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March 16, 2021

Chief, Forest Service
U.S. Dept. of Agriculture
1400 Independence Ave. SW, Mail Stop 1143
Washington, D.C. 20250-1143

FREEDOM OF INFORMATION ACT ("FOIA") APPEAL

Re: Black Hills Clean Water Alliance FOIA request dated October 20, 2020, FOIA Number 2021-FS-R2-00696-F.

Dear FOIA Appeals Officer and/or Chief, U.S. Forest Service:

This letter constitutes the appeal of Black Hills Clean Water Alliance (BHCWA), submitted by their undersigned attorneys, of the adverse determinations issued by Patricia M. O'Connor, Acting Regional Forester of the Rocky Mountain Region regarding BHCWA's FOIA request dated October 20, 2020 ("FOIA Request"). BHCWA's FOIA Request and the U.S. Forest Service (USFS) letter dated December 16, 2020 ("FOIA Determination") that contains the adverse determinations are attached hereto.

The FOIA Determination violates FOIA and is part of a policy, practice, and/or pattern of the Black Hills National Forest and Rocky Mountain Regional Office denying BHCWA prompt access by withholding agency records involving mining proposals, for which remedy is also being sought in the U.S. District Court, South Dakota Western Division. *Black Hills Clean Water Alliance v. US Forest Service :20-cv-05034-JLV*. For any questions that may involve the pending litigation, please note that the USFS is represented by Assistant United States Attorney Alison J. Ramsdell ((605) 330-4400, Alison.Ramsdell@usdoj.gov), and Kirk Minckler, USDA Office of General Counsel (copied on the FOIA Determination).

BHCWA has requested that all litigation-related contacts with BHCWA be routed through below-signed counsel, who represent BHCWA in this appeal and the pending litigation.

The FOIA Request described the agency records:

> Please provide any and all agency records created or obtained by the Northern Hills District Office or the Black Hills National Forest Office that relate to exploratory gold drilling in the Northern Hills District of the Black Hills National Forest. The subject matter scope of this request must be interpreted broadly, and includes but is not limited to, these specific documents:

- all draft or final plans of operations that have been submitted to the Forest Service since January 1, 2018, involving existing or proposed exploration or mines in the Northern Hills Ranger District;

- all documentation related to gold-related exploration and mining activities by Mineral Mountain Resources.

The FOIA Determination states that the Forest Service limited the scope of the record search "from 1/1/2018 To 11/3/2020." FOIA Determination at 2. The FOIA Determination provided no information on the date the search commenced, or the steps taken to implement a search. FOIA Request at 1.

The search for records apparently identified 2,627 of responsive agency records. FOIA Determination at 1. An undetermined number of pages were withheld in full or by redaction. *Id*. Instead of reviewable analysis that linked any withholding to a FOIA-cognizable harm that would be caused by public access, the FOIA Determination recited boilerplate language regarding FOIA Exemption 5 and Exemption 6. *Id*.

The FOIA Request specified a readily available form (electronic media) and format (searchable PDFs) for the FOIA production: The FOIA Request specified "that paper copies be scanned and electronic records be provided on CD-ROM, DVD, flash drive, or other electronic media containing files in native format and printed from native format into searchable pdfs." FOIA Request at 2.

The FOIA Determination did not conclude the responsive records were not readily reproducible as searchable PDFs on electronic media. Despite BHCWA's specified form and format, the agency records were provided in non-searchable pdf image format, and were posted to an ephemeral agency website.

The FOIA Determination did not grant or deny the fee waiver request. BHCWA's fee waiver is justified by the documentation in the FOIA Request and information known to the Forest Service, especially those who follow BHCWA's public dissemination of information and social media activities related to Black Hills National Forest management. BHCWA is a non-profit citizens organization providing support for citizens in the Black Hills region interested in mining and mineral exploration operations in and around the Black Hills and related public land issues – the subject of the FOIA requests. BHCWA's uses of this information will include informing citizens about the environmental issues surrounding any proposed mineral exploration or development, dissemination of the materials for possible use in publicly-circulated newsletters and information packets, and possible use in administrative or judicial action should there have been a failure to comply with federal laws. No monetary gain will accrue to BHCWA as a result of this request.

