the FWS FOIA Officer at FWS headquarters with the understanding that it will be forwarded to any other offices of either of the Agencies that may also have responsive records.

Exclusions

The following records are excluded from Defenders’ FOIA request:

1. Records pertaining to logistical issues such as scheduling of meetings and conference calls, project timelines, assignment of lead offices, document processing, etc.
2. Readily available agency records such as Federal Register notices.
3. FWS’s lynx SSA, 5-Year Review, and 4(a)(1) Memo.

Withheld Records

Should the Agencies decide to invoke a FOIA exemption for any of the requested records, please include in the full or partial denial letter sufficient information for Defenders to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to Defenders.

Format of Requested Information

Defenders would appreciate receiving responsive records in electronic PDF format that is text searchable/OCR formatted. Specifically, I ask that you provide the records either in (1) load ready format with a CSV file index or Excel spreadsheet, or, if that is not possible, (2) in PDF format and *without* the inclusion of any “profiles” or “embedded files.”

Under FOIA, an agency is obligated to provide documents in a readily accessible electronic format and in the format requested, *see, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). Profiles and embedded files within files are not readily accessible with our document review software. Therefore, I request that you provide all records as individual PDFs (or Word, Excel, etc. documents) instead.

If possible, please produce the records in electronic format to: jrylander@defenders.org. Please produce any hard copies of the requested records by sending them to me at this address:

Jason Rylander
Defenders of Wildlife
1130 17th St NW
Washington, DC 20036

Request for Records to be Produced on a Rolling Basis

Please produce the records on a rolling basis. At no point should the search for—or deliberation concerning—certain records delay the production of others that the Agencies have already retrieved and elected to produce.

Fee Waiver Request

I respectfully request that the Agencies waive all search and duplication fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. §§ 2.45–2.48. Defenders’ fee waiver request fits within the “other” fee requester category and meets all applicable statutory and regulatory requirements for this category as demonstrated below.

FOIA provides in relevant part that:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).¹

To receive a full fee waiver for a records request, FOIA requires that disclosure of the information be in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government. FOIA also requires that the disclosure not be primarily in the commercial interest of the requester. Whether a requesting party has met these requirements is at the discretion of the specific government department a party is requesting records from, and each department has enacted its own regulations to implement the FOIA requirements. *See* 5 U.S.C. § 552(a)(4)(A)(i).

As explained below, this FOIA request satisfies the requirements of fee waiver under the FOIA statute, as well as the factors listed in DOI’s governing regulations for waiver or reduction of fees: that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45.

Defenders has spent years promoting the public interest through the development of policies that protect endangered and threatened species, and has routinely received fee waivers under FOIA. Defenders is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, Defenders intends to use the requested records to inform the public, so the public can meaningfully participate in the oversight and protection of threatened animals like the Canada lynx.

¹ I also note that the Agencies may not assess any search fees if they fail to meet FOIA’s mandatory time limits for responses. In 2007, Congress amended FOIA to provide that “[a]n agency shall not assess search fees . . . if the agency fails to comply with any time limit” of FOIA. 5 U.S.C. § 552(a)(4)(A)(viii). An agency is required to make a determination on a FOIA request, including a fee waiver request, within 20 working days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). It is likewise required to rule on an appeal of any denial within 20 working days of receiving such an appeal. 5 U.S.C. § 552(a)(6)(A)(ii). *See Bensman v. Nat’l Park Serv.*, 806 F. Supp. 2d 31 (D.D.C. 2011).

A. The requested disclosure is in the public interest and is likely to contribute significantly to public understanding of the Agencies' operations and activities regarding endangered and threatened species.

