



B & D Law Offices, P.C.



Attorneys & Counselors at Law

April 18, 2023

Via Email Only, SM.FS.WOFOIA@usda.gov

Chief, USDA Forest Service

Re: FOIA APPEALS of:
FOIA Case Number 2023-FS-R3-01831-F
FOIA Case Number 2023-FS-R3-02406-F

Dear Chief, USDA Forest Service:

FOIA Case Number 2023-FS-R3-01831-F:

This is an appeal within 90 days of the 2/15/23 letter from the USFS (Mr. Alford) to our FOIA request dated 1/27/23 (not 2022, as mis-stated in Mr. Alford's letter). Attached for your convenience are copies of:

- our 1/27/23 request;
- the USFS' 2/15/23 response.

FOIA Case Number 2023-FS-R3-02406-F:

This is also an appeal within 90 days of the 3/13/23 letter from the USFS (Mr. Alford) to our FOIA request dated 2/28/23 (not 2022, as mis-stated in Mr. Alford's letter). Attached for your convenience are copies of:

- our 2/28/23 request;
- the USFS' 3/13/23 response.

In both FOIA requests we requested certain specific information relating to the **Cerro Pelado Fire** in New Mexico that started on April 22, 2022, and was fully contained on June 15, 2022. We made our request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3)(A), which requires the agency to "promptly" make reasonably described records available to the requesting person. (The USFS letter dated 2/15/23 was within 20 days of the USFS' receipt on 2/1/23. The USFS letter dated 3/13/23 was within 20 days of the USFS' receipt on 3/2/23.)

FOIA Case Number 2023-FS-R3-01831-F: On 1/27/23 we requested the following records, and we will pay all reasonable costs and expenses resulting from the production of the requested documents to the extent required by law:

1. The report on the Cerro Pelado Fire of the COR inspection on 4/26/22 which documented that merchantable wood and equipment had been burned by the Cerro Pelado Fire.
2. The report on the Cerro Pelado Fire by **Ben Cooksey**:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Cooksey's report.

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3. The report on the Cerro Pelado Fire by **Julian Madrid**:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Madrid’s report.
4. The report on the Cerro Pelado Fire by **Travis Lunders**:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Lunders’ report.
5. All ‘cause and origin’ reports on the Cerro Pelado Fire.

FOIA Case Number 2023-FS-R3-02406-F: On 2/28/23 we requested the following records, and we will pay all reasonable costs and expenses resulting from the production of the requested documents to the extent required by law:

1. For the Cerro Pelado Fire that started on 4/22/2022, all Burn Plans and modifications to the plans.
2. For the Cerro Pelado Fire that started on 4/22/2022, prescribed burn accomplishments (location and acreage), daily logs of all prescribed burn operations, weather observations for the area(s) of the prescribed burn operations, the prescribed fire personnel and the accompanying qualifications (Red Cards) on the Jemez Ranger District for 2022.

Both Responses (2/15/23 and 3/13/23) improperly withheld records concerning the Cerro Pelado Fire on the sole basis that the requested documents “are still part of an ongoing law enforcement investigation” and therefore exempt pursuant to FOIA exemption 7(A), 5 U.S.C. § 552(b). Also, both responses stated the agencies are not required under the FOIA to notify requesters when records become available.

Records Compiled for Law Enforcement Purposes Exemption only protects records that are compiled for law enforcement reasons. Here, the records requested were not “compiled for law enforcement purposes.” They were not created in a civil or criminal investigation or an agency administrative enforcement proceeding. Even if the requested records had been compiled for law enforcement purposes, there is (and can be) no showing how the requested records would interfere or impede an investigation or harm the government’s case in an ongoing proceeding. The documents requested were all prepared by non-law enforcement U.S. Forest Service personnel for purposes of a controlled burn that began on or about 4/22/2022. None of the requested documents are “investigative documents” compiled for law enforcement purposes as alleged in the USFS Responses. In *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 658 F.Supp.2d 217, 226 (D.D.C. 2009), the court held that the DOJ did not meet its burden under Exemption 7(A) as it failed to “describe with any reasonable degree of particularity the subject matter of the hypothetical proceedings, the parties involved, when such proceedings might occur, or how the information withheld here might be used by these hypothetical parties to interfere with these hypothetical proceedings.” As the court explained,

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requiring the agency to specify the connection between the documents and an “ongoing or anticipated” proceeding is consistent with the exemption’s purpose: “to prevent disclosures which might prematurely reveal the government’s cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence.” *Id.* at 229-30 (quoting *Maydak v. U.S. Dep’t of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000)).