By this appeal BHCWA asserts that the USFS delay and decisions regarding search, FOIA exemptions, and the form and format of the production all withheld requested records in error and in violation of FOIA's plan language and statutory purposes. BHCWA requests that an experienced and senior level FOIA Officer from outside the Rocky Mountain Region be tasked with formulating a new search and directing the prompt fulfilment of the FOIA Request by

providing searchable PDFs on an electronic media, with written description of the search, and full justification of the basis and harm associated with all assertion of exemptions.

Current agency appeals policy and practice, which does not disclose the parameters of the search or the basis for exemptions in the FOIA Determinations, invites inefficiency and time-consuming litigation, and should be abandoned. Instead, the Appeal Determination should set useful precedent by rejecting the FOIA Determination that fails to document the search and justify all withholdings in a manner that supplies BHCWA and the Appeal Officer with sufficient information to allow a reasoned and informed determination on whether the agency complied with FOIA. See, Anderson v. Dep't of Health & Human Sevs., 907 F.2d 936, 941 (10th Cir. 1990). Nothing prevents the Appeal Determination from establishing precedent that requires the FOIA Office to provide a detailed basis to review the propriety of the FOIA search and exemption decisions, particularly in light of the unnecessary time and expense of the current practice of delaying such disclosures until summary judgment phase of litigation.

ARGUMENT

I. FOIA IS DESIGNED TO REQUIRE DISCLOSURE OF AGENCY RECORDS.

The purpose of the FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). FOIA is designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Accordingly, FOIA requires that federal government agencies disclose to the public any requested documents. 5 U.S.C. § 552(a). As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know 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 the Press, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." Id. at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." Id. at 172.

The agency may deny FOIA only after establishing a foreseeable harm would be caused by disclosure of the requested documents based on interests addressed by one of the nine enumerated exemptions to the general disclosure requirement. 5 U.S.C. § 552(b)(1)-(9). Congress limited the widespread agency abuse of FOIA exemptions by adopting the FOIA Improvement Act of 2016, which requires that agencies seeking to withhold records must show that (1) the agency reasonably foresees that disclosure of the record would harm an interest protected by an exemption, or (2) the disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i). The withholding determination must be made and justified concurrent with the decision to withhold the record. 7 C.F.R. § 1.5(g)(2).

FOIA's structure and purposes impose strict procedural and substantive requirements on agencies seeking to withhold agency records based on an exemption to the statutory right of access by any person to federal agency records. Consistent with encouraging disclosure, most exemptions under § 552(b) are discretionary, not mandatory. See e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 291 (1979) (Exemption 4 does not "require[e] the conclusion that the exemptions

impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic, or history of the Act."). "Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure." Id. at 292.

"The system of disclosure established by the FOIA is simple in theory. A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in [5 U.S.C.] § 552(b)." Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988). *See also*, Assembly of State of California v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992) ("FOIA requires that government agencies disclose to the public any requested documents. The agency may avoid disclosure only if it proves that the documents fall within one of nine enumerated exemptions. FOIA's purpose is to encourage disclosure, and to that end, its exemptions are to be interpreted narrowly."); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) ("The clear purpose of the FOIA is to assure that the public has access to all government documents, subject only to nine specific limitations, to be narrowly interpreted."); Mead Data Central v. United States Dep't of the Air Force, 566 F.2d 242, 259 (D.C. Cir. 1977) ("Congress and the courts have stacked the scales in favor of disclosure and against exemption.").

