

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

WILDERNESS WORKSHOP,)	
Third Street Center, Suite 27)	
520 S. 3 rd St.)	
Carbondale, CO 81623)	
)	
ROCKY MOUNTAIN WILD,)	
1536 Wynkoop St. Suite 900)	
Denver, CO 80202)	
)	
Plaintiffs,)	
)	
v.)	
)	
)	Civil Action No. 2022-cv-3606
U.S. DEPARTMENT OF AGRICULTURE,)	
an agency of the United States,)	
1400 Independent Ave., S.W.)	
Washington, D.C. 20250, and)	
)	
U.S. FOREST SERVICE,)	
an agency of the United States)	
201 14 th St., SW)	
Washington, D.C. 20024)	
)	
Defendants.)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Defendants are agencies of the United States Department of Agriculture (“USDA”) and the U.S. Forest Service (“USFS”), that have wrongfully withheld records responsive to a request made by Plaintiffs Wilderness Workshop (“WW”) and Rocky Mountain Wild (“RMW”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*

2. WW and RMW filed a written FOIA with USFS request on August 31, 2022 (“FOIA request”). To aid in processing, the FOIA request was copied to several offices, including the

Office of General Counsel (“OGC”), the USDA Secretary’s Office, the USFS’s Washington Office, and the USFS’s Regional Office in Colorado.

3. The FOIA request seeks information in agency records about the impacts of a proposed road through the National Forest System that impacts important wildlife habitat and negatively affects Colorado’s second largest migrating mule deer herd, as well as federally listed threatened and endangered species and their habitat, and federal public lands generally. Plaintiffs also sought information related to the Defendants’ interpretation of its obligations under the Alaska National Interest Lands Conservation Act (“ANILCA”), 16 U.S.C. § 3101, *et seq.*

4. This information was sought to inform Plaintiffs’ assessment of the impacts of potential Berlaimont Access Routes, to better understand the Final Environmental Impact Statement and Record of Decision, engage members and decisionmakers about the agency’s consideration of this issue, and strategize about how best to engage in the process prior to and after issuance of a final decision. Agency personnel have stated that a decision is likely to issue very soon.

5. The information in agency records withheld by Defendants is time sensitive. Delayed access harms Plaintiffs’ ability to understand the factual basis of the agency decisionmaking and to determine whether the agency has based its decisionmaking on the factors required by various federal public lands laws. Withholding agency records continues to impact Plaintiffs’ ability to know about actions taken by agency personnel who are working closely and sharing information with the project proponent. Allegations regarding political interference have been made by a number of persons who are interested in these public lands. The project proponent has sent letters and sought meetings with Defendants regarding irregularities in the decisionmaking process. These allegations and letters are responsive to the FOIA request.

6. The Defendants’ FOIA violations harm Plaintiffs’ participation in a statutorily established public land management and environmental decisionmaking process carried out,

overseen, and authorized by USDA and USFS personnel who have not provided full and prompt access to agency records responsive to the FOIA Request.

7. Congress determined that FOIA litigation is subject to expedited consideration. Unlike other civil litigation involving a federal agency, a responsive pleading is required within thirty days of service. 5 U.S.C. § 552 (a)(4)(C) (“Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.”). Agencies are not allowed to claim insufficient appropriations as a basis to relieve federal agencies of the statutory duties imposed by FOIA or the duty to comply with judicial orders.

8. By violating FOIA, Defendants have violated Plaintiffs’ right to promptly access agency records not subject to a recognized FOIA Exemption upon filing a written request, a statutory right that each FOIA requester enjoys regardless of the requester’s purpose. 5 U.S.C. § 552.

9. Plaintiffs request an order finding that USFS and OGC violated FOIA, directing USFS and OGC to make a prompt determination on Plaintiffs’ FOIA Request supported by agency declarations documenting each search and each assertion of a FOIA Exemption, and compelling USFS and OGC to promptly provide Plaintiffs with the responsive records by a date certain.

II. JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty).

11. Defendant agencies’ failure to make a full and final determination on Plaintiffs’ FOIA Request within twenty (20) working days of its August 31, 2022 receipt by USFS is construed as a denial of the FOIA Request and waives further exhaustion of administrative appeal

requirements that can otherwise apply in FOIA cases. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(C)(i).

12. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding the FOIA Request. 5 U.S.C. § 552(a)(6)(C)(i) (“Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”).

13. Venue in this Court is proper. 5 U.S.C. § 552(a)(4)(B). The records requested by this FOIA Request involve ongoing USFS regulatory authority over federal public lands in Colorado, and the agency’s administration of laws and regulations applicable to public lands throughout the nation. The FOIA processing decisions and the underlying administrative process involved decisionmaking review and authority of personnel in Defendants’ Washington D.C. Offices. The Agencies failed to search for records produced in its Washington D.C. Offices.

14. Venue is also appropriate under 28 U.S.C. § 1391 because Defendants are agencies of the United States with its National Offices located in Washington, D.C. and a substantial part of the events or omissions giving rise to these claims occurred in this judicial district.

15. This Court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). The District Court “shall determine the matter de novo.” 5 U.S.C. § 552(a)(4)(B).

16. This Court has statutory authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has statutory authority to grant injunctive relief

pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations.

17. This Court has statutory authority to award costs and attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).

18. In addition to *de novo* review and authority to compel agency FOIA compliance, this Court has statutory authority to refer this matter to the Special Counsel to investigate and make binding recommendations to remedy an agency's potentially arbitrary and capricious circumstances surrounding the withholding of agency records. 5 U.S.C. § 552(a)(4)(F).

19. "In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member." 5 U.S.C. § 552(a)(4)(G).

20. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiffs' harms can be remedied by an order of this Court.

III. PARTIES

21. Plaintiff, WILDERNESS WORKSHOP ("WW") is a Colorado non-profit corporation based in Carbondale, Colorado. WW's mission is to protect the wilderness, water, and wildlife of Western Colorado's public lands. WW has long worked to protect and conserve the wilderness and natural resources of the Roaring Fork Watershed, the White River National Forest, and adjacent public lands. WW was founded in 1967, and has been fighting to protect local public lands for more than 50 years. The organization has more than 700 members. WW engages in research, education, legal advocacy and grassroots organizing to protect the ecological integrity of local landscapes and public lands. WW focuses on the monitoring and conservation of air and water quality, wildlife species and habitat, natural communities and lands of wilderness quality. WW has particular interest in the agency records related to the project at issue because it will

affect important wildlife habitat, including habitat of threatened and endangered species, on public lands within the White River National Forest.

22. Plaintiff, ROCKY MOUNTAIN WILD (“RMW”) is a Colorado non-profit organization based in Denver, Colorado. Rocky Mountain Wild was created by the merger of two of Colorado’s most trusted and effective conservation organizations, Center for Native Ecosystems and Colorado Wild. Recognizing the need to stem dramatic losses of native species and habitat, these organizations joined forces to protect, connect and restore wildlife and wild lands throughout the Southern Rocky Mountain region of Colorado, southern Wyoming, eastern Utah, and northern New Mexico. Rocky Mountain Wild, and its predecessor organizations, regularly review projects proposed on or affecting National Forest lands that might adversely affect wildlife, water quality, air quality, and other resources; comments extensively on proposed public land management decisions; and when necessary files administrative appeals and lawsuits. Rocky Mountain Wild works to protect connectivity corridors through the Interstate 70 corridor and has focused much attention on the heavily impacted Eagle/Vail section that would be impacted by the Berlaimont development. Rocky Mountain Wild and its members have participated in the administrative processes regarding Berlaimont and have grave concerns about how it will impact the landscape and wildlife.

23. WW and RMW regularly use FOIA as an important avenue for gaining information about agency activities. WW and RMW are harmed when it is denied documents to which it is entitled. WW and RMW intend to continue using FOIA to access agency records in the possession of Defendants.