To be eligible for a full fee waiver, FOIA requires that the requested information “contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(1). Here, Defenders seeks information regarding how the Agencies have addressed their obligations under the Endangered Species Act. DOI’s regulations set forth four factors the Agencies’ FOIA officers will consider in determining whether a request meets this FOIA requirement. 43 C.F.R. § 2.48. Because this request meets each of these four factors, the disclosure of the requested records to Defenders is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

1. The subject matter of the requested records specifically concerns identifiable “operations and activities of the government”

The Agencies are responsible for administering the ESA, which includes listing imperiled species as endangered or threatened, designating critical habitats, protecting and recovering these listed species, and consulting with other federal agencies when federal actions affect listed or proposed species or critical habitat. The requested records relate to the Agencies’ efforts to administer the ESA as well as their compliance with a court order requiring the Service to develop a lynx recovery plan or find that doing so would not promote the conservation of the lynx. *Friends of the Wild Swan v. Ashe*, 18 F. Supp. 3d 1077, 1082 (D. Mont. 2014). As such, the requested records specifically concern “operations and activities of the government.” *See* 43 C.F.R. § 2.48(a)(1).

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government. DOJ Guide to the Freedom of Information Act, *Fees and Fee Waivers* at 27 (Aug. 23, 2013 ed.). There can be no question that this is such a case.

2. The disclosure of the requested records is likely to contribute to the public’s understanding of the operations and activities of the Agencies

DOI and FWS are federal agencies charged with interpreting, applying, and administering the requirements of the ESA and its implementing regulations with respect to U.S. terrestrial species, and complying with the 2014 court order. Disclosure will grant the public information that will allow the public to better understand the operations of DOI and FWS, the best available scientific data underlying the SSA, 5-Year Review, and 4(f)(1) Memo, and the Agencies’ analyses of those data. It will also enable the public to better understand the policy and regulatory factors that led to the creation of those documents. Thus, the records will be meaningfully informative. *See* 43 C.F.R. § 2.48(a)(2)(i). Furthermore, the information contained in these records is directly related to the Agencies’ ESA § 4(f)(1) determination, which is part of the operations and activities of the federal government. *See* 43 C.F.R. § 2.48(a)(2)(ii).

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of the Agencies' decisions because these records are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the potential for the lynx population to decline and for the species to lose ESA protections in the event that they are delisted from their current status as "threatened" under the ESA, it is important that information relating to government operations or activities involving the species to be made available to the public. This information will facilitate meaningful public participation in future decision-making processes involving listed or proposed species, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of the Agencies' decision-making process concerning implementation of the ESA.

Defenders is a not-for-profit environmental advocacy organization that represents its members' interests in ensuring that imperiled species receive the full protections of the ESA to ensure their survival and recovery in the wild. Defenders will rely on its own legal and scientific experts, as well as outside experts, to analyze the information contained in responsive records produced by the Agencies. Defenders has used, and will continue to use, a full array of tools to help ensure its members' interests are vindicated and the general interested public is informed by disseminating records and its analysis of the information contained therein. Defenders frequently communicates with its members, supporters, partner organizations, and the interested public on news and information relevant to the impacts of the operations and actions of the government on endangered and threatened animals and plants.

Defenders will ensure that the information produced in response to this request, and its analysis thereof, will be disseminated to a reasonably broad audience of persons interested in protecting endangered species. In disseminating such information, Defenders will ensure that it is made public for the benefit of the audience of interested persons beyond our membership, such as members and staff of other conservation advocacy organizations, the media, the academic community, and the interested public. Defenders can disseminate information obtained from the requested records in a variety of ways.

Defenders actively communicates with its more than 1.1 million members and supporters and the interested public through direct mail and email campaigns; through broadcasting action alerts notifying the public of opportunities to comment on agency proposals; through publishing and frequently updating website pages and blog posts to educate the public on species-specific wildlife conservation issues; through distributing a quarterly print magazine; through communicating with partner organizations both nationally and internationally; by maintaining an active online presence on Facebook, Twitter, and YouTube; by distributing press releases directly to media contacts and through its website and RSS feed; and by educating lawmakers and advocates for protective laws at the state and federal levels.

3. The disclosure of the requested records is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject

As described above, Defenders and its members have a longstanding interest and expertise in the protection of species listed under the ESA. More importantly, Defenders has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public at large.”

Defenders intends to disseminate the information it receives through FOIA regarding the Agencies’ operations and activities in a variety of ways, including but not limited to analysis and distribution to the media, distribution through publication and mailing, posting on the organization’s websites, emailing, and listserv distribution to members and other interested parties.