Congress has placed further weight on the disclosure side of the scale by adopting the FOIA Improvement Act of 2016. "FOIA now requires that an agency release a record — even if it falls within a FOIA exemption — if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." N.Y. Times Co. v. United States DOJ, 2021 U.S. Dist. LEXIS 20776, at *15 (S.D.N.Y. Feb. 3, 2021) (internal quotations and citation omitted); Farmworker Justice v. United States Dep't of Agric., 2021 U.S. Dist. LEXIS 40437, at *13 (D.D.C. Mar. 4, 2021) (rejecting "generalized explanations of harm removed from the specific information at issue.").

To further this purpose, FOIA's terms and the FOIA Request are to be broadly construed in favor of disclosure.

> FOIA generally provides that the public has a right of access, enforceable in court, to federal agency records. *See* Anderson v. Department of Health & Human Servs., 907 F.2d 936, 941 (10th Cir.1990). FOIA is to be broadly construed in favor of disclosure, and its exemptions are to be narrowly construed. *Id.* The federal agency resisting disclosure bears the burden of justifying nondisclosure. *Id.*

Audubon Society v. United States Forest Service, 104 F.3d 1201, 1203 (10th Cir. 1997).

> FOIA is to be broadly construed in favor of disclosure, and its exemptions are to be narrowly construed. If an agency has been sued by an individual because the agency has refused to release documents, the agency bears the burden of justifying nondisclosure.

Casad v. U.S. Dept. of Health & Human Services, 301 F.3d 1247, 1250 (10th Cir. 2002) (citations omitted). See also Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) ("These exemptions are specifically made exclusive . . . and must be narrowly construed."); Frazee v. U.S. Forest Service, 97 F.3d 367, 370 (9th Cir. 1996); Bristol-Myers Co. v. FTC, 424 F.2d 935,

938 (D.C. Cir. 1970) ("The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed.").

Given the policy behind the FOIA, the federal courts have consistently refused to allow agencies to meet their burden of proving the requested documents fall within one of the FOIA's exemptions by making conclusory and generalized allegations of confidentiality. "We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases." Coastal States, 617 F.2d at 861. *See also* Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977) ("agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts."). The agency must "establish [its] right to withhold information from the public and they must supply the courts with sufficient information to allow [them] to make a reasoned determination that [the agency is] correct." Coastal States, 617 F.2d at 861. See also Anderson v. Dep't of Health & Human Sevs., 907 F.2d 936, 941 (10th Cir. 1990) ("The district court must determine whether all of the requested materials fall within an exemption to the FOIA and may not simply conclude that an entire file or body of information is protected without consideration of the component parts.").

"FOIA requires an agency presented with a FOIA request to conduct a search that is 'reasonably calculated to uncover all relevant documents.'" Info. Network for Responsible Mining v. BLM, 611 F. Supp. 2d 1178, 1184 (D. Colo. 2009) (quoting Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (quoting Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351, 227 U.S. App. D.C. 253 (D.C. Cir. 1983)); see Maynard v. Central Intelligence Agency, 986 F.2d 547, 559 (1st Cir. 1993). The appeal must "evaluate the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." Rocky Mt. Wild, Inc. v. United States Forest Serv., 138 F. Supp. 3d 1216, 1222 (D. Colo. 2015) (quoting Friends of Blackwater v. United States DOI, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (quoting Campbell v. United States DOJ, F.3d 20, 28 (D.C. Cir. 1998)).

Appellate review "applies a reasonableness test to determine the adequacy of a search methodology . . . consistent with congressional intent tilting the scale in favor of disclosure." Albaladejo v. Immigration & Customs Enf't,, 2021 U.S. Dist. LEXIS 19239, at *11 (D.D.C. Feb. 2, 2021) (quoting Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998), as amended (Mar. 3, 1999) internal quotations omitted. FOIA requires "more than perfunctory searches" and requires "follow through on obvious leads to discover requested documents. *Id*. quoting Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325, (D.C. Cir. 1999). An "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990).