The fact that the presumed targets of the law enforcement proceedings are the very same U.S. Forest Service personnel who prepared the requested documents in the first place or at the very least were given access to the requested documents, requires that the U.S. Forest Service satisfy a high burden in proving that harm will occur from “the release of information that the targets of the investigation already possess.” *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng’rs*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (emphasis omitted) (citing *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982)); *cf. Wright v. Occupational Safety & Health Admin.*, 822 F.2d 642, 646 (7th Cir. 1987). The U.S. Forest Service’s burden to withhold records is greater when the subject already has access to it. *Campbell v. Dep’t of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982). In such situations, courts “must conduct a more focused and particularized review of the documentation on which the government bases its claim that” release of the record “would interfere with the investigation.” *Id.* For example, a court gave such additional scrutiny to an agency’s Exemption 7(A) claim where a requester sought only records that had been submitted to the agency by the subject of the investigation, a company for which he had previously worked. *Id.* at 259-60. The court reasoned that the government failed to explain how such information — submitted by the company itself — “could reveal the direction of the investigation to [the company] or alert it to anything it does not know already.” *Id.* at 260. Here the requested documents were either prepared by or on behalf of the presumed targets of the investigation, or the targets of the investigation have already been granted access to the requested documents.

In any event, much is already known about the U.S. Forest Service’s “secret” investigation. For example, we know that the investigation is being conducted by the Office of Personnel Management and that it involves an investigation into U.S. Forest Service personnel falsifying statements regarding the origin of the fire, as well as backburning to attempt cover-up. We know that Ben Cooksey’s report contained flagrant factual misrepresentations which were discovered by Julian Madrid, and subsequently confirmed by Travis Lunders’ report. Since this and other information is already a matter of public record, the U.S. Forest Service is hard pressed to establish how “the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). And, to the extent Mr. Cooksey is being investigated, it is hard to imagine how producing a copy of his report and the subsequent reports by Messrs. Madrid and Lunders could reveal the direction of the investigation or alert him to anything he does not already know.

The FOIA establishes a strong presumption in favor of disclosure of government records, placing the burden on you to justify the withholding of requested documents. According to the Supreme Court, the FOIA is grounded in a general philosophy of full agency disclosure unless

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information is exempted under the clearly delineated statutory language. The Supreme Court also has concluded that the FOIA exemptions are limited and are to be narrowly construed. In denying our FOIA request, you are required to explain how a release of information requested could reasonably be expected to cause some articulable harm. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that the government must show how the records “would interfere with a pending enforcement proceeding”; *Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995, reh’g den. 1995) (“To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.”); *Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that agency must demonstrate interference with pending enforcement proceeding); *Beneville v. U.S. Dep’t of Justice*, No. 98-6137, slip op. at 22 (D. Or. June 11, 2003) (explaining that simply satisfying the law enforcement purpose “does not establish the remainder of the requirement . . . that disclosure of the documents could reasonably be expected to interfere with law enforcement proceedings” (citing *Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987))); *Judicial Watch v. FBI*, No. 00-745, slip op. at 8 (D.D.C. Apr. 20, 2001) (“Once the agency establishes that an enforcement proceeding is pending, the agency must show that release of the withheld documents is likely to cause some distinct harm.”); *Scheer v. U.S. Dep’t of Justice*, 35 F.Supp. 2d 9, 13 (D.D.C. 1999) (stating that agency “must first prove” existence of law enforcement proceeding and “must next prove” harm), appeal dismissed per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); *Franklin v. U.S. Dep’t of Justice*, No. 97-1225, slip op. at 7 (S.D. Fla. June 15, 1998) (magistrate’s recommendation) (two-part test), adopted (S.D. Fla. June 26, 1998), aff’d, 189 F.3d 485 (11th Cir. 1999) (unpublished table decision); *Hamilton v. Weise*, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *25 (M.D. Fla. Oct. 1, 1997) (same); *Butler v. Dep’t of the Air Force*, 888 F. Supp. 174, 183 (D.D.C. 1995) (same), aff’d per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); see also *Attorney General’s Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act* (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (emphasizing the importance of “enhancing the effectiveness of our law enforcement agencies”).

