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## Western Environmental Law Center

August 13, 2014

*Sent via Email and USPS Certified Mail Return Receipt Requested*

Melissa Allen, FWS FOIA Officer  
Division of Information Resources and Technology Management  
5275 Leesburg Pike  
MS:IRTM  
Falls Church, VA 22041  
[fwhq\\_foia@fws.gov](mailto:fwhq_foia@fws.gov)

### **FREEDOM OF INFORMATION ACT REQUEST**

Dear Ms. Allen:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. I make this request on behalf of WildEarth Guardians (“Guardians”) for the following documents:

- The entire project record and/or project file for the U.S. Fish and Wildlife Service’s (Service’s) August 13, 2014, decision not to list wolverine (Docket No. FWS-R6-ES-2012-0107).
- Any and all correspondence, including emails, phone records, meeting notes, and other documents between Service staff regarding the decision not to list wolverine.
- Any and all correspondence, including emails, phone records, meeting notes, and other documents between Service staff regarding the May 30, 2014 memo from the Region 6 Regional Director, Noreen Walsh, to the Assistant Director for Ecological Services in Montana directing that a withdrawal of the proposed rule to list the wolverine as threatened be prepared.
- Any and all correspondence, including emails, phone records, meeting notes, and other documents between Service staff and the Office of the Federal Register and other U.S. government and agency personnel regarding the publication of the August 13, 2014, decision not to list wolverine.

Guardians requests all records dated before fulfillment of this FOIA request. Please tender responsive records in digital format whenever possible.

\* \* \*

Please identify and inform us of all responsive or potentially responsive records within the 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 182-183 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA’s limited exemptions. *Department of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Public Law 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. U.S. Department of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

## **Presumption of Openness and “Foreseeable Harm” Standard**

On his first full day in office President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable Harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, *available at* [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

## **Request for Fee Waiver**

FOIA was designed to grant a broad right of access to government information, with a focus on the public’s “right to be informed about what their government is up to,” thereby “open[ing] agency action to the light of public scrutiny.” *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). A key component of providing public access to those records is FOIA’s fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that “[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . 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.”

FOIA's fee waiver requirement is to be "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 organizations such as Guardians access to government documents without the payment of fees. 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). Indeed, FOIA's waiver provision was intended "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 . . . 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)).

Guardians, a non-commercial and public-interest requester, hereby requests a waiver of all fees associated with this request because disclosure "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. This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.<sup>1</sup> Below, stated first in bold, are the criteria USFS considers in assessing requests for fee waivers, followed by an explanation of Guardians' satisfaction of those requirements. *See* 43 C.F.R § 2.48.<sup>2</sup> Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

**(1) The subject of Guardians' request concerns identifiable operations or activities of the Federal Government:**

The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote. Guardians requests documents related to a federal government decision-making process. The decision to list, or not list, a species under the Endangered Species Act is an activity of the federal government, and therefore the decision to list, or not list, the wolverine is an activity of the federal government.

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

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<sup>1</sup> Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

<sup>2</sup> *See also* Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att'y Gen. (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), *available at* [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm).

**(2) How disclosure is likely to contribute to public understanding of those operations or activities:**

Disclosure of these records is likely to contribute to public understanding of the operations and activities of FWS. FWS “must not make value judgments about whether the information at issue is ‘important’ enough to be made public; it is not the bureau’s role to attempt to determine the level of public interest in requested information.” 43 C.F.R. § 2.45(f).

**(i) How the contents of the records are meaningfully informative:**

The requested records are meaningfully informative about government operations or activities and are likely to contribute to an increased public understanding of those operations or activities. The records requested will provide us with the ability to communicate to the public about the decision-making processes of the FWS. The documents will give Guardians, and therefore the public, crucial insight into the policies and decision-making processes of the FWS as they relate to the listing of species under the Endangered Species Act. The actions and assessments of the FWS regarding this issue are of concern to the public. Disclosure of the requested records will enhance the public’s knowledge of this issue and support public oversight of federal agency operations.

These documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding FWS decision-making processes related to the listing of species under the ESA. The information requested will likely contribute to an understanding of whether or not the FWS is complying with federal law by protecting species from take and ensuring that they have a chance to avoid extinction, and ultimately recover. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“[T]he 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.”). Information related to endangered species is particularly informative. *See 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.”).

**(ii) The logical connection between the content of the records and the operations or activities:**

The requested records directly concern the operations or activities of the FWS.