Courts have observed that agencies are notorious for narrowly interpreting FOIA requests to avoid FOIA-complaint searches, noting that "FOIA requests are not a game of Battleship. The requester should not have to score a direct hit on the records sought based on the precise phrasing of [the] request. Rather, the agency must liberally interpret the request and frame its search accordingly." Gov't Accountability Project v. United States Dep't of Homeland Sec., 335 F. Supp. 3d 7, 12 (D. D.C. 2018). The FOIA duty to frame a broad search requires a reasonably broad set of electronic search terms used in the underlying subject matter, which also "dictates using

more sophisticated search techniques, including additional filtering keywords or Boolean operators and connectors, to winnow the results to a manageable level." Id. at 13 n.3; Bagwell v. United States DOJ, 311 F. Supp. 3d 223, 230 n.3 (D.D.C. 2018).

Importantly, maintaining FOIA-accessible and reproducible agency records is not an afterthought or imposition; Congress included an explicit FOIA provision requiring that "[e]ach agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of" FOIA's open government mandates. 5 U.S.C. § 552(a)(3)(B).

Because many agencies and courts have not faithfully fulfilled FOIA's statutory purposes, Congress has repeatedly amended FOIA in the past several years in an effort to reign in agency secrecy. Scope of searches must conform with the Electronic FOIA Amendments of 1996's (Pub. L. No. 104-231, 104th Cong., 110 Stat. 3048) expansion of the FOIA definition of a record to include "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(1). Similarly, "the major delays encountered by FOIA requestors were chief among the problems with FOIA that Congress sought to remedy by passing the 2007 Amendments." Bensman v. Nat'l Park Serv., 806 F. Supp. 2d 31, 38 (D.D.C. 2011) (internal quotes omitted). The FOIA Improvement Act of 2016, abrogates some of the previous precedent, agency practice, Department of Justice memos, and simplifies review by requiring no balancing of interests when the agency fails to show the required harm. 5 U.S.C. § 552(a)(8)(A).

Pre-2016 FOIA interpretations must be used with great care. When applying a statute, the "proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019) citing Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U. S. 401, 407, (2011).

The applicable regulations must be interpreted and applied consistent with the statute. The Final Determination is an "adverse determination" but does not include the reasons for the withholding determinations, and for the form and format portion, provides no determination at all. 7 C.F.R. § 1.5 (g).

> *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect will notify the requester of that determination in writing. The written communication to the requester will include the name and title of the person responsible for the adverse determination, if other than the official signing the letter; a brief statement of the reason(s) for the determination, including any exemption(s) applied in denying the request; an estimate of the volume of records or information withheld, such as the number of pages or some other reasonable form of estimation; a statement that the determination may be appealed, followed by a description of the requirements to file an appeal; and a statement advising the requester that he or she has the right to seek dispute resolution services from the component's FOIA Public Liaison or the Office of Government Information Services ("OGIS"). An adverse determination includes:
>
> (1) A determination to withhold any requested record in whole or in part;
>
> (2) A determination that a requested record does not exist or cannot be found, when no responsive records are located and released;

(3) A determination that a record is not readily reproducible in the format sought by the requester;

(4) A determination on any disputed fee matter; or

(5) A denial of a request for expedited treatment.

Id. In order to make any determinations, whether on the request or the appeal, FOIA and the regulations require the decisionmaker to include the necessary fact and legal basis for the Office of General Counsel to "examine to provide a legal sufficiency review" of the appeal decision. 7 C.F.R. § 1.9 (e). *In camera* review based on the asserted reasons for each withholding are typically required for withheld records. *Id*. at § 1.9(e)(1). The regulations, like FOIA's language and caselaw, requires a *Vaughn* index (or functional equivalent) to support the agency determinations at each step of the agency FOIA decisionmaking. 7 C.F.R. § 1.5 (g) (Determination on requests); 7 C.F.R. § 1.9. Foregoing robust determinations produces an absurd result, with the FOIA decision document providing no law or facts to undergo legal sufficiency review to support the administrative review. *Id*.

