

WILDERNESS WORKSHOP & ROCKY MOUNTAIN WILD

July 28, 2021

FREEDOM OF INFORMATION ACT REQUEST

By Electronic Mail

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Re: FOIA Request: All Agency Records Involving Berlaimont Estates LLC request for expanded access to the Edwards Overlook Parcel within the White River National Forest (Related to FOIA Requests 2018-FS-R2-01157, 2019-FS-R2-04828-F, 2019-OGC-04831-F, 2019-OSEC-04827-F, 2019-FS-WO-05158-F, 2020-FS-WO-06518-F, 2020-FS-R2-06530-F, 2020-OGC-06519-F, 2020-OSEC-06520-F).

Dear FOIA Officers:

On behalf of Wilderness Workshop (WW) and Rocky Mountain Wild (RMW) and pursuant to the Freedom of Information Act (FOIA) of 1966, 5 U.S.C. § 552, and implementing regulations, 36 C.F.R. Part 200, we request copies of all agency records concerning, relating, or pertaining to the Berlaimont Estates LLC request for expanded access to the Edwards Overlook Parcel within the White River National Forest. The scope of this Request includes all agency records that have not been produced in response to other Wilderness Workshop FOIA requests.¹ We specifically request that the Office of General Counsel (OGC) and the Undersecretary's Office are searched for responsive records.

The types of agency records sought here include, but are not limited to, environmental analysis, letters, consultations, comments, meeting notes, phone call notes, handwritten and electronic mail messages, text messages, social media posts, maps, draft and final documents, inter- and intra-agency consultations, photos, GIS data, GPS data, correspondence, records of communications that were created, obtained, generated, modified, or acquired by offices within the U.S. Department of Agriculture (including OGC, the U.S. Forest Service, and the Undersecretary's Office), concerning, relating, or pertaining to the Berlaimont Estates LLC request for expanded access to the Edwards Overlook Parcel within the White River National Forest.

In addition to the agency records created or obtained by staff, attorneys, contractors, or other agents working on behalf of the U.S. Department of Agriculture, the search for communications and records of communications must include, but not be limited to, agency records involving the following persons:

- Any representative of Berlaimont Estates LLC (including, for example, representatives like Huperetes Advisors, Mauriello Planning Group, Vaclav Vochoska, lobbyist Michael Connor

¹ Wilderness Workshop last filed a FOIA request for information on this project in September of 2020. Please ensure the search carried out pursuant to the present request is designed to identify all documents created or obtained since the cutoff date(s) that the agency relied upon to close its search for responsive documents related to the most recent request filed by WW on this issue. Assistant U.S. Attorney Andrea Wang (andrea.wang@usdoj.gov) can provide detailed information on the resolution of the previous requests, including information not provided to Wilderness Workshop. To the extent that the search identifies agency records that pre-date the cut-off date for prior requests that were not previously disclosed (e.g., records not identified in the previous search or obtained after the cut-off date) or are no longer subject to a recognized FOIA exemption, please disclose those documents as well.

from WilmerHale, and attorney Andrew Spielman from WilmerHale), and any other project proponent or affiliate;

- Any federal, state or local agencies (including, for example, U.S. Fish and Wildlife Service, Eagle County, and Colorado Parks and Wildlife);
- Any members of the public;
- Any elected officials, including those elected to local, State, and national offices;
- Forest Service personnel and any other external entity; and
- Communications with personnel within the U.S. Department of Agriculture and any other person or entity.

References to “entity,” “proponent” and “affiliate” include any and all employees, contractors, partners, subsidiaries, parent corporations, board members, officers, managers, attorneys, agents, and any other person acting on the entity’s behalf.

We request that the U.S. Department of Agriculture identify and produce all responsive records from any agency or office and conduct searches wherever such records may reasonably be expected to be found. Responsive records may be maintained in various levels of the agency’s organizational structure, including OGC, the Undersecretary’s Office, the U.S. Forest Service’s Rocky Mountain Regional Office and the Office of the Chief of the U.S. Forest Service, and the White River National Forest and Districts within the White River National Forest.

