

EXHIBIT J
Knick Report FOIA Appeal Decision



FOIA Appeal No. 2014-008
IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

December 9, 2013



Kathleen Sgamma
Western Energy Alliance
410 17th Street, Suite 700
Denver, CO 80202

Dear Ms. Sgamma:

This responds to the October 28, 2013, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”), which was received on the same date and filed on behalf of Western Energy Alliance (“WEA”). The Department has assigned your appeal as **Appeal Number 2014-008** and it concerns the United States Geological Survey’s (“USGS”) response to WEA’s June 17, 2013, FOIA request, which sought 12 categories of documents generally related to a report entitled “Modeling ecological minimum requirements for distribution of greater sage-grouse leks: implications for population connectivity across their western range, U.S.A.” (hereinafter referred to as “Report”).

A discussion of the specific issues you identify in the appeal and the Department’s determination on each one follows.

ISSUE 1: You claim that there is an apparent conflict of interest in the peer reviews and handling of the manuscript” and seek to have the Department “confirm” whether a particular individual “did not solicit any independent reviews.”

DECISION: There is nothing in the FOIA, the Department’s FOIA regulations (“regulations”), or current case law that requires the Department or the USGS to provide you with the confirmation that you seek through this appeal. Rather, the FOIA only “provides a means for access to existing documents and is not a way to interrogate an agency.”¹

Since the challenge you raise here seeks only to clarify an agency action on a non-FOIA related matter, the Department concludes that there is **NO ACTION** for it to take on ISSUE 1 in the appeal.

¹ *Patton v. U.S. R.R. Ret. Bd.*, No. ST-C-9104, slip op. at 3 (W.D.N.C. Apr. 26, 1991); *Gillin v. Dep’t of the Army*, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993) (“FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions.”); *Ivey v. U.S. Office of Special Counsel*, No. 050176, 2005 U.S. Dist. LEXIS 18874, at *8 (D.D.C. Aug. 31, 2005) (finding that agency is not required to answer questions in response to request seeking reasons behind an agency action).

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ISSUE 2: You challenge whether the USGS issued a complete response to Item 2 of the FOIA request, which sought “[t]he names and institution of employment or affiliation...of those who actually engaged in peer review of the [] Report....”

You state that the USGS only provided WEA with the name of “one internal USGS reviewer” who actually engaged in a peer review of the Report and “not two as required by the USGS internal peer review policy.” You also assert that the USGS’s “response [to Item 2 of the FOIA request] is deficient because no second internal reviewer was identified or review provided.” Finally, you assert that the USGS is “required to provide the names of the reviewers and the reviews supplied to [one of the authors of the Report, who is a USGS employee] from the *Journal of Applied Ecology*.”

DECISION: Whether the USGS followed its purported internal procedures regarding peer reviews is not a matter for the Department’s FOIA Appeals Office to evaluate as a part of the FOIA appeals process, as such an issue falls outside of the scope of this Office’s authority. However, since the Department is remanding other issues in the appeal for the USGS to conduct a new search of its files (discussed in detail below), the Department will also remand ISSUE 2 in the appeal in order to address the FOIA-related matter for this issue of whether the USGS has adequately searched for, located, and made a determination on the releasability of all of the responsive documents or information for Item 2 of the FOIA request that may be in its possession.

Therefore, by copy of this letter, the Department is remanding ISSUE 2 of the appeal to the USGS for it to:

- **Conduct a new search of its paper and electronic files (including e-mails) for “[t]he names and institution of employment or affiliation...of those who actually engaged in peer review of the [] Report....”** In performing this new search, the USGS will:
 - Contact all of the individuals in its office who are likely possessors of responsive documents.
 - Ensure the likely possessors used key words from Item 2 of the FOIA request (e.g., the name of the Report, “peer,” “review”) to search their paper and electronic files (including e-mails) to locate any responsive documents that might exist for this item.
 - If the USGS’s new search does not uncover any additional responsive documents/information that might exist for Item 2 of the FOIA request, the letter that it sends to the Appellant in connection with this remand will advise her of this finding.
 - If the USGS’s new search uncovers additional responsive documents/information, it will either release the requested materials to WEA or invoke a FOIA exemption as a basis to withhold them in full or in part.