In sum, reliance on outdated and abrogated agency or Department of Justice guidance or reliance on interpretations of previous versions of FOIA may cause the Appeal Determination to repeat the violations Congress aimed to address in a series of recent FOIA amendments.

II. THE BURDEN TO INVOKE EXEMPTION 5 WAS NOT MET

FOIA Exemption 5 allows withholding of "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. 552(b).

The FOIA Determination makes no effort to link the elements of Exemption 5 to any withheld record. When the FOIA Determination fails to meet its FOIA burden, no further analysis is required, Farmworker Justice v. United States Dep't of Agric., 2021 U.S. Dist. LEXIS 40437, at *9 (D.D.C. Mar. 4, 2021) (rejecting withholdings based on conclusory assertions, failure to provide specific record support, and failing to "engage[] with the relevant factors under the case law.").

The FOIA Determination fails to overcome the burden Congress placed on agencies and fails to overcome FOIA's presumption of access. No further inquiry is required, and the Appeal Determination may properly order disclosure.

III. THE BURDEN TO INVOKE EXEMPTION 6 WAS NOT MET

FOIA Exemption 6 allows withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6). The FOIA Determination presents conclusory assertions, but does not analyze any specific record or identify any invasion of privacy that might be unwarranted under

the caselaw or the terms of the statute. Farmworker Justice v. United States Dep't of Agric., 2021 U.S. Dist. LEXIS 40437, at *9 (D.D.C. Mar. 4, 2021).

BHCWA has a variety of interests in the withheld records. Contact and other information regarding agency personnel and non-agency individuals provide important investigatory tools useful to both government investigation into citizens and citizens' investigations into government officials' activities. See e.g. In re Clinton, 973 F.3d 106 (D.C. Cir. 2020). The agency records withheld pursuant to Exemption 6, "when read in context, do actually add to the plaintiff's knowledge of the government's activities." Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 384 F. Supp. 2d 100, 118 (D.D.C. 2005).

By contrast, the FOIA Determination shows not harm to any protected interest. FOIA, as amended in 2016, abrogates much of the previous precedent and simplifies the withholding inquiry during this administrative appeal by requiring no balancing of interests when the FOIA Determination fails to show any required harm protected Exemption 6. 5 U.S.C. § 552(a)(8)(A).

IV. THE USFS's CONCLUSORY STATEMENTS DO NOT JUSTIFY WITHHOLDING THE REQUESTED DOCUMENTS

As amended, FOIA places mandatory limits on withholding by requiring a showing of harm.

> (A) An agency shall—
> (i) withhold information under this section only if—
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
>
> (II) disclosure is prohibited by law; […].

5 U.S.C. § 552 (a)(8)(A).

In denying BHCWA's FOIA Request, the FOIA Determination simply made generic statements regarding Exemptions 5 & 6, without linking the explanation to any specific record. FOIA Determination at 1-2. No factual basis was provided. Neither Exemption was linked to a specific document or foreseeable harm. Such generalized and conclusory statements do not satisfy USFS's duty to provide the details as to how or why the Exemption applies, the specifically foreseen harm, and the basis for withholding the agency record. Farmworker Justice v. United States Dep't of Agric., 2021 U.S. Dist. LEXIS 40437, at *13 (D.D.C. Mar. 4, 2021).

The FOIA Determination lacks the required explanation of harm linked to the specific Exemption or specific information withheld. *Id.* The heightened statutory burden to demonstrate harm imposed by the FOIA Improvement Act of 2016 adds to the long-standing rule that generalized justifications for nondisclosure "are unacceptable and cannot support an agency's decision to withhold requested documents." Public Citizen Health Research Group v. F.D.A., 704 F.2d 1280, 1291 (D.C. Cir. 1983).