**(iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:**

The public currently does not have the ability to evaluate the actions or inaction of the FWS. Disclosure of these records will contribute to the understanding of a reasonably broad

audience of persons interested in the subject because we will disseminate the information we receive to a large audience of interested persons. Once the information is made available, it will be analyzed and presented to the public in a manner that will meaningfully enhance the public's understanding of this issue.

- (iv) **Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you 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, as opposed to your individual understanding:**

Guardians has a proven track record of contributing to public understanding of issues surrounding wildlife, plants, and endangered species through the extensive media coverage we have received on administrative and legal initiatives we have undertaken. These initiatives were based, in part, on materials received from the Government and processed by Guardians. Guardians has on staff or available for consultation biologists, environmental lawyers, and policy analysts with experience and expertise in conservation issues, wildlife protection, and data analysis.

Guardians is a leader in wildlife protection and its staff has significant expertise regarding these issues. For example, in December 2011, Guardians' then-general counsel Jay Tutchton testified before Congress regarding the importance and effectiveness of the Endangered Species Act. Guardians has an active Wildlife Program and is an important advocate for wildlife and plants. Guardians has submitted numerous petitions to FWS to list species under the ESA, including a "Petition to List All Critically Imperiled or Imperiled Species in the Southwest United States as Threatened or Endangered Under the ESA."<sup>3</sup>

Our organization has a long history of acquiring, analyzing, and disseminating information and data regarding federal actions and policy. For example, Guardians received extensive records from the Animal and Plant Health Inspection Service regarding its Wildlife Services program. We digested and analyzed the materials we received and, using these and other materials, we developed a report to President Barack Obama and Congress called *War on Wildlife*.<sup>4</sup> In addition, we disseminated this report to our members, via our on-line and paper newsletters, and to the public, via our website, and publicized the issue via the media.

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<sup>3</sup> See [http://www.wildearthguardians.org/site/DocServer/petition\\_protection-475-species\\_6-21-07.pdf?docID=1442&AddInterest=1103](http://www.wildearthguardians.org/site/DocServer/petition_protection-475-species_6-21-07.pdf?docID=1442&AddInterest=1103).

<sup>4</sup> See <http://wg.convio.net/site/DocServer/report-war-on-wildlife-june-09-lo-2.pdf?docID=242>

(v) **Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information):**

Guardians has the ability and intention to disseminate the information requested to the public and our approximately 35,000 members and e-activists. Therefore, the disclosure of the requested documents will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Guardians plans to disseminate the information it obtains pursuant to this FOIA request in various effective ways, including through our website, newsletters, press releases, Facebook, and public education events. Our staff of experts will first analyze and digest the documents. The information will then be disseminated to our members and supporters, members of other conservation organizations, as well as other interested members of the public.

Guardians maintains a website, [www.wildearthguardians.org](http://www.wildearthguardians.org), dedicated to providing information to the general public with access to past press releases, publications, videos, and audio clips. Guardians may also feature the information we receive from FOIA requests in monthly updates sent to our email listserve. Our listserve details Guardians' efforts, through litigation and other means, to protect wildlife, wild places, and endangered ecosystems. Since these efforts rely heavily on information we obtain through FOIA, a synopsis of this information is disseminated on a regular basis to over 23,000 recipients of our listserve and all visitors to our website. Our quarterly newsletter, *Wild at Heart*, is also distributed to all our members and is available at newsstands throughout the West.

Guardians also regularly issues press releases on agency activities and is frequently interviewed for newspaper articles. We have had great success in disseminating responsive FOIA information through mainstream news coverage and press releases, which we make available to the public through our website. *See, e.g.*, Press Release, WildEarth Guardians, Iconic Rio Grande Diminished to Isolated Pools (Jun. 5, 2013);<sup>5</sup> April Reese, *Endangered Species: Drying Rio Grande forces emergency measures to keep silvery minnow afloat*, ENVIRONMENT & ENERGY PUBLISHING (July 2, 2013).<sup>6</sup>

These mechanisms for publicizing and distributing information received through FOIA requests demonstrate Guardians' intention to disseminate the information to the public with the goal of disclosing material that will inform the public. *See also Forest Guardians v. U.S. Dep't*

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<sup>5</sup> Available at: [http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8591&news\\_iv\\_ctrl=1194#.Ub9g2fm1GSo](http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8591&news_iv_ctrl=1194#.Ub9g2fm1GSo); Susan Montoya Bryan, *Endangered fish salvaged along drying Rio Grande*, LAS CRUCES SUN-NEWS (July 9, 2013 9:18 PM); [http://www.lcsun-news.com/las\\_cruces-news/ci\\_23630432/bc-nm-drought-saving-fish-1st-ld-writethru](http://www.lcsun-news.com/las_cruces-news/ci_23630432/bc-nm-drought-saving-fish-1st-ld-writethru).