We request that responsive records be released as soon as they are available. To the extent that some subset of the requested records is readily available, we would be happy to receive them while the agency searches for other records.

We request that the agency provide electronic, pdf copies of the requested records on a discreet physical electronic media (on a flash or jump drive, for example). Please ensure that electronic copies are provided in a searchable “pdf” format. To the extent GPS, GIS, or other data files are not readily copied into pdf format, please provide the agency records on a physical media, in native format, along with instructions as to the required software. U.S. Department of Agriculture, and the Department of Justice, have apparently adopted a policy and practice of ignoring the statutory command that agencies honor the request for disclosure in a readily available form and format. 5 U.S.C. § 552(a)(3)(B). An unlawful pattern has emerged where federal agencies – often at the direction of federally employed attorneys – instead upload FOIA requested documents to ephemeral agency websites. The arbitrary and capricious refusal to provide the requested form and format (searchable pdfs on physical electronic media) has caused Wilderness Workshop and other FOIA requesters great inconvenience, including but not limited to, post-release agency manipulation and withdrawal of responsive agency records.

We also note that federal courts have held that any record exchanged between a federal government agency and another party cannot be withheld under Exemption 5 of the FOIA. *See* 5 U.S.C. § 552(b)(5) (2009); *see also Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977); *Senate of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 1 (2001) (Exemption 5

applies to “inter-agency or intra-agency” communication). Further, any comments from or to other agencies on the environmental impact of any activities may not be withheld as interagency documents. *See* 40 C.F.R. § 1506.6(f) (2009).

This request is made on behalf of Wilderness Workshop and Rocky Mountain Wild.

Wilderness Workshop is a Carbondale-based non-profit organization with a mission to protect and conserve the wilderness, biological integrity, and natural resources of the White River National Forest (WRNF) and adjacent public lands. Wilderness Workshop is the watchdog for local public lands. Wilderness Workshop has approximately 800 members and has been working to further its mission since 1967. Wilderness Workshop has spent countless hours inventorying ecological values on local public lands, reviewing projects that threaten to disturb those lands, and advocating for meaningful protections for the most ecologically significant areas.

In the late 1990s and early 2000s WW worked with the U.S. Forest Service on the revision of the White River National Forest Land and Resource Management Plan. That plan closed public lands around the Berlaimont property to cars and trucks in winter months to protect wildlife resources. The most recent proposals to develop the Berlaimont inholding involve approval of a new road and year-round access that would impact winter wildlife habitat and necessitate a plan amendment from the U.S. Forest Service. The documents that are the subject of this FOIA request relate to development of public lands of ecological significance that WW has worked to protect for years.

Rocky Mountain Wild is a Denver Based non-profit organization focused on protecting wildlands for wildlife. RMW has spend decades working to protect public lands from high impact development projects such as the Berlaimont development. Further, RMW has been working to ease connectivity issues throughout the I-70 corridor, with a specific emphasis on the Eagle Valley and Vail Pass.

Release of the records described in this request will primarily benefit the public and substantially contribute to public understanding of a development proposal that will impact cherished National Forest lands. Wilderness Workshop and Rocky Mountain Wild will make the information obtained from this request available to members and other groups concerned with protecting these lands. Wilderness Workshop and Rocky Mountain Wild will also make available to the media newsworthy summaries of the requested documents, as well as newsworthy documents themselves.

Release of the information will also empower members of Wilderness Workshop, Rocky Mountain Wild and members of the public, to engage in public advocacy efforts to protect lands on the White River National Forest, and to more effectively evaluate litigation or appropriate grassroots action. Wilderness Workshop is a not-for-profit corporation and does not seek these documents for commercial use.

Accordingly, we request that you grant a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 36 C.F.R. § 200.7(b)(4). We fully expect that such a waiver will be granted, as it has been in the past. However, if a waiver is not granted, please inform the undersigned of the cost of disclosing the above-described records if such fees exceed \$25.00.

Additional Information Concerning Fee Waiver: Legal Background.