In this case, outside of bare assertions, the USFS fails to provide any justification whatsoever for the assertion that the information requested would substantially harm any interest protected by FOIA Exemption 5 or 6. 5 U.S.C. § 552(a)(8)(A)(i) (requiring withholding agency to show that

the agency reasonably foresees that disclosure of the record would harm an interest protected by an exemption). That violates FOIA. See Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977) ("agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts."). Withholding is allowed "'only if' 'the agency reasonably foresees that disclosure would harm an interest protected by' the exemption or if 'disclosure is prohibited by law.'" Farmworker Justice v. United States Dep't of Agric., 2021 U.S. Dist. LEXIS 40437, at *9 (D.D.C. Mar. 4, 2021) *quoting* 5 U.S.C. § 552(a)(8)(A)(i) (FOIA Improvement Act).

The FOIA Determination does not meet the statutory standards, and requires an Appeal Determination that directs release of all withheld agency records.

V. THE FOIA DETERMINATION FAILED TO EXPLAIN WHY "REASONABLY SEGREGABLE PORTIONS" OF THE DOCUMENT(S) ARE EXEMPTED FROM DISCLOSURE,

When withholding is permissible, FOIA also mandates that "the agency shall […]"

> (ii) (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information

5 U.S.C. § 552 (a)(8)(A). These mandatory duties were not addressed in the FOIA Determination.

Even if USFS could prove that the agency records withheld in full are exempt under FOIA, only those specific portions of the document(s) that are legally exempt under an asserted Exemption can be withheld. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Anderson v. Department of Health & Human Services, 907 F.2d 936, 941 (10th Cir. 1990) *citing* United States Dept. of Justice v. Julian, 486 U.S. 1 (1988).

In this case, USFS improperly withheld the **entirety** of an undisclosed number of the agency records identified in its search. Similarly, the FOIA Determination does not explain the decision to release some "reasonably segregable portions" that are not eligible for Exemption 5 or Exemption 6 withholding, but not others. 5 U.S.C. § 552(b). "[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears." Arieff v. Department of the Navy, 712 F.2d 1462, 1466 (D.C. Cir. 1983).

The FOIA Determination failed to justify the Acting Regional Forester's decision not to release portions of documents withheld in full, or justify at all why it has not done so for the redacted portions. Thus, the Acting Reginal Forester's FOIA decision, as set out in the FOIA Determination, violated FOIA and cannot be sustained.

VI. SEARCH

FOIA requires the agency to conduct a search that is "reasonably calculated to uncover all relevant documents." Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (internal quotations and citations omitted). The administrative appeal must "evaluate the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." Rocky Mt. Wild, Inc. v. United States Forest Serv., 138 F. Supp. 3d 1216, 1222 (D. Colo. 2015) (citations omitted). The FOIA Determination provides no information on the scope of the agency search, except the date range, and cannot be upheld on appeal.

The FOIA Determination states that the Forest Service limited the scope of the record search "from 1/1/2018 To 11/3/2020." FOIA Determination at 2. Setting the ending cut-off-date on the date of request is unlawful. See, e.g., McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (observing that "a temporal limit pertaining to FOIA searches . . . is only valid when the limitation is consistent with the agency's duty to take reasonable steps to ferret out requested documents"), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see also, e.g., Pub. Citizen v. Dep't of State, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (finding an agency's search to be inadequate because the agency unjustifiably failed to use a later "cut-off" date that "might have resulted in the retrieval of more [responsive] documents"). The date the search commences is presumably a reasonable cut-off date. 7 C.F.R § 1.7(a).

The FOIA Determination provided no information on the date the search commenced, or the steps taken to implement a search. FOIA Request at 1. Using an arbitrary ending cut-off date is unlawful, and requires a new search. Moreover, failure to give Plaintiffs *advance* notice of the cutoff date runs afoul of D.C. Circuit precedent. Prop. of People v. DOJ, 405 F. Supp. 3d 99, 120 (D.D.C. 2019) citing Public Citizen, 276 F.3d at 643-44 (invalidating agency's **cut**-off date policy because it permitted the agency to "withhold, with little or no justification, a potentially large number of relevant documents").