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- Should the USGS determine to invoke a FOIA exemption to deny the Appellant access to any portion of any responsive documents/information that it may locate, the letter it sends to her will contain all of the information the regulations require a bureau to include when it makes such a determination, e.g., “[a] reference to any FOIA exemption(s) applied” and the name...of the Office of the Solicitor attorney consulted...”²

As a final matter on ISSUE 2 of the appeal, the Department again notes your assertion that the USGS “is required to provide the names of the reviewers and the reviews supplied...from the *Journal of Applied Ecology...*” The USGS advised WEA in its letter responding to the FOIA request that it “does not have access to the names of the journal peer reviewers.” To be sure, **in performing the new file search in connection with the Department’s remand of ISSUE 2 of the appeal, the USGS will:**

- **Reevaluate whether it has any documents or information that contains the names of the “journal peer reviewers.”**
- **The letter the USGS sends to the Appellant will inform her of its findings, i.e., whether it located responsive documents or its determination on the release of any that it locates.**
 - The withholding of any documents or information that it locates will require the USGS to invoke a FOIA exemption and its letter will contain all of the information required by the regulations, as noted above.

With regard to your request for any “reviews supplied from the *Journal of Applied Ecology...*,” such information (if it exists) is not responsive to Item 2 of the FOIA request, which only sought the names and identifying information of individuals who “actually engaged in a peer review of the [] Report.” Your request for any “reviews supplied” would fall under Item 4 of the FOIA request and is addressed under ISSUE 4(b) of the appeal.

ISSUE 3: You challenge the sufficiency of the USGS’s response to Item 3 of the FOIA request, which sought, “[t]he questions asked and/or issues presented to the Peer Reviewers with respect to the [] Report.” In response to this item, the USGS advised WEA that “[f]or the USGS internal review, the USGS stated expressly that we were mostly interested in a statistical review.” You state that “the USGS did not provide adequate detail to address [this item of the FOIA] request which would include a copy of the communication requesting a peer review [from the] reviewer(s), including the questions asked and unredacted copies of any response received thereto.”

DECISION: While the USGS noted that it “expressly [stated] that we were mostly interested in a statistical review,” it did not provide any documentation to WEA that reflects it making such a

² 43 C.F.R. § 2.24(b)(1)-(5).

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statement to the reviewers. Since such a document would clearly be responsive to Item 3 of the FOIA request, it would be an error for the USGS not to have provided it to WEA if such a document actually exists. Additionally, the Department agrees with you that Item 3 of the FOIA request would also encompass “a copy of the communication [merely] requesting a peer review [from the] reviewer(s)” if such a communication exists.

Since the USGS’s response to WEA on Item 3 did not address whether it actually possesses either of these types of communications to reviewers (or any others) by either releasing them, invoking a FOIA exemption to withhold them in full or in part, or advising that it does not have or cannot locate responsive documents, the Department concludes that the USGS’s response here was procedurally deficient.

To resolve the USGS’s error, **by copy of this letter, the Department is remanding ISSUE 3 of the appeal for the USGS to:**

- **Respond anew to Item 3 of the FOIA request by conducting another search of its paper and electronic files (including e-mails) for responsive documents.**
 - If the USGS locates documents that are responsive to Item 3 of the FOIA request, it will either release the requested documents to WEA or invoke a FOIA exemption as a basis to withhold them in full or in part.
 - Should the USGS determine to invoke a FOIA exemption to deny the Appellant access to any portion of any responsive materials that it may locate, its new letter to her will contain all of the information the regulations require a bureau to include when it makes such a determination, as noted above.
 - If the USGS determines that it does not have or cannot locate responsive documents, its letter to the Appellant will contain all of the information the regulations require a bureau to include when it makes such a determination, as noted above.

ISSUE 4: There are two aspects to the challenges you raise in ISSUE 4. The Department identifies and addresses each in turn.

ISSUE 4(a): You challenge the USGS’s “extensive redaction...of the Decision on Manuscript letter...written by the Editor of *Ecology and Evolution*” in response to Item 4 of the FOIA request without providing “any justification for the redaction other than “[t]he editors’ and the peer-reviewers’ proprietary comments are redacted.” You note that the USGS’s response is contrary to what is required by the regulations, in that it did not include a reference to any FOIA exemption that it applied.

You raise the same challenge regarding the USGS’s responses to two other items in the FOIA request where it did not reference a

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FOIA exemption as a basis to withhold information, i.e., “the final lek count data...used by [the authors]...,” which is Item 5.1 of the FOIA request, and “data excluded from the analyses in the final data set...,” which is Item 5.4 of the FOIA request.