Because DOI and FWS are statutorily entrusted with the responsibility to administer the ESA, the information contained in the responsive records will enable the public to more fully understand the Agencies’ recent analysis and determinations relating to the Canada lynx. The information will therefore provide new insight to Defenders and to an audience of interested persons as to how the Agencies meet their ESA responsibilities.

Disclosure of the responsive records will thus significantly contribute to a greater understanding of the Canada lynx, as well as the adequacy of DOI and FWS regulations and activities to protect endangered and threatened species, by Defenders and a broad audience of interested persons. This information is not made readily available to the public at large without the employ of a FOIA request. *See* 43 C.F.R. § 2.48(a)(3)(iv). Therefore, it is unlikely that the important information contained in the responsive records would be disseminated to a broad audience of interested persons without fulfillment of this FOIA request.

4. The public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure of the requested records.

The Agencies’ records are the best source of information for significantly enhancing the public’s understanding of the regulatory mechanisms undertaken by the Agencies under the ESA. Therefore, disclosure of such records, and the analysis and dissemination of the information contained therein, will enhance to a significant extent the public’s understanding of the subject of this FOIA request. *See* 43 C.F.R. § 2.48(a)(4).

B. Obtaining the information is of no commercial interest to Defenders.

To be eligible for a full fee waiver, FOIA requires that the requested information “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(2). The formal fee assessment/waiver guidelines established by the Office of Management and Budget (OMB) state that:

The term “commercial use’ request” refers to a request from or on behalf of one who seeks information for a use or purpose that *furtheres the commercial, trade, or profit interests* of the requester or the person on whose behalf the request is made.

52 Fed. Reg. 10,012, 10,017–18 (Mar. 27, 1987) (emphasis added).²

Defenders of Wildlife is a 501(c)(3) not-for-profit public interest organization and has no commercial interest in the disclosure of the requested information. Furthermore, Defenders does not seek the requested information to further any commercial, trade, or profit interests.

The requested materials will allow Defenders to better understand the decision-making process of the Agencies regarding the Canada lynx. The requested records will be analyzed and disseminated to Defenders’ members, supporters, partner organizations, and the interested public, all of whom share Defenders’ goal of protecting imperiled species. Defenders and its members and supporters, as well as its partner organizations and the interested public, share only a conservation interest and moral obligation to protect endangered plants and animals, and therefore have no commercial interest in obtaining the records requested. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(2).

For the foregoing reasons, Defenders has satisfied the statutory and regulatory requirements to be considered by the Agencies in granting fee waivers under the “other” requester category governed by 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. §§ 2.45–2.48. Defenders is thus entitled to the full grant of such waiver for its FOIA request.

Although Defenders is willing to pay up to a total of \$100.00 in reasonable search and/or duplication fees for document search time exceeding two hours and for duplication costs for responsive documents exceeding 100 pages, if this fee waiver request is denied, I request that you contact me to discuss the costs for search and/or duplication fees before fulfilling this FOIA request. I also request that you provide a written explanation for the denial.

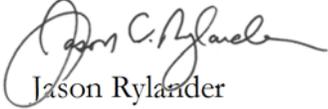
Conclusion

I request that the Agencies, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the applicable DOI regulations. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.6. I also request that, should this FOIA request take longer than ten business days to process, you notify me of the individualized tracking number that has been assigned to the request and information about how I may receive information on the status of my request via telephone, email, or Internet, including the estimated date on which you will complete action on this request. 5 U.S.C. § 552(a)(7).

² FOIA mandates that OMB promulgate a schedule of fees and guidelines to which each agency must conform. 5 U.S.C. § 552(a)(4)(A)(i). Because it was statutorily charged with the issuance of the fee guidelines, which apply equally to all components of the Executive Branch, OMB’s interpretation of the FOIA fee structure is to be given deference, even to the extent of negating an agency’s contrary interpretation. *See, e.g., Emvtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 949 (9th Cir. 2005).

Thank you for your cooperation. If you find that this request needs any clarification please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason C. Rylander". The signature is fluid and cursive, with a large initial "J" and "R".

Jason Rylander
Senior Staff Attorney
(202) 772-3245
jrylander@defenders.org