Both of the USFS FOIA Responses allege that the mere pendency of enforcement proceedings is an adequate basis for the invocation of Exemption 7(A). The U.S Forest Service must also establish that some distinct harm could reasonably be expected to result if the record or information requested were disclosed. *See, e.g., Lion Raisins Inc. v. USDA*, 354 F.3d 1072, 1085 (9th Cir. 2004) (stating that the “USDA cannot argue that revealing the information would allow Lion premature access to the evidence” or harm its investigation, because “Lion already has copies of the documents it seeks”); *Neill v. Dep’t of Justice*, No. 93-5292, 1994 WL 88219, at *1 (D.C. Cir. Mar. 9, 1994) (explaining that conclusory affidavit lacked specificity of description necessary to ensure meaningful review of agency’s Exemption 7(A) claims); *Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (holding that government must make specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (finding that agency failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) (stating that the “government must

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show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding”); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 173 (C.D. Cal. 2002) (illustrating that an agency cannot easily demonstrate harm to its proceedings when “the subjects of the investigation . . . have copies” of the record in question); *Scheer v. U.S. Dep’t of Justice*, 35 F. Supp. 2d 9, 13-14 (D.D.C. 1999) (finding that the agency’s assertion that disclosure to the requester would harm its investigation “is belied” by the agency’s full disclosure to the target of the investigation; therefore, the agency “has not met its burden of offering clear proof that disclosure . . . would have interfered with a law enforcement proceeding within the meaning of FOIA exemption 7(A)”); *Jefferson v. Reno*, No. 96-1284, 1997 U.S. Dist. LEXIS 3064, at *10 (D.D.C. Mar. 17, 1997) (ruling that neither agency’s declaration nor its checklist “describes how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings”).

Therefore, please provide all requested reports and records in FOIA #2023-FS-R3-01831-F and in FOIA #2023-FS-R3-02406-F.

Sincerely,

B & D LAW OFFICES, P.C.

/s/ Christopher P. Bauman
Christopher P. Bauman, Esq.
cpb@bdsfirm.com

Enclosures: FOIA Case Number 2023-FS-R3-01831-F:
1/27/23 Request
2/15/23 Response

FOIA Case Number 2023-FS-R3-02406-F:
2/28/23 Request
3/13/23 Response

cc: Mark C. Dow, Esq., mcd@bdsfirm.com
Cynthia L. Weisman, Esq., cw@bdsfirm.com

B & D Law Offices, P.C.



Attorneys & Counselors at Law

January 27, 2023

Via U.S. Regular Mail
Via Certified Mail, Return Receipt Requested

United States Forest Service
Southwestern Region
FOIA Service Center
333 Broadway SE
Albuquerque, NM 87102

Re: FOIA Request

Dear Sir/Ma'am:

This letter is a request for certain specific information relating to the Cerro Pelado Fire in New Mexico that started on April 22, 2022, and was fully contained on June 15, 2022. This request is made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3)(A), which requires the agency to "promptly" make reasonably described records available to the requesting person. FOIA requires the agency to respond with a determination of the request within **20 days of receipt** of a request. 5 U.S.C. § 552(a)(6)(A). Based on the mailing date above, adding 3 days for receipt, that deadline is **Tuesday, 2/21/2023**.

The undersigned person requests the following records be promptly made available to him, and the undersigned will pay all reasonable costs and expenses resulting from the production of the requested documents to the extent required by law.

1. The report on the Cerro Pelado Fire of the COR inspection on 4/26/22 which documented that merchantable wood and equipment had been burned by the Cerro Pelado Fire.
2. The report on the Cerro Pelado Fire by Ben Cooksey:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Cooksey's report.
3. The report on the Cerro Pelado Fire by Julian Madrid:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Madrid's report.
4. The report on the Cerro Pelado Fire by Travis Lunders:
 - A. The unedited version – before the USFS made edits, and
 - B. The version after the USFS made edits to Lunders' report.
5. All 'cause and origin' reports on the Cerro Pelado Fire.