RESPONSE: The Department agrees that the USGS’s responses to these items are procedurally deficient. As you correctly note in the appeal and as the Department noted above under ISSUE 2, the regulations require a bureau that determines to withhold a document in full or in part to include in its letter responding to a requester, among other things, “[a] reference to any FOIA exemption(s) applied,” the name...of the Office of the Solicitor attorney consulted,” and “[a] statement that the denial may be appealed...”³

While the USGS’s letter to WEA advised of the right to appeal its response to the FOIA request, it did not advise of any of the other information that the regulations require when a bureau withholds a document in full or in part, as the USGS did in response to the items identified above in ISSUE 4(a) of the appeal. In light of the deficiencies with the USGS’s responses, the Department concludes that ISSUE 4(a) of the appeal (the USGS’s withholding of information) is not ready for review by this Office, as neither you nor the Department knows for certain what, if any, FOIA exemption(s) protects the information that the USGS withheld.

Therefore, to resolve the procedural deficiencies with the USGS’s responses to Items 4, 5.1, and 5.4 of the FOIA request, **by copy of this letter, the Department is remanding ISSUE 4(a) in the appeal to the USGS for it to evaluate the releasability of the documents/information it redacted.**

Please be aware that the USGS stated in its responses to Items 4, 5.1, and 5.4 its belief that the information it redacted is “proprietary” and the materials were submitted by entities outside of the federal government. The USGS’s deficient responses to these items lead the Department to conclude that the information it withheld could “possibly [be] confidential information”⁴ and, as a result, it is necessary for the USGS to consult with the submitters of the information to obtain their views on disclosure before it can make a determination on release⁵ (as required by the regulations⁶). Note that the regulations also require the USGS to notify a requester when it begins the consultation process.⁷

Further, please note that if after consulting with the submitters, the USGS determines to invoke a FOIA exemption to continue to deny WEA access to any portion of the information it withheld in Items 4, 5.1, and 5.4, the new letter the USGS sends to WEA in connection with the remand

³ 43 C.F.R. § 2.24(b)(1)-(5).

⁴ 43 C.F.R. § 2.26. See also 43 C.F.R. § 2.70 (defining “confidential information”).

⁵ 43 C.F.R. § 2.28.

⁶ 43 C.F.R. § 2.27(a)(2).

⁷ 43 C.F.R. § 2.35(a).

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will contain all of the information the regulations require it to advise a FOIA requester of when a bureau makes such a determination, as discussed above.

ISSUE 4(b): You assert that the USGS's response to Item 4 of the FOIA request is "deficient" because it did not provide any responses from an author of the Report to any of the reviewers. Item 4 of the FOIA request sought:

Any formal or informal report(s), paper(s), data compilation(s), communication(s), comment(s), red-line(s), summary(ies) or other document type related to the Peer Reviewers' review or impression of the [] Report...

You request that if a particular reviewer provided comments "with no follow-up requirement that they be responded to by [the author], please so indicate." Further, as noted above under ISSUE 2 of the appeal, you seek the "reviews supplied...from the *Journal of Applied Ecology*..." and challenge the sufficiency of the USGS's response because it did not provide any such reviews.

RESPONSE: By copy of this letter, the Department will remand ISSUE 4(b) to the USGS for reprocessing to ensure that it has adequately searched for, located, and made a determination on the releasability of all of the responsive documents for Item 4 of the FOIA request that may be in its possession. In processing this aspect of the remand, the USGS is directed to:

- **Conduct another search of its paper and electronic files (including e-mails) to ensure that it has uncovered and addressed the releasability of any responsive documents for Item 4 of the FOIA request that may be in its possession.**
 - In performing this new search, the USGS will ensure that its search is designed to uncover any responsive documents that may exist for every aspect of Item 4 of the FOIA request (e.g., by contacting likely possessors of responsive documents and using key words to retrieve any materials that may exist).
 - If the USGS locates documents that are responsive to Item 4 of the FOIA request, it will either release the requested documents to WEA or invoke a FOIA exemption as a basis to withhold them in full or in part.
 - Should the USGS determine to invoke a FOIA exemption to deny the Appellant access to any portion of any responsive materials that it may locate, its new letter to her will contain all of the information the regulations require a bureau to include when it makes such a determination, as noted above.

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- If the USGS determines that it does not have or cannot locate additional responsive documents, the letter that it sends to the Appellant in connection with this remand will advise her of this finding.

