



CENTER *for* BIOLOGICAL DIVERSITY

February 25, 2014

VIA ELECTRONIC MAIL

Larry Buklis, Region 1 FOIA Coordinator
U.S. Fish and Wildlife Service
911 NE 11th Ave
Portland, OR 97232
Phone: 503-231-2072
Fax: 503-231-6259
Email: Larry_Buklis@fws.gov

RE: Freedom of Information Act Request

Dear Mr. Buklis,

On behalf of the Center for Biological Diversity (“Center”), I am writing to submit a request for information under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et. seq.

REQUESTED INFORMATION

The Center is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat, and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission, I respectfully request the following information on behalf of the Center:

Any and all records related to any discussion, plans, or efforts by the U.S. Fish and Wildlife Service or Idaho Department of Fish and Game (“IDFG”) to obtain authorization pursuant to section 10 of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B), for the “take” of any listed species from hunting and/or trapping that is regulated by IDFG, including but not limited to any “incidental take permit” for IDFG, whether actual or theoretical.

Any and all records relating to Fish and Wildlife Service's “follow up with the IDFG to determine the full extent of trapping and the potential impact on lynx due to permitted recreational trapping” as stated in the attached letter from the U.S. Fish and Wildlife Service's Idaho State Supervisor Brian Kelly. This includes but is not limited to non-target catches of lynx.

Arizona • California • Nevada • New Mexico • New York • Alaska • Oregon • Minnesota • Vermont • Washington • Washington, DC

Timothy J. Ream, Staff Attorney • 351 California St., Suite 600 • San Francisco, CA 94104
Phone: 415-632-5315 • Fax: 415-436-9683 • tream@biologicaldiversity.org

FORMAT OF REQUESTED INFORMATION

The Center would appreciate receiving responsive records in an electronic PDF format that is text searchable/OCR formatted. Specifically, we 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.” We would appreciate the inclusion of an index.

Under the FOIA, you are 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 and this is why we are requesting that you provide all records as PDFs (or Word documents) instead.

REQUEST FOR FEE-WAIVER

The Center requests that you waive all fees in connection with this request. As demonstrated below, the Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Interior’s fee-waiver regulations at 43 C.F.R. § 2.19. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether the Center meets the fee-waiver criteria, it is imperative that FWS remember that FOIA carries a presumption of disclosure, and that the FOIA fee-waiver amendments of 1986 were designed specifically to facilitate access to government records for non-profit, public interest groups such as the Center without the payment of fees. As stated by one Senator, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court has stated, this waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

I. Disclosure of This Information is in the Public Interest Because It will Significantly Contribute to Public Understanding of the Operations or Activities of Government.

Under federal law, records are to be furnished completely, without charge, when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of government and is not in the commercial interest of the requestor.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.21(a). Pursuant to this requirement, the Center seeks a waiver of all search and copy fees, because the requested information will significantly contribute to public understanding of the issues involved.

A. The Subject of the Request Concerns “the Operations and Activities of the Government.”

The subject matter of this request relates to the extent and impact of trapping of Canadian lynx, and any related Incidental Take Permit granted to the IDFG pursuant to the Endangered Species Act. These records are clear and identifiable activities of the government, *see* 43 C.F.R. § 4130.6-1, in this case, the executive branch agency: the FWS. *See Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.” (internal quotations omitted)).

B. The Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities (the Informative Value of the Information to be Disclosed).

The requested information concerns the recovery of the endangered Canada lynx, and will allow the Center to understand the FWS’s activities and operations with regard to Canadian lynx’s protection under the Endangered Species Act. The information requested will contribute to an understanding of how the FWS is carrying out its Endangered Species Act responsibilities with regard to species that are threatened by human activities. The public is always well served when it knows how government activities have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“the American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not”). These records are not currently in the public domain. Their release is therefore not just “likely,” but is in fact *certain*, to contribute to better public understanding of the FWS’s operations and activities.

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the Ninth Circuit made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents will provide new information about the FWS’s decision making and current thinking about Canadian lynx and their threats. *See Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405

F.Supp.2d 553 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”); see also *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1230 (D. Or. 2003) (finding that the FOIA request was informative of government operations because “there is substantial public interest in agency activities relating to endangered species.”).

C. The Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The requested documents will allow the Center to understand the reasoning behind an Incidental Take Permit requested by the IDFG pursuant to the Endangered Species Act, as well as the impact of government permitted trapping on Canadian lynx. Such public oversight of agency action is vital to our democratic system and was clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action with the requested information. These records are being requested to educate ourselves and our membership and are not being sought merely for their intrinsic informational value.¹

In addition, the Center plans to use the information it learns from the disclosed records to educate the public about Canada lynx, threats to the species, and FWS's basis for potentially issuing an Incidental Take Permit under the Endangered Species Act to the IDFG. The requested information will reveal in greater detail the threats to Canada lynx and how the FWS plans to address those threats under the Endangered Species Act. There can be no dispute that disclosure of the requested documents will provide information that will significantly enhance the public's understanding of Canada lynx and their status in Idaho. Even if the documents fail to reveal that certain actions need to be taken, this does not mean the documents do not serve the public interest. See *Judicial Watch*, 326 F.3d at 1314.

II. Obtaining the Information is of No Commercial Interest to the Center.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

III. The Center Has a Recognized Ability to Disseminate this Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information provided to it through FOIA.

The Center's work appears in well over 2,000 news stories in print, radio and TV per month, including regular reporting in such important outlets as The New York Times, Washington Post,

¹ It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. *Judicial Watch*, 326 F.3d at 1315.

and Los Angeles Times. Last year, more than 1.5 million people visited the Center's extensive website, viewing a total of more than 6.5 million pages. The Center also sends out more than 200 email newsletters and action alerts per year to more than 625,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 40,000 members. The Center also regularly tweets to more than 18,000 followers on Twitter. The Center intends to use any or all of these far-reaching outlets to share with the public information obtained as a result of this request.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public, (4) the Center possesses the ability to disseminate the requested information to the public, and (5) the news media recognizes that the Center is an established expert in the field of imperiled species and biodiversity.

Public oversight and enhanced understanding of Canada lynx, the threats this species faces, and how the FWS plans to address those threats is absolutely necessary. The Center's members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested on the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2d Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

Again, the requested information will be used to inform the Center's and the public's understanding of Canada lynx, the threats this species faces in the U.S., and how the FWS plans to address those threats. Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize the requested information. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of FWS responsibilities and activities. The Center has publicized agency compliance with the provisions of various environmental laws, as well as the policy costs and benefits of pending activities, many times through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner.

Moreover, the Center's informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally and internationally. Our informational publications continue to contribute information to public media outlets, as well.

CONCLUSION

We hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee waiver. Please call or email me if you have any questions about this request. Thank you.

Sincerely,

/s/

Timothy J. Ream
Center for Biological Diversity

Enclosures (1)