In 1974, Congress amended the judicial review section for fee waivers under FOIA, replacing the “arbitrary and capricious” threshold of review, by which courts are required to grant deference to agencies, with the more rigorous de novo review standard. *See* 5 U.S.C. § 552(a)(4)(A)(vii) (when review is limited to the administrative record before the agency at the time of the decision). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....

132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

FOIA’s amended fee waiver provision was intended specifically to facilitate access to agency records by citizen “watchdog” organizations, which utilize FOIA to monitor and mount challenges to governmental activities. *See Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to such groups, which

[R]ely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions

[The fee waiver] provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (*quoting Ettliger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984)) (emphasis added). Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public-interest fee waivers are to be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sen. Leahy)). “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.” *Ettlinger*, 596 F. Supp. at 873 (quoting legislative history). An agency may not refuse a fee waiver when “there is nothing in the agency’s refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.” *Id.* at 874 (quoting *Fitzgibbon v. CIA*, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)). “Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver.” *Id.* (citing 5 U.S.C. § 552(a)(4)(B)).

In light of these principles, based on this FOIA request, it is clear that Wilderness Workshop, and Rocky Mountain Wild are non-profit groups interested in the impacts of proposed development and agency policies on sensitive wildlife habitat on public lands, and are entitled to a fee waiver for the documents requested. The factors identified in Department of Agriculture regulations concerning fee waivers are addressed more specifically below.

(1) The requested records concern the operations or activities of the Federal government. 7 C.F.R. Part 1 Appx. A § 6(a)(1)(i).

The requested documents relate directly to the operations or activities of the Federal government. In particular, the information sought concerns the operations and activities of the U.S. Forest Service regarding management of public lands with sensitive wildlife habitat and other important public values.

(2) Disclosure of the requested records is likely to contribute to an understanding of government operations or activities. 7 C.F.R. Part 1 Appx. A § 6(a)(1)(ii).

The informative value of the documents requested is high. Much of the information we seek is relevant to development of public lands with sensitive values. The Forest Service is contemplating abandoning existing closures that the agency implemented years ago for the benefit of wildlife. Wildlife populations in the area have been in steady decline and are more in need of protection now than they were when the closure was implemented. Also, the agency is relying on a statute that many believe is not applicable outside of Alaska. The release of information sought in this FOIA request will better inform Wilderness Workshop, Rocky Mountain Wild, the public, local elected officials, and national legislators about decisions that are likely to have significant impacts on a landscape of public concern, and how the Forest Service is interpreting laws and regulations in its management of these sensitive public lands.

Further, “courts have consistently overturned agency denials of fee waivers when requestors have made a legitimate, objectively supportable showing of using the requested information for

scholarly research into political and historical events.” *Ettlinger*, 596 F. Supp. at 875; *see also Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1360 (D.C. Cir. 1983).

(3) Disclosure of the requested records is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject. 7 C.F.R. Part 1 Appx. A § 6(a)(1)(iii).

The requested information likely will contribute significantly to the understanding of a reasonably broad audience of persons interested in the road across public lands that has been proposed by Berlaimont Estates LLC. This particular development proposal has been an issue of great public concern and extensive public dialogue. Federal courts have held that public interest groups satisfy this requirement where requestors show the “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice (Judicial Watch I)*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). In addition, a description of past successful methods of informing the public combined with a “firm intent to disseminate” the information has been held to meet this test. *Judicial Watch, Inc. v. Dep’t of Justice (Judicial Watch II)*, 185 F. Supp. 2d 54, 59-60 (D.D.C. 2002) (*quoting Judicial Watch I*, 122 F Supp. 2d at 13).

Wilderness Workshop meets this test. First, the information will enable Wilderness Workshop to provide new information to the public at large on this development proposal. This information, which has not been released previously, will allow Wilderness Workshop and Rocky Mountain Wild to confirm or clarify the status of the development proposal on sensitive public lands. Wilderness Workshop has expertise in communicating with the public and the media on issues related to the protection of public lands in Colorado. Wilderness Workshop and Rocky Mountain Wild have professional staff and volunteers recognized as experts on the policy and politics of wildland protection and public land management to which this request relates. In addition, Wilderness Workshop intends to publish summaries of the information sought here to the media as well as make available the information itself.