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Thank you very much for your assistance in this matter. If you would like to discuss this matter, please contact me at any time.

Sincerely,
B & D LAW OFFICES, P.C.
/s/ Christopher P. Bauman
Christopher P. Bauman, Esq.
cpb@bdsfirm.com

Cc: Mark C. Dow, Esq., mcd@bdsfirm.com
Cynthia L. Weisman, Esq., cw@bdsfirm.com



Forest
Service

Southwestern Region
Law Enforcement and
Investigations

333 Broadway Blvd SE.
Albuquerque, NM 87102
Phone: (505) 842-3196
FAX: (505) 842-3105

File Code: 6270

Date: February 15, 2023

B & D Law Offices, P.C.
6605 Uptown Blvd, NE, Suite 280
PO Box 30684
Albuquerque, NM 87190
cpb@bdsfirm.com

**Copy of FOIA #2023-FS-R3-01831-F Response
on 2-15-23**

RE: Freedom of Information Act Case Number 2023-FS-R3-01831-F

Dear Mr. Bauman:

This is the final response for your Freedom of Information Act (FOIA) dated January 27, 2022 and received by the Southwestern Region FOIA Service Center on February 1, 2023. This request was assigned Case Number 2023-FS-R3-01831-F. Please include this case number in all communications regarding this request.

You requested the following records regarding the Cerro Pelado wildfire:

1. The report on the Cerro Pelado Fire of the COR inspection on 4/26/2022 which documented that merchantable wood and equipment had been burned by the Cerro Pelado Fire.
2. The report on the Cerro Peiado Fire by Ben Cooksey:
 - a. The unedited version - before the USFS made edits, and
 - b. The version after the USFS made edits to Cooksey' s report.
3. The report on the Cerro Pelado Fire by Julian Madrid:
 - a. The unedited version - before the USFS made edits and
 - b. The version after the USFS made edits to Madrid's report.
4. The report on the Cerro Pelado Fire by Travis Lunders:
 - a. The unedited version - before the USPS made edits, and
 - b. The version after the USFS made edits to Lunders' report.
5. All 'cause and origin' reports on the Cerro Pelado Fire.

Please be advised that the law enforcement report(s) of investigation have not been completed at the time of your request, and the report(s), as well as all related records are still part of an on-going law enforcement investigation. Therefore, the information is being withheld pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552 (b). Exemption 7(A) authorizes the withholding of 'records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.' The FOIA does not require agencies to notify requesters when records become available.



Based on the nature of the investigation of the Cerro Pelado Fire, withholding the investigative documents during the investigatory period is appropriate. Early disclosure of findings may interfere with pending enforcement proceedings related to the Cerro Pelado Fire.

The FOIA provides you the right to appeal this response. Any appeal must be made in writing, within 90 days from the date of this letter to the Chief, USDA Forest Service. Additionally, due to the concerns surrounding the COVID-19 virus we are only accepting appeals electronically at this time. Please email your appeal to SM.FS.WOFOIA@usda.gov. The term "FOIA APPEAL" should be placed in capital letters on the subject line of the email along with the FOIA case number assigned to your request. To facilitate the processing of your appeal, please attach a copy of this letter to your request as well.

If you need any further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the FOIA Public Liaison at (202) 205-1542. Additionally, you may contact the Office of Government Information Services, National Archives and Records Administration, to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001, email ogis@nara.gov; telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you have any questions regarding this final response, please contact Alisha Daniel via telephone at 505-321-2559 or via email at alisha.daniel@usda.gov.

We feel this fully satisfies your request with the Southwestern Region FOIA Service Center.

JAMES ALFORD
Special Agent in Charge

B & D Law Offices, P.C.