ISSUE 5: You take issue with the USGS's response to Item 5 of the FOIA request, which sought "the original lek data...that was available to [the Report authors] for analyses in the study area (spanning the years 1965-2007)." You assert that the USGS's response that it "has nothing to provide" "is not responsive to [WEA's] request." To support your assertion, you note that "[t]he study was funded by the US Fish and Wildlife Service [(\"FWS\")]" and should be publicly available under FOIA." You also state that "[t]he USGS has provided no credible support for the proposition that the data is proprietary."

DECISION: Nothing that you provided in ISSUE 5 of the appeal establishes that the USGS's response that it has "nothing to provide" is in error. Indeed, you note that the study regarding the requested "original lek data" was funded by the FWS, which a separate bureau in the Department. Perhaps a FOIA request to that bureau is in order for WEA to obtain access to the information it seeks here.⁸ As to your claim that the USGS's position that the data WEA seeks in Item 5 of the FOIA request is "proprietary," the USGS made no such determination on this item.

Accordingly, the Department concludes that there is **NO ACTION** for it to take on ISSUE 5 of the appeal.

ISSUE 6: You challenge the USGS's response to Item 5.3 of the FOIA request, which sought "[a] copy of any permission letter or related correspondence to [the Report authors] to use [the] data in publication."

Even though the USGS stated in its response to WEA that only "[o]ne state required a signed agreement" (a copy of which it released to WEA) and it obtained "[v]erbal permission...from the [other] state contacts prior to the beginning of the project," you challenge the USGS's response because "there is no documentation of verbal or written permission being granted for use of the data in this publication." Further, you state that WEA's review of the one signed agreement revealed "no indication that the data covered under the...agreement are the [same] data used in the study."

DECISION: As to the aspect of ISSUE 6 that seeks documents regarding the "verbal permission" the USGS said it received from its state contacts, the Department concludes that there is **NO ACTION** for it to take. The USGS clearly stated in its response here that the permission was verbally granted. The Department concludes that there is also **NO ACTION** for it to take on the aspect of ISSUE 6 related to the signed agreement, as the USGS provided you

⁸ If WEA wishes to submit a FOIA request to the FWS, please visit the Department's FOIA website at www.doi.gov/foia for his name and mailing address.

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with the agreement that it said it signed in order to use the data in publication. Whether the signed agreement is sufficient enough to cover the data is not a matter that is subject to review by this Office in connection with a FOIA appeal.

ISSUE 7: You challenge the responsiveness of the document that the USGS released in response to item 5.5 of the FOIA request, which sought “[a] copy of the funded grant, contract, or cooperative agreement that resulted in funding by the Great Northern Landscape Conservation Cooperative.” You state that “[t]here is no mention in [the document the USGS released] that the funding came from the ‘*Great Northern Landscape Conservation Cooperative*’ that [the authors] acknowledge[] as a source of funding for their paper.”

DECISION: As with ISSUE 6 in the appeal, the Department concludes that there is **NO ACTION** for it to take here, as the USGS provided you with the document it determined “resulted in funding by the Great Northern Landscape Conservation Cooperative.”

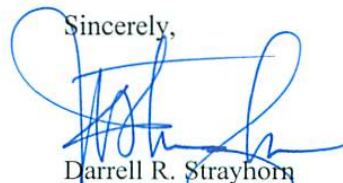
In summary, the Department has remanded ISSUES 2, 3, 4(a), and 4(b) of the appeal to the USGS for further action.

- **The USGS will correspond directly with the Appellant regarding the remand and it will provide this Office with copies of the letter it sends to her.**
- **The USGS will complete its processing of the remand within 20 workdays from the date of this decision, including releasing the disclosable portions of any documents that its new searches uncover AND making a determination on the release of withheld information discussed in ISSUE 4(a) of the appeal.**

The Department has also concluded that there is **NO ACTION** for it to take on ISSUES 1, 5, 6, and 7 of the appeal. If you are dissatisfied with the Department’s determination on these issues, you have a right to seek judicial review under 5 U.S.C. § 552(a)(4)(B).

This completes the Department’s response to your appeal. If you have any questions regarding this matter, please call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA & Privacy Act Appeals Officer
Department of the Interior

cc: Christina Bartlett, Acting FOIA Officer, USGS (**FOR ACTION**)
Cindy Cafaro, Departmental FOIA Officer