24. WW and RMW work in furtherance of their goals in part by acquiring information regarding federal programs and activities through FOIA. These organizations then compile and analyze that information and, subsequently, disseminate that information to members, the general

public, and public officials through various sources including publications, Plaintiffs' websites and newsletters, general news media coverage, and public presentations. WW and RMW have been successful in their efforts at educating the public and elected officials on issues concerning federal government programs and activities that affect the environment and contribute significantly to the public's understanding of governmental operations and activities. WW and RMW also use the information that they acquire through FOIA to participate in federal decision-making processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal environmental laws.

25. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups incorporated in many federal laws applicable to federal agencies, including the Administrative Procedure Act. *See, e.g.*, 5 U.S.C. § 551, *et seq.* WW and RMW use FOIA to publicize activities of federal agencies and to mobilize the public to participate in the management of public land. WW and RMW intend to continue using FOIA requests to fulfill their oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA. WW and RMW filed the FOIA request at issue, and have standing to bring this FOIA suit. WW and RMW bring this action on their own behalf and on behalf of adversely affected members.

26. WW and RMW, their staff, or one or more of their members have and will suffer direct injury by the Defendants' failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. Defendants' refusals to provide timely FOIA access to agency records prevents WW and RMWs informed involvement in Defendants' time-limited opportunities to participate in administrative processes and to

effectively engage in USFS's decisions affecting sensitive public lands. Harm to the environment flows from Defendants' FOIA violations, which conceal the facts and circumstances of USFS's decisionmaking process. WW and RMW bring this action on behalf of each organization, its staff, and its members.

27. Defendant U.S. Forest Service ("USFS") is an agency as defined by 5 U.S.C. § 552(f)(1). FOIA charges USFS with the duty to provide public access to agency records in their possession or control. USFS possesses records responsive to Plaintiffs' FOIA Request. USFS has denied Plaintiffs access to agency records in contravention of federal law.

28. Defendant U.S. Department of Agriculture ("USDA") is an agency as defined by 5 U.S.C. § 552(f)(1). FOIA charges the Office of the Secretary with the duty to provide public access to agency records in their possession or control. USDA's various secretaries located in Washington D.C. and the Office of General Counsel work closely with the Forest Service personnel and contractors. USDA is denying WW and RMW access to its records in contravention of federal law.

29. Defendants use a decentralized FOIA program to gather agency records from its personnel's paper and electronic files and agency-wide recordkeeping system. Information known only to Defendants is required to ensure a FOIA-compliant search is carried out.

30. Among other things, Defendants failed to lawfully make a full and final determination on Plaintiffs' FOIA Request within the statutory twenty working day limit. As of the date of this filing, a final determination has not been made on the FOIA Request. As of the date of this filing, each Defendant possesses, controls, and unlawfully withholds agency records responsive to Plaintiffs' FOIA Request that are not subject to a FOIA Exemption.

IV. SUMMARY OF LAW

31. FOIA imposes statutory duties upon agencies to “ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the *fundamental ‘right to know.’*” Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 (2007) (*emphasis supplied*). Judicial interpretations and applications of FOIA that limit public access must be applied sparingly due to a series of Congressional actions taken to increase public access. *Id.*

32. In 2016, Congress enacted the FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538 (2016). Like previous enactments, 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).

33. The FOIA Improvement Act addresses Congressional “concerns that 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.”).

34. In 2016, Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can “articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.” H.R. REP. NO. 391, at 9. The foreseeable harm requirement applies to all nine FOIA Exemptions.

35. This lawsuit is necessary to vindicate Plaintiffs’ right to prompt access agency records, which is violated by Defendants’ unlawful withholding of responsive agency records, in part, by

failing to make a determination on Plaintiffs' FOIA Request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(i).

36. This lawsuit is also necessary because Defendants have refused to provide estimated dates by which Plaintiffs' FOIA Request will be completed, an agency duty Congress imposed in 2007 to remedy widespread and casual violations of FOIA deadlines. 5 U.S.C. § 552(a)(7).

37. FOIA is violated whenever an agency withholds an agency record without first determining that the information is subject to a recognized FOIA Exemption and also determining that public access would actually cause harm to the interests protected by that FOIA Exemption. 5 U.S.C. § 552(b).

38. Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits of FOIA. 5 U.S.C. § 552(a)(6)(C)(i). Defendants' failure to comply with FOIA's time limits has constructively exhausted all of Plaintiffs' administrative remedies. WW and RMW now turn to this Court to provide relief that ensures Plaintiffs, their members, and the public have the prompt public access to agency records guaranteed by FOIA. 5 U.S.C. § 552(a)(6).

39. An agency's failure to comply with FOIA deadlines exhausts all administrative remedies and puts all questions of FOIA compliance within the jurisdiction of the federal courts.

40. FOIA is normally resolved on summary judgment, with the burden of proving FOIA compliance falling on the agency. During this litigation, the government must carry its burden of demonstrating all elements of FOIA compliance. The government may meet its litigation burdens by providing declarations, and disclosing contravening evidence in its possession, that address, among other things: a broad interpretation of the FOIA Request, a lawful search, a lawful cut-off date for each search, and the justification in a *Vaughn* index for withholding any agency record or part thereof.

41. The Federal Rules of Civil Procedure do not exempt FOIA cases from Rule 26 disclosures. Fed.R.Civ.Pro. 26(a)(1)(B) (listing exemptions). The issues presented in this FOIA litigation are not based on an administrative record. The record in this FOIA case is developed in the district court. 5 U.S.C. § 552(a)(4)(B) (The district court “shall determine the matter de novo.”). Local rules that exempt FOIA litigation from the normal adversarial practice used in civil litigation, such as those contained in Rule 26 and Rule 56, cannot alter the Federal Rules.

V. STATEMENT OF FACTS

42. On August 31, 2022 Plaintiffs submitted a written FOIA Request to Defendants. One or more of Defendants’ components received the FOIA request on August 31, 2022. Defendants claim they received the FOIA request on various dates ranging from days to weeks after the FOIA request was sent.

43. The FOIA Request sought prompt access to agency records involving the Berlaimont Estates Access Route EIS process.

44. The USFS’s Washington Office acknowledged receipt of the FOIA request on September 6, 2022, and assigned the request FOIA tracking number: 2022-FS-WO-05349-F.

45. The USFS’s Rocky Mountain Regional Office acknowledged receipt of the FOIA request on September 14, 2022, and assigned the request FOIA tracking number: 2022-FS-R2-05464-F.

46. The Office of General Counsel acknowledged receipt of the FOIA request on September 6, 2022 and assigned the request FOIA tracking number: 2022-OGC-05363-F.

47. On October 26, 2022 the Rocky Mountain Regional Office provided an interim release. The USFS’s Washington Office and the OGC still have not responded with release of any requested materials.

48. Plaintiffs have not received any additional responses.

49. Defendants have an unlawful, arbitrary, and capricious practice of dividing Defendants' FOIA requests into multiple pieces and assigning multiple tracking numbers. Defendants' practice cannot convert a single FOIA request into multiple FOIA requests. Defendants' FOIA duties must be assessed based on the single FOIA request submitted on August 31, 2022.

50. On November 9, 2022, Plaintiffs contacted Defendants to determine if a date for a final determination of the FOIA Request could be provided. Defendants failed to provide a final determination date.

51. Defendants did not provide a determination on the FOIA Request during the 20-working day period following August 31, 2022. The 20th working day after August 31, 2022 fell on September 29, 2022.

52. As of close of business on the day before this filing, WW and RMW have not received a final determination on the FOIA Requests. As of this filing, Defendants have not provided an updated estimate for a final determination.

53. As of the close of business on the day before this filing, the USDA Freedom of Information Act Public Access Website lists FOIA 2022-FS-R2-05464-F at "In Process", FOIA 2022-OGC-05363-F as "Assigned for Processing" and FOIA 2022-FS-WO-05349-F as "Assigned for Processing".¹

54. Defendants possess or control, and are withholding, agency records responsive to Plaintiffs' FOIA Request that are not subject to a FOIA exemption. Defendants' withholding of agency records is unlawful.

