



May 29, 2020

VIA ONLINE PORTAL

U.S. Fish and Wildlife Service

<https://www.foia.gov/>

Re: Freedom of Information Act Request: California and Oregon Fisher Denial Decision File

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests the following records from the U.S. Fish & Wildlife Service (“FWS”):

The records in the decision file¹ that FWS relied upon when finding that the northern California and southern Oregon fisher population does not warrant listing as a threatened or endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”) found at Federal Register, Vol. 85, No. 95, May 15, 2020, 29532.

For this request, the term “records” refers to documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related 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, I ask that you indicate this fact and the reasons therefore in your response.

¹ See “Compiling a Decision File and an Administrative Record,” <https://www.fws.gov/policy/282fw5.html> (last visited May 28, 2020).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to 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 segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *Id.* § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." *Id.* § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Finally, agencies must preserve all the records requested herein while this FOIA is pending or under appeal. The agency shall not destroy any records while they are the subject of a pending request, appeal, or lawsuit under the FOIA. 40 C.F.R. § 2.106; *see Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act"). If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held an agency in contempt for "contumacious conduct" and ordered the agency to pay plaintiff's costs and fees for destroying "potentially responsive material contained on hard drives and email backup tapes." *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 62 (D.D.C. 2003); *see also*

Judicial Watch, Inc. v. Dept. of Commerce, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys' fees and costs because, among other factors, agency's "initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed"), *aff'd in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys' fees and costs, the court found that an Assistant United States Attorney prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending" and referred him to the Department of Justice's Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. 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 id.* Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any "portfolios" or "embedded files." Portfolios 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.

If you should seek to withhold or redact any responsive records, 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) provide all segregable portions of the records for which you claim a specific exemption. *Id.* § 552(b). Please correlate any redactions with specific exemptions under FOIA.

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. *Id.* § 552(a)(6)(A)(i); 21 C.F.R. § 20.41(b). Failure to comply within the statutory timeframe may result in the Center 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:

Ann K. Brown
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me 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." *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *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 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center 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. The Center Qualifies for a Fee Waiver.

Under FOIA, 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 or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The U.S Department of Interior's ("Interior") FOIA regulations that govern FWS at 43 C.F.R. § 2.45(a) – (b) establish the same standard.

Thus, when determining whether a request is in the public interest, FWS must consider: (1) how the subject of the requested records concerns "the operations or activities of the Federal government;" and (2) how disclosure is "likely to contribute" significantly to an understanding of those government operations or activities, including (i) how the contents of the records are meaningfully informative; (ii) what the logical connection is between the content of the records and the operations or activities of the federal government; (iii) how disclosure will contribute to an understanding of a reasonably broad audience of persons interested in the subject; (iv) the Center's expertise in the subject area, as well as its identity, vocation, qualifications, and plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject; (v) the requester's ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject; (vi) whether the records would confirm or clarify data that has been previously released;

and (vii) how the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure. *Id.* § 2.48(a)(1) – (2).

When these requirements are satisfied and any commercial interest is not the primary interest furthered by the request, this balancing test shows a waiver or reduction of fees is justified.

In determining whether disclosure of the requested records is primarily the requester's commercial interest (based the requester's intended use of the information), Interior will consider: (1) whether the requested records would further any commercial interest of the requester; (2) if so, whether that is the primary interest furthered by the request by balancing the commercial interest against the public interest in disclosure of the records; (3) any explanatory information regarding these considerations that the requester provides; (4) whether the public interest is greater than any identified commercial interest in disclosure; (5) if the requester's commercial interest would be furthered by disclosure, whether the public interest in disclosure would be greater than any commercial interest in the records. *Id.* at § 2.45(a)(2)(b).

As shown below, the Center meets each of these factors.

A. 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, a government agency. This FOIA request will provide the Center and the public with crucial insight into FWS's rationale for denying ESA protection for the California and Oregon population of fisher.

The requested records are likely to contribute to an understanding of government operations and activities, and therefore the Center meets this factor.

