



THE HUMANE SOCIETY
OF THE UNITED STATES



HUMANE SOCIETY
INTERNATIONAL

March 9, 2018

Melissa Allen
FWS FOIA Officer
MS-IRTM
5275 Leesburg Pike
Falls Church, VA 22041
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Re: Freedom of Information Act Request & ESA Section 10(c) Request: Trophy hunting imports

Dear FOIA Officer:

This request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA") for records pertaining to hunting trophies of foreign listed species protected under the Endangered Species Act (ESA) and/or the Convention on International Trade of Endangered Species of Flora and Fauna (CITES). Further, for species for which the ESA permits are required, Section 10(c) of the ESA provides "[i]nformation received by the Secretary as a part of any public record at every stage of the proceeding." 16 U.S.C. § 1539(c).

This request is made on behalf of the Humane Society of the United States (HSUS) and Humane Society International (HSI). HSUS is a national nonprofit animal protection organization headquartered in Washington, D.C., with four regional offices located throughout the country. HSI (HSUS' corporate affiliate) is a global nonprofit animal protection organization headquartered in Washington D.C., with offices and projects around the world. HSUS and HSI work to combat animal abuse and exploitation, and educate the public on a broad range of wildlife issues and other issues concerning animal protection.

REQUESTED RECORDS

We request the records detailed below, for the following species: **lion** (*Panthera leo leo*, *Panthera leo melanochaita*, and *Panthera leo persica*); **elephant** (*Loxodonta africana* and *Elephas maximus*); and **leopard** (*Panthera pardus*).

For each of the aforementioned species, we request the following records from January 1, 2018 to whenever this request is processed:

1. All permit applications submitted for CITES import permits for a hunting trophy(ies);
2. All permits issued for CITES import permits for hunting trophies;
3. All permit applications submitted for ESA permits for a hunting trophy(ies), unless such applications are publicly available on www.regulations.gov;
4. All permits issued for ESA permit applications for hunting trophies;
5. All non-detriment findings (positive or negative) or general advices made or received by the U.S. Fish and Wildlife Service for hunting trophy imports or exports;
6. All enhancement findings (positive or negative) or internal advice for made by the U.S. Fish and Wildlife Service for hunting trophies.

For purposes of this request, "records" is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in FWS' possession and control. If such records are no longer under the control of FWS but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to the headquarters for FWS with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to be exclusive of any other records that have a reasonable relationship to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, please indicate this fact and the reasons therefore in your response.

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information to appeal the denial. Please include a detailed ledger which includes:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and

2. Complete explanations and justifications for the denial, including the identification of the category within the governing statutory provision under which the record (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) segregate the exempt portions and mail the remaining records to my attention at the address below location within the statutory time limit. 5 U.S.C. § 552(b).

HSUS and HSI are willing to receive records on a rolling basis.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records 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.”). “Readily-accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B).

Please provide all records in a readily-accessible, electronic PDF format. Additionally, please 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, without any “profiles” or “embedded files.” Profiles and embedded files within files are not readily-accessible. *Please do not provide the records in a single, or “batched,” .pdf file.* We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 5 C.F.R. § 1303.10(c). Failure to comply within the statutory timeframe may result in HSUS and HSI taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Anna Frostic

The Humane Society of the United States

1255 23rd Street NW, Suite 450

Washington, DC 20037

afrostatic@humanesociety.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (202-676-2333) to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The fee waiver amendments of 1986 were designed specifically to provide non-profit organizations such as HSUS and HSI access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies 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 Senator Leahy).

I. HSUS and HSI Qualify for a Fee Waiver.

Under FIOA, a party is entitled to a fee waiver 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 primarily in the commercial interest of the requestor." 5 U.S.C. § 552 (a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

A. Disclosure of information is in the public interest under 43 C.F.R. § 2.48(a)(1) – (4).

In determining whether HSUS and HSI meet the fee waiver requirements, the FWS must consider four factors to determine whether a request is in the public interest. These factors

include: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably-broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 43 C.F.R. § 2.48(a)(1) – (4). As shown below, HSUS and HSI meet each of these factors.

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

The subject matter of this request concerns the operations and activities of FWS. Specifically, this request asks for permit applications submitted to FWS and the agency’s findings on those applications (if one is made). These records are critical to understanding how FWS is implementing its permitting authority under the ESA and CITES and how the agency is treating hunting trophies under those laws.