<sup>6</sup> Available at: [http://www.eenews.net/greenwire/2013/07/02/stories/1059983810;http://wg.convio.net/site/DocServer/Greenwire\\_Silvery\\_Minnow\\_Story\\_7\\_2\\_13.pdf?docID=9603&AddInterest=1103](http://www.eenews.net/greenwire/2013/07/02/stories/1059983810;http://wg.convio.net/site/DocServer/Greenwire_Silvery_Minnow_Story_7_2_13.pdf?docID=9603&AddInterest=1103).

*of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument). Guardians will use the information obtained through this FOIA request in the methods described herein, therefore the organization has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject.

**(3) How disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:**

**(i) Whether the information being requested is new:**

The information being requested is new. Although the full contents of the requested records are currently unknown to us, Guardians does not request any records previously provided to us by the Government.

**(ii) Whether the information would confirm or clarify data that has been released previously:**

The information Guardians is requesting has not, to our knowledge, been released previously.

**(iii) How disclosure will increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure:**

Because this information is not currently in the public domain, disclosure of these records will increase the level of public understanding of the operations or activities of FWS that existed prior to disclosure. Guardians will disseminate the information obtained from this FOIA request to a large public audience, as explained above, and will help the public understand these issues in a simple and informative way.

**(iv) Whether the information is already publicly available:**

The information Guardians is requesting is not, to our knowledge, publicly available. The Government may omit sending us requested records that are available in publicly accessible forums such as on the internet or that are routinely available at public or university libraries. However, please provide us with adequate references and/or website links so that we may obtain these materials on our own.

**(4) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure:**

The public's understanding of FWS decision-making processes related to the listing of endangered species, and specifically the decision-making processes that went into the listing decision for the wolverine will be enhanced to a significant extent by the disclosure of these records. The public currently does not have the ability to evaluate the actions or inaction of the FWS regarding the listing decision for the wolverine.

Guardians' dissemination of the information obtained pursuant to this FOIA request will enhance the public's understanding of this issue because this information is not currently available to the public. *See Federal CURE*, 602 F. Supp. 2d at 205 (the existing public availability of the information is weighed when determining the degree of significance that will be derived from the disclosure of the information) (citing *Forest Guardians*, 416 F.3d at 1181). As described above, Guardians will disseminate the information it obtains pursuant to this FOIA in various effective ways, including through our website, newsletters, press releases, Facebook page, and public education events. Furthermore, the information obtained through this FOIA request will be used to contribute to one or more of the following: public interest litigation, petitions, newsletters, public presentations, e-mail and postal mail publications, press releases, and local and national news stories.

Given Guardians' unique position and abilities, disclosure will lead to a significant enhancement of the public's understanding of the Government operations and activities at issue.

**(5) Any commercial interest that would be furthered by the requested disclosure:**

Guardians has no commercial, trade, or profit interest that would be furthered by the requested disclosure. Guardians is incorporated as a New Mexico nonprofit corporation under Certificate NM 1587757 and is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. As such, Guardians has no commercial interests. The requested records will be used in the furtherance of Guardians' mission as an education and advocacy group to protect the wildlife, wild rivers, wild places, and climate in the American West.

Guardians, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information. Therefore, no assessment of the magnitude of the interest is required. *See* 43 C.F.R. § 2.48(b)(2)-(3).

**Conclusion**

Given Guardians' well-orchestrated and demonstrably successful efforts at educating the public on wildlife, habitat, and endangered species issues, and the fact that our education program has significantly contributed to an understanding of Government operations and activities, it is clear that Guardians is entitled to a fee waiver. *See* 43 C.F.R. § 2.48. In the event that your agency denies Guardians a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in

excess of \$50.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day statutory deadline is also applicable to Guardians' fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

*Please direct all correspondence and responsive records to counsel for WildEarth Guardians:*

**John Mellgren, Staff Attorney  
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1216 Lincoln Street  
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mellgren@westernlaw.org**

Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at the phone or email below.

Sincerely,

A handwritten signature in black ink, appearing to read "John Mellgren". The signature is fluid and cursive, with a large initial "J" and "M".

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For:

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