55. As of this filing, Defendants continue to withhold agency records responsive to the FOIA Request. Defendants have not made a final determination on the FOIA Request. Defendants have

¹ Confirmed through the USDA Freedom Of Information Act (FOIA) Public Access Website, available at <https://efoia-pal.usda.gov/App/CheckStatus.aspx> on 11/28/2022.

provided no indication that a FOIA-compliant search has been carried out. Defendants have not provided the “cut-off date” used for any search, thereby frustrating Plaintiffs’ intent to file a follow-up FOIA request. Defendants have provided no basis for withholding any of the specific agency records being withheld in full or in part.

FIRST CLAIM FOR RELIEF

Violation of FOIA: Unlawfully Withholding Agency Records Responsive to FOIA Request

56. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

57. Defendants have not communicated to Plaintiffs the scope of the documents they intend to produce and withhold in response to the FOIA Request or their reasons for withholding any documents, and have not disclosed to Plaintiffs records responsive to the FOIA Request.

58. Defendants continue to violate FOIA by failing to conduct and document a lawful search for responsive records, which is a condition precedent to a lawful determination. On information and belief, responsive agency records have been withheld due to an unlawfully narrow search. 5 U.S.C. §§ 552(a)(3)(B)-(C).

59. Defendants continue to violate FOIA by illegally withholding agency records that are responsive to the FOIA Request, but which Defendants have not demonstrated are subject to a FOIA withholding provision or would cause actual harm recognized by such provisions. 5 U.S.C. § 552(b).

60. These failures to make determinations on Plaintiffs’ FOIA Request within the timeframe required by FOIA are a constructive denial and wrongful withholding of the records requested. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(C)(i).

61. Defendants continue to violate FOIA by not making responsive records promptly

available to Plaintiffs. 5 U.S.C. § 552(a), 5 U.S.C. § 552(a)(6)(C)(i).

62. Defendants continue to violate FOIA by unlawfully withholding agency records that are responsive to Plaintiffs' request for records, but which are not subject to any FOIA Exemption that allows withholding. 5 U.S.C. § 552(b), 5 U.S.C. § 552(a)(6)(C)(i).

63. Plaintiffs are entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA, for the Office of the Secretary's violation of FOIA. 5 U.S.C. § 552(a)(4)(E).

64. At such time as appropriate, Plaintiffs anticipate requesting entry of judicial findings confirming that the circumstances raise questions as to the arbitrary and capricious conduct of agency personnel in processing this FOIA Request and referral to Special Counsel for further investigation and remedy of the arbitrary and capricious conduct. 5 U.S.C. § 552(a)(4)(F).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

- A. Enter Findings and Declare that Defendants have violated FOIA by unlawfully withholding agency records responsive to Plaintiffs' FOIA Request;
- B. Enter Findings and Declare that each Defendant violated its duty to comply with FOIA's statutory deadlines;
- C. Enter Findings and Declare that each Defendant has violated its duty to provide estimated dates of completion for Plaintiffs' FOIA Request;
- D. Direct by injunction that Defendants provide Plaintiffs a lawful determination on its FOIA Request by a date certain;
- E. Direct by order that each Defendant conduct a lawful search for responsive records;

F. Direct by order that each Defendant provide proof that a lawful search was conducted with a cutoff date set as the date of such order;

G. Direct by injunction that Defendants promptly provide all agency records responsive to Plaintiffs' FOIA Request that are not subject to withholding pursuant to one of the nine recognized FOIA exemptions;

H. Direct by order that Defendants provide Plaintiffs with a detailed statement justifying each withholding of an agency record, or portions thereof, in accordance with the indexing requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);

I. Direct by order that Defendants provide Plaintiffs with all responsive agency records in the form and format specific in the request, by a date certain within twenty working days of any such order;

J. Grant Plaintiffs' cost of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E);

K. Enter a finding that Defendants' conduct involves circumstances that raise questions of whether the agency has unlawfully, arbitrarily, and/or capriciously withheld agency records, and refer the matter for administrative investigation and remedy (5 U.S.C. § 552(a)(4)(F)); and,

L. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED November 30, 2022:

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