This FOIA will provide HSUS, HSI, and the public with crucial insight into how FWS regulates hunting trophies coming into the U.S. and evaluates permit applications for such activities. It is clear that consideration of permit applications is a specific and identifiable activity of the government, in this case the executive branch agency, FWS. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, HSUS and HSI meet this factor.

ii. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

1. Contents of the records are meaningfully informative

The requested records are meaningfully informative about government operations or activities because the records will show whether FWS is properly granting these permits under the law. The requested records will therefore contribute to an increased understanding of those operations and activities by the public.

2. Logical connection between content and the operations and activities.

The requested records contain information documenting the operations and activities of FWS, including the permitting process. By doing so, these records are necessarily connected to the operations and activities of FWS and will contribute to public understanding of those operations or activities.

3. Disclosure will contribute to understanding of a reasonably broad audience of persons interested in the subject.

Disclosure of the requested records will allow the HSUS and HSI to convey to the public, information about the number of applications submitted for hunting trophies and how FWS is handling these applications under the ESA and CITES. Once the information is made available, HSUS and HSI will analyze it and present it to its millions of members and online activists, as well as the general public, in a manner that will meaningfully enhance the public's understanding of FWS's regulation of trade in imperiled species and hunting trophies under the ESA and CITES. Thus, the requested records are likely to contribute to an understanding of FWS operations and activities.

4. Identity, vocation, qualifications, and expertise regarding the requested information that explains HSUS and HSI plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience or persons interested in the subject.

HSUS and HSI undeniably have the ability to contribute to the public's understanding of federal agencies' operations as well as agencies' policies and activities relating to the importation of endangered wildlife species due to the organizations' size, broad reach, and proven ability to disseminate information to a large segment of the public. HSUS is the nation's largest animal protection organization and HSI is the world's largest international animal protection organization—together, HSUS and HSI have offices, animal care facilities, and projects located throughout the country and around the world.

Policies and activities relating to importation of endangered species are of national concern. The HSUS and HSI are particularly well suited to distribute information to concerned citizens and others throughout the country, due to their long-standing dedication and ongoing efforts to promote the humane care and treatment of animals in their natural habitats, as well as in captivity, and to advocate against the unsustainable and inhumane trade in endangered species and other wildlife, which are frequently traded as pets, hunting trophies, or for exhibition at inhumane, unregulated roadside zoos. In addition, HSUS and HSI routinely distribute information, press releases, reports, and copies of original documents to members of the media to generate articles. See, e.g., HSI & HSUS, *Trophy Hunting by the Numbers: The United States' Role in Global Trophy Hunting*, http://www.hsi.org/assets/pdfs/report_trophy_hunting_by_the.pdf; Rachael Bale, *Hard Numbers Reveal Scale of America's Trophy-Hunting Habit*, National Geographic, <http://news.nationalgeographic.com/2016/02/160206-American-trophy-hunting-wildlife-conservation/> (news article relying on report *Trophy Hunting by the Numbers*).

HSUS and HSI continually add reports, comments, action alerts, press releases, and other materials relating to endangered species and wildlife to their home pages (<http://www.humanesociety.org> and <http://www.hsi.org>) to ensure that interested citizens have around the clock access to information. In sum, HSUS and HSI are well positioned to contribute significantly to the public understanding of federal agencies' policies and activities relating to the welfare and conservation of endangered species, once they receive and digest the requested information.

5. Ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject is presumed for representatives of the "news media" under 43 C.F.R. §2.38.

Aside from HSUS' and HSI's qualifications for a fee waiver due to the significance of the material requested under 5 U.S.C. § 552(a)(4)(A)(ii)(II), HSUS and HSI alternatively qualify for a fee waiver under the fee exemption provided for "representative[s] of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. §§ 2.48(a)(2)(v), 2.70. The definition of "representative of the news media" has a well-accepted interpretation which stems from the District of Columbia Circuit:

A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.

Nat'l Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also* 43 C.F.R. § 2.70 (defining "representative of the news media" in the same terms).

In reaching this conclusion, the court relied on strong statements by legislators, in support of the amendments, who argued that the term "representative of the news media" be "broadly interpreted if the Act is to work as expected" and extend to "any person or organization which regularly disseminates information to the public." *Nat'l Sec. Archive*, 880 F.2d at 1386, *citing* 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

Under this definition and interpretation, HSUS and HSI unquestionably are "representative[s] of the news media." HSUS and HSI both have extensive and well-exercised means to keep the public informed on the operations and activities of the United States government. HSUS and HSI do not merely obtain information and then contact members of the press to relate that information; rather, they independently analyze the information, draft their own reports and articles on the issues, and disseminate the information broadly through their own publications to members and other interested persons. *See, e.g., HSUS, U.S. provides Endangered Species Act Protections for African Lions- Seeks to Avoid Sequel to Cecil Killing* (Dec. 20, 2015), <http://blog.humanesociety.org/wayne/2015/12/u-s-provides-endangered-species->

act-protections-for-african-lions.html?credit=blog_post_020316_id7906 (last visited May 23, 2017); *Trophy Hunting by the Numbers*.