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

The requested records are meaningfully informative about government operations or activities, and will contribute to an increased understanding of those operations and activities by the public. As described further below, the requested records meet the requirements to be considered in the public interest.

(i) The Contents of the Records Are Meaningfully Informative.

The records requested through this FOIA request are meaningfully informative. Disclosure of the requested records will allow the Center to convey to the public information about why FWS rejected listing the fisher under the ESA, despite the fact that it faces threats from logging, rodenticides, and other influences.

Thus, the Center meets this factor.

(ii) There Is a Logical Connection Between the Content of the Records and the Operations or Activities of the Federal Government.

There is a logical connection between the responsive records' content and the operations or activities of the federal government.

It is clear that a federal agency's decision-making about whether to grant protection under federal law is a specific and identifiable activity of the government, and in this case it is the executive branch agency of FWS. *Judicial Watch*, 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor.") (internal quotations omitted). The requested records will also contribute to public understanding of whether FWS's actions are consistent with the ESA. The requested records will contribute to public understanding of this topic.

Thus, the Center meets this factor.

(iii) Disclosure Will Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject.

Activities of FWS generally, and specifically its basis for denying ESA protection for the California and Oregon fisher, are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this topic. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (finding that "WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment").

Through the Center's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger*, 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. Dept. 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").

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of FWS's decision-making as it relates to listing 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 to the public will educate the public about FWS's decision-making.

(iv) The Center Has Expertise in this Subject Area, and Has Plan to Disclose the Information in a Manner that Will Be Informative to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject.

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 activities of numerous government agencies for over 30 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

Once the information is made available, the Center will analyze it and present it to its 1.7 million members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

(v) The Center Has the Ability and Intent to Disseminate the Information to a Reasonably Broad Audience of Persons Interested in the Subject.

The Center has a proven track records of successfully disseminating information to a reasonably broad audience of people interested in this subject matter.

The Center's work appears in over 5,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the plight of endangered species during this administration utilizing information obtained by the Center from federal agencies including FWS. In 2019, more than 2.9 million people visited the Center's extensive website, and viewed pages a total of 5.3 million times. The Center sends out more than 297 email newsletters and action alerts per year to more than over 1.7 million members and supporters. Three times a year, the Center sends printed newsletters to more than 74,500 members. More than 561,000 people follow the Center on Facebook, and there are regular postings regarding the protection of endangered species. The Center also regularly tweets to more than 85,000 followers on Twitter.

Furthermore, public oversight and enhanced understanding of FWS's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the

information to a reasonably-broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. 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.*

The Center intends to use these far-reaching media outlets to share with the public information obtained as a result of this FOIA request.

(vi) The Records Were Not Previously Released, So They Would Neither Confirm or Clarify Data That Had Been Previously Released.

The government has not previously released the requested records, as the Center has specifically requested records that have not been released previously.

Indeed, the public does not currently have the ability to easily evaluate the requested records, which are not currently in the public domain.² See *Cnty. Legal Servs.*, 405 F. Supp. 2d at 560 (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... .”

Thus, the requested records will neither confirm nor clarify data that was previously released.

(vii) The Public’s Understanding of the Subject in Question Will Be Enhanced to a Significant Extent by the Disclosure.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of how FWS came to its decision to deny protections for the California and Oregon fisher population, 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 the future for this species.

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, the Center meets this factor as well.

² It is immaterial 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. See *Judicial Watch*, 326 F.3d at 1315.

C. Obtaining the Requested Records is of No Commercial Interest to the Center.

In deciding whether the fee waiver request meets the requirements in § 2.45(a)(2)(b), Interior must consider that the Center has no commercial interest that would be furthered by the requested disclosure.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.7 million members and online activists dedicated to the protection of endangered and threatened species and wild places. Even if the Center did have a primary interest furthered by the request, the public interest in disclosure of the records would far outweigh any commercial interest recognized by the Center.

Thus, the Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

II. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that FWS will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ann K. Brown', with a stylized, flowing script.

Ann K. Brown
Open Government Coordinator
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