(4) The public’s understanding of the subject will be enhanced to a significant extent by disclosure of the requested records. 7 C.F.R. Part 1 Appx. A § 6(a)(1)(iv).

The requested records will likely enhance the public’s understanding of management on public lands to a significant extent. The legislative history of FOIA makes clear that the ‘significance’ test is met where, as here, the information requested will support “public oversight of agency operations”:

A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.

132 Cong. Rec. H9464 (Reps. English and Kindness); *see also McClellan Ecological Seepage Situation*, 835 F.2d at 1284-86.

The requested records will support public oversight by allowing the public to better understand how agency policies and decisions impact sensitive public lands with critical wildlife habitat, and how the agency is interpreting applicable laws and regulations. Those actions have been and continue to be the subject of public debate. That debate will be better informed by the release of these records, which are at least in part new and have never been divulged or presented to the public. Wilderness Workshop therefore meets this standard.

(5) Wilderness Workshop has no commercial interest in the requested records. 7 C.F.R. Part 1 Appx. A § 6(a)(1)(v)-(vi).

To reiterate, Wilderness Workshop and Rocky Mountain Wild are public-interest nonprofit organizations with no commercial interest in the requested information, and is therefore a “noncommercial requester” for purposes of the fee waiver. *See McClellan*, 835 F.2d at 1284.

(6) No exemption to the fee waiver provisions is applicable.

In addition, a discretionary waiver is compelled because “disclosure will primarily benefit the general public,” 7 C.F.R. Part 1 Appx. A § 6(a)(2), and because charging a fee to the “nonprofit group would not be in the interest of the program involved.” *Id.* at § 6(a)(2). The general public interest, Forest Service NEPA programs, and Wilderness Workshop/Rocky Mountain Wild will benefit from disclosure. Moreover, the Dept. of Agriculture shall, to the “fullest extent possible,” ensure FOIA is interpreted to ensure the general public and Wilderness Workshop/Rocky Mountain Wild are able to meaningfully participate in the NEPA process based on the timely FOIA disclosure of relevant information to fulfill NEPA’s dual aims - informed decisionmaking and public participation. *See* 42 U.S.C. § 4332.

It should be noted that the Dept. of Agriculture cannot deny a fee waiver on the basis that any of the requested information is reasonably available to Wilderness Workshop/Rocky Mountain Wild through means other than this FOIA request. *See Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 365-66 (D.D.C. 1989) (rejecting Navy’s argument that overlapping information may be found in other Navy documents which other members of the public have; “the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver”).

We also note that Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007, 110 Pub. L. No. 175, 121 Stat. 2524. In the Congressional findings to the OPEN Government Act, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” 110 Pub. L. No. 175 § 2(2). In addition, Congress found that “disclosure, not secrecy, is the dominant objective of [FOIA].” *Id.* § 2(4) (*quoting Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976)). Thus, under FOIA, there is a “strong presumption in favor of disclosure.” *Id.* § 2(3) (*quoting Dep’t of State v. Ray*, 502 U.S. 164 (1991)). Similarly, many longstanding agency policies and practices that promoted secrecy did not survive the 2016 FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538 (2016). The 2016 legislation implemented several changes to FOIA that


were designed to increase public access to government records. H.R. REP. NO. 391, 114th Cong., 2d Sess. 1, 7-8 [*4] (2016); S. REP. NO. 4, 114th Cong., 1st Sess. 2-5 (2015). Congress took action because “some agencies [were] overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure.” S. REP. NO. 4, 114th Cong., 1st Sess. 2 (2015); *see also* H.R. REP. NO. 391, 114th Cong., 2d Sess. 9 (2016) (“[T]here is concern that agencies are overusing these exemptions to protect records that should be releasable under the law.”). Please ensure that the response and determinations on this FOIA Request are based on the provisions Congress adopted to strengthen prompt public access to agency records and eliminate agency policies and practices that promote agency secrecy.

Thank you for your prompt attention to this request. I look forward to your response as soon as possible, but in no event any later than 20 working days, as required by law. If you have any questions in this matter, please contact us at the phone numbers below.

Sincerely,



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