The FOIA Determination provides no information on any other aspect of the search. Here, information on the search was presumably documented in forms provided by the FOIA Officer. Freedom of Information Act (FOIA) Records Search Request, Certification, and Billing Form FS-6200-0025 (REV.05/2015), see FS Handbook 6209.13. BHCWA requests the Appeal Officer direct the production of those Search Forms to inform the appeal decision.

Even when the FOIA Determination does provide information on the search, which was not done here, the administrative appeal must consider the appellant's challenge to the "search's adequacy, particularly in view of well defined requests and positive indications of overlooked materials." Reporters Comm. for Freedom of the Press v. FBI, 877 F.3d 399, 402 (D.C. Cir. 2017) (citations and internal quotations omitted).

The search conducted in this case appears to have been ad hoc and did not conform with FOIA's mandates. For example, some email records released reference attachments that do not readily appear in the produced materials. The produced records contain a number of agendas and emails about meetings conducted about the project, including communications with representatives of the mining project proponent and its representatives and contractors. However, there do not appear to be any meeting notes or minutes related to these meetings. Notes describing or

recounting what happened at meetings attended by mining proponents are not subject to any privilege or exemption. This lack of full information appears to be in part a result of a failure to include relevant agency personnel in the search process. For instance, very few records appear from agency personnel that have been publicly involved in the processing of the mining proposals, including Christopher Stores (Natural Resources Planner), Michael Hilton (Tribal Liaison), or Karl Emanuel (Northern Hills Ranger District staff).

Given these gaps in the record production, and the absence of any search information in the FOIA determination, the Appeal Officer should direct a FOIA Officer outside of the Rocky Mountain Region to direct the formulation and conduct of a new search in accordance with FOIA.

VII. BHCWA's FORM AND FORMAT REQUEST WAS IGNORED

FOIA requires agencies to 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. 5 U.S.C. § 552(a)(3)(B). The applicable regulations require the Forest Service to "provide a record in the format specified by a requester, if the record is readily reproducible by the component in the format requested." 7 C.F.R. 1.7 (d). The regulations require, but the FOIA Determination did not contain, a "determination that a record is not readily reproducible in the format sought by the requester." 7 C.F.R. § 1.5 (g)(3). Instead, the FOIA Determination ignored and therefore denied BHCWA's right to designate the form and format of production.

The FOIA Request specified "that paper copies be scanned and electronic records be provided on CD-ROM, DVD, flash drive, or other electronic media containing files in native format and printed from native format into searchable pdfs." FOIA Request at 2. This form and format is readily producible, is consistently used by the agency in creating and obtaining agency records, and there is no reason BHCWA's request cannot be honored.

Instead of heeding BHCWA's request and FOIA's mandate, the agency records were reproduced as non-searchable PDF files, posted to the agency website. Instead of denying the request, the FOIA Determination ignored the request and provided no basis for the determination. 7 C.F.R. § 1.5 (g)(3). Indeed none exists.

The violation of the FOIA mandate that agencies respect BHCWA's stated preference is not an isolated mistake. This FOIA violation is part of an agency practice that effectively hinders use of the records and allows the Forest Service to conceal their activities from the public, elected officials, superior line officers, and resource specialists within the Forest Service.

RELIEF SOUGHT

Based on the above, BHCWA requests that the USFS immediately appoint a FOIA Officer from outside the Rocky Mountain Region to design and carry out a FOIA-compliant search, and release all requested records/documents that will not cause substantial foreseeable harm to a legitimate interest covered by a FOIA exemption. We look forward to your final determination within 20 working days pursuant to FOIA. It would be useful as we evaluate the need to seek judicial review of this matter if you were to provide us with a projected date-certain by which we could expect a determination of this appeal as is required by FOIA. Due to the urgent and

immediate need of BHCWA for this information, we reserve the right to seek immediate judicial review if this appeal is not satisfactorily resolved and the requested documents are not produced in accordance the FOIA-mandated time deadlines and prompt access provision.

Respectfully Submitted,

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Exhibits