Attorneys & Counselors at Law

February 28, 2023

Via U.S. Regular Mail; Via Certified Mail, Return Receipt Requested

United States Forest Service
Southwestern Region
FOIA Service Center
333 Broadway SE
Albuquerque, NM 87102

Re: FOIA Request

Dear USFS:

This letter is a request for certain specific information relating to the **Cerro Pelado Fire** in New Mexico that started on April 22, 2022, and was fully contained on June 15, 2022. This request is made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3)(A), which requires the agency to "promptly" make reasonably described records available to the requesting person. FOIA requires the agency to respond with a determination of the request within **20 days of receipt** of a request. 5 U.S.C. § 552(a)(6)(A). Based on the mailing date above, adding 3 days for receipt, that deadline is **Thursday, 3/23/2023**. The undersigned person requests the following records be promptly made available to him, and the undersigned will pay all reasonable costs and expenses resulting from the production of the requested documents to the extent required by law.

1. For the Cerro Pelado Fire that started on 4/22/2022, all Burn Plans and modifications to the plans.
2. For the Cerro Pelado Fire that started on 4/22/2022, prescribed burn accomplishments (location and acreage), daily logs of all prescribed burn operations, weather observations for the area(s) of the prescribed burn operations, the prescribed fire personnel and the accompanying qualifications (Red Cards) on the Jemez Ranger District for 2022.

Thank you for your assistance.

Sincerely,
B & D LAW OFFICES, P.C.
/s/ Christopher P. Bauman
Christopher P. Bauman, Esq.
cpb@bdsfirm.com

Cc: Mark C. Dow, Esq., mcd@bdsfirm.com
Cynthia L. Weisman, Esq., cw@bdsfirm.com



Forest
Service

Southwestern Region
Law Enforcement and
Investigations

333 Broadway Blvd SE.
Albuquerque, NM 87102
Phone: (505) 842-3196
FAX: (505) 842-3105

File Code: 6270
Date: March 13, 2023

B & D Law Offices, P.C.
Christopher P. Bauman
6605 Uptown Blvd. NE, Suite 280
Albuquerque, NM 87110
cpb@bdsfirm.com

**Copy of FOIA #2023-FS-R3-02406-F Response on
3/13/23**

RE: Freedom of Information Act Case Number 2023-FS-R3-02406-F

Dear Mr. Bauman:

This is the final response for your Freedom of Information Act (FOIA) dated February 28, 2022 and received by the Southwestern Region FOIA Service Center on March 2, 2023. This request was assigned Case Number 2023-FS-R3-02406-F. Please include this case number in all communications regarding this request.

You requested the following records regarding the Cerro Pelado wildfire:

1. *For the Cerro Pelado Fire that started on 4/22/2022, all Burn Plans and modifications to the plans.*
2. *For the Cerro Pelado Fire that started on 4/22/2022, prescribed burn accomplishment's location and acreage), daily logs of all prescribed burn operations, weather observations for the area(s) of the prescribed burn operations, the prescribed fire personnel, and the accompanying qualifications (Red Cards) on the Jemez Ranger District for 2022.*

Please be advised that the law enforcement report(s) of investigation have not been completed at the time of your request, and the report(s), as well as all related records are still part of an on-going law enforcement investigation. Therefore, the information is being withheld pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552 (b). Exemption 7(A) authorizes the withholding of 'records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.' The FOIA does not require agencies to notify requesters when records become available.

Based on the nature of the investigation of the Cerro Pelado Fire, withholding the investigative documents during the investigatory period is appropriate. Early disclosure of findings may interfere with pending enforcement proceedings related to the Cerro Pelado Fire.

The FOIA provides you the right to appeal this response. Any appeal must be made in writing, within 90 days from the date of this letter to the Chief, USDA Forest Service. Additionally, due to the concerns surrounding the COVID-19 virus we are only accepting appeals electronically at this time. Please email your appeal to



SM.FS.WOFOIA@usda.gov. The term “FOIA APPEAL” should be placed in capital letters on the subject line of the email along with the FOIA case number assigned to your request. To facilitate the processing of your appeal, please attach a copy of this letter to your request as well.

If you need any further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the FOIA Public Liaison at (202) 205-1542. Additionally, you may contact the Office of Government Information Services, National Archives and Records Administration, to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001, email ogis@nara.gov; telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you have any questions regarding this final response, please contact Alisha Daniel via telephone at 505-321-2559 or via email at alisha.daniel@usda.gov.

We feel this fully satisfies your request with the Southwestern Region FOIA Service Center.

JAMES ALFORD
Special Agent in Charge