Thus, HSUS and HSI have shown a “firm intention . . . to publish” this important information and to make it easily accessible. *Nat’l Sec. Archive*, 880 F.2d at 1386. As a result of their longstanding interest in policies and activities concerning endangered species and other wildlife, HSUS and HSI have developed a substantial level of expertise on these issues and command public attention when they disseminate such information. Given their independent and extensive public dissemination of information pertaining to policies and activities of endangered species and other wildlife, HSUS and HSI meet the criteria for representatives of the news media.

- iii. Disclosure is likely to significantly contribute the understanding of a reasonably broad audience of persons interested in how FWS regulates trade of endangered.

The requested records will contribute to public understanding of how FWS is regulating requests to trade in endangered and threatened or Appendix I and II species and how this regulation is consistent with the ESA and CITES. As explained above, the records will contribute to public understanding of how hunting trophies are regulated under the law.

Through HSUS and HSI’s synthesis and dissemination (by means discussed above), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, since they are not routinely posted by FWS or made available on regulations.gov. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 559-560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[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... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of how FWS is regulating trade in imperiled species and their parts. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records will educate the public about how FWS is interpreting its obligations under the ESA and CITES with respect to hunting trophies.

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

HSUS and HSI are not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of FWS’s regulation of wildlife trade, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about not just trade in wildlife specimens but specifically how the agency is regulating hunting trophies.

The records are also certain to shed light on FWS’s compliance with the ESA and CITES. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, HSUS and HSI meet this factor as well.

II. Disclosure of the information is not primarily in the commercial interest of HSUS and HSI.

In addition to the requirement that disclosed information be in the public’s interest, the information must also not be in commercial interest of the requester. Access to government records, disclosure forms, and similar materials through FOIA requests are essential to HSUS and HSI’s role in educating the general public and is not primarily in the commercial interests of the organizations. HSUS and HSI routinely distribute, at no charge, their own information and information obtained from other sources regarding the government’s policies and activities relating to endangered species and other wildlife to anyone requesting such information. This includes distribution to the public, media, students, and scientists of articles and reports on topics of national and international significance. HSUS and HSI have no commercial interest and will realize no commercial benefit from the release of the requested records.

¹ In this connection, it is immaterial whether any portion of HSUS and HSI’s request may currently be in the public domain because the request is considerably larger than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

CONCLUSION

In summary HSUS and HSI believe that this request satisfies the criteria for fee waiver or reduction for the following reasons:

1. HSUS and HSI are non-profit, public interest groups whose tax exempt numbers are 53-0225390 and 52-1769464, respectively. The primary purpose for requesting these records is to obtain information about policies and activities relating to the federal government's administration of the ESA and to analyze, distill, and distribute this information to the public, not to commercially profit from the sale of this information.
2. HSUS and HSI are members of the news media. They have demonstrated their ability to disseminate to the general public the information they acquire. This is achieved by state and nationally distributed newsletters, statewide membership mailings, information available electronically via the internet, and extensive and reliable media contacts.

Therefore, HSUS and HSI ask that any search and duplication fees in this case be waived or reduced. If the request will involve more than two (2) search hours or more than one hundred (100) pages of documents, the waiver or reduction is denied, or fees are estimated to exceed two hundred and fifty dollars (\$250.00), please notify me immediately before the request is processed so HSUS and HSI may decide whether to pay the fees, whether to narrow our request based on your description of the records, or whether to appeal the denial of the request for waiver or reduction.

I may be reached during business hours by phone at 202-676-2333 or by e-mail at afrostitc@humanesociety.org. If you have any questions regarding any aspect of this request, please contact me by telephone or e-mail rather than by mail in order to expedite timely disclosure. Thank you for your assistance. I will look forward to receiving your reply within the twenty business days as required by law, and which is not altered by the use of multitrack processing. 5 U.S.C. § 552(a)(6)(A)(i); 43 CFR §§ 2.15(f), 2.16(a).

Sincerely,



Anna Frostic
Managing Attorney, Wildlife Litigation
The Humane Society of the United States
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