



April 24, 2019

FWS FOIA Officer
5275 Leesburg Pike
Falls Church, VA 22041
fwhq_foia@fws.gov

Re: Freedom of Information Act Request – Canada Lynx Trapping

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) for records pertaining to the trapping of a Canada lynx in Harbor Beach, MI. The Canada Lynx is protected under the Endangered Species Act (“ESA”) and/or the Convention on International Trade of Endangered Species of Flora and Fauna (“CITES”).

This request is made on behalf of the Humane Society of the United States (“HSUS”). HSUS is a national nonprofit animal protection organization headquartered in Washington, D.C., with regional offices located throughout the country. HSUS works 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 following records pertaining to the trapping of a Canada lynx dated March 18, 2016 through the date this request is processed:

1. All incidental take permit applications submitted pertaining to the taking of Canada lynx in Michigan;
2. All incidental take permit denials pertaining to the taking of Canada lynx in Michigan;
3. All issued incidental take permits pertaining to the taking of a Canada lynx in Michigan;
4. All permit applications submitted pursuant to Section 10(a)(1)(a) of Endangered Species Act pertaining to the taking of Canada lynx in Michigan;
5. All permit denials pursuant to Section 10 (a)(1)(a) of the Endangered Species Act pertaining to the taking of Canada lynx in Michigan;

6. All permits issued pursuant to Section 10(a)(1)(a) of the Endangered Species Act pertaining to the taking of a Canada lynx in Michigan;
7. All communications with permit applicants regarding the taking of a Canada lynx in Michigan;
8. All communications, veterinary records, photographs, law enforcement statements and other records regarding a Canada lynx that was trapped on March 17, 2019, in Harbor Beach, MI, and later released into Schoolcraft County on April 12, 2019, including but not limited to any records regarding the sighting of the lynx, the trapping of the lynx, the transportation of the lynx, or the release of the lynx into the wild.

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, and notes.

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 is willing to receive records on a rolling basis. 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).

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 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 Qualifies 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 meets 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 meets 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 issuances or denials of these permits, as well as communications surrounding the take of a Canada lynx, a threatened species under the ESA and listed under appendix II of CITES. These records are critical to understanding how FWS is implementing its permitting authority under the ESA and CITES and how the agency is treating threatened species under those laws.

The records requested through this FOIA request will provide HSUS and the public with crucial insight into how FWS 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 meets 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. 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 to convey to the public, information about bolstering the native carnivore protection and how FWS is handling applications to take threatened species under the ESA. Once the information is made available, HSUS 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 taking of threatened and endangered species under the ESA. 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' 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 undeniably has the ability to contribute to the public's understanding of federal agencies' operations as well as agencies' policies and activities relating to the taking of threatened and 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 has offices, animal care facilities, and projects located throughout the country.

Policies and activities relating to the taking of threatened and endangered species and the protection of native carnivores are of national concern. The HSUS is 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 routinely distributes information, press releases, reports, and copies of original documents to members of the media to generate articles. *See, e.g.*, HSUS, *U.S. House moves to delist wolves from Endangered Species Act*, <https://www.humanesociety.org/news/us-house-moves-delist-wolves-endangered-species-act>; Laura Bies, *More legal challenges over gray wolves, grizzly bears*, The Wildlife Society, <https://wildlife.org/more-legal-challenges-over-gray-wolves-grizzly-bears/> (news article citing HSUS' efforts to petition to keep wolves listed under the ESA).

HSUS continually adds reports, comments, action alerts, press releases, and other materials relating to endangered species and wildlife to their home pages (<http://www.humanesociety.org>) to ensure that interested citizens have around the clock access to information. In sum, HSUS is well positioned to contribute significantly to the public understanding of federal agencies' policies and activities relating to the welfare and conservation of threatened and 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' 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 alternatively qualifies 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 unquestionably is “representative[s] of the news media.” HSUS has extensive and well-exercised means to keep the public informed on the operations and activities of the United States government. HSUS does 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, Victory! Court restores Endangered Species Act protections for Yellowstone’s grizzly bears*, (September 25, 2018), <https://blog.humanesociety.org/2018/09/victory-court-restores-endangered-species-act-protections-for-yellowstones-grizzly-bears.html> (last visited March 25, 2019).

Thus, HSUS has 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 has developed a substantial level of expertise on these issues and commands public attention when they disseminate such information. Given its independent and extensive public dissemination of information pertaining to policies and activities of endangered species and other wildlife, HSUS meets 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 threatened and endangered species.

The requested records will contribute to public understanding of how FWS is regulating threatened and endangered species and how this regulation is consistent with the ESA and CITES. As explained above, the records will contribute to public understanding of how taking of threatened and endangered species are regulated under the law.

Through HSUS’ 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 protection of native carnivores and how FWS is treating endangered and threatened species under the ESA. 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 with respect to the taking of threatened and endangered species.

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

HSUS is 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 threatened and endangered species, 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 the taking of threatened and endangered species, but specifically how the agency is regulating ESA permits.

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

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

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’ role in educating the general public and is not primarily in the commercial interests of the organization. HSUS routinely distributes, at no charge, its 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

¹ In this connection, it is immaterial whether any portion of HSUS’ 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.

distribution to the public, media, students, and scientists of articles and reports on topics of national and international significance. HSUS has no commercial interest and will realize no commercial benefit from the release of the requested records.

CONCLUSION

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

1. HSUS is a non-profit, public interest group whose tax exempt number is 53-0225390. 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 is a member 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 asks 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 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 afroctic@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. 5 U.S.C. § 552(a)(6)(A)(i); 43 CFR §§ 2.15(f), 2.16(a).

Sincerely,



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