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Refer To File #: 000010-0464

VIA E-MAIL

October 17, 2014

Chief, USDA, Forest Service
1400 Independence Avenue, SW
Mail Stop: 1143
Washington, DC 20250-1143
wo_foia@fs.fed.us
R5_FOIA@fs.fed.us

Re: FOIA APPEAL – FOIA Request 2014-FS-R5-05523-F

To Whom It May Concern:

This is an appeal from a denial of fee waiver with respect to FOIA No. 2014-FS-R5-05523-F. The Forest Service indicates in the letter that the denial is based on the failure of our client, Dr. Murphy, to meet factors 2, 3, and 4 described in the agency's FOIA guidelines, 7 C.F.R. Subtitle A, Part 1. Below we provide detailed evidence that Dr. Murphy meets factors 2, 3, and 4.

With respect to factor 2, Dr. Murphy expects that the records sought will contribute to an understanding of government operations or activities, specifically, the decision to proceed with the Upper Echo Lake Hazardous Fuels Reduction Project ("Project"), because the records will help the public understand the basis for that decision. The records sought are communications to and from the Lake Tahoe Basin Management Unit ("LTBMU") Forest Supervisor who ultimately approved the Project and signed the November 2012 decision memo for the Project and the agency's lead biologist who consulted on the Project. Presumably, those two individuals played determinative roles in the agency's decision to proceed with the Project and in deciding what steps the agency would take to comply with applicable environmental laws and to protect human health and the environment in the course of project implementation. Release of such records is in the public interest because the Project has the potential to have adverse environmental impacts that were not analyzed as a consequence of the agency's decision to invoke a categorical exclusion from the need to prepare an environmental assessment or environmental impact statement for the Project. Post-decision information, including the Forest Service's decision to consult with the Fish and Wildlife Service regarding the effects of the Project on the endangered Sierra Nevada yellow-legged frog, demonstrates the potential for unanalyzed environmental impacts of the Project.

With respect to factor 3, Dr. Murphy has a lifelong understanding of the Project area and is a renowned expert in conservation biology. Dr. Murphy is a Pew Scholar in Conservation and the Environment and a biologist at the University of Nevada, Reno. Dr. Murphy is past president of the Society for Conservation Biology. He has served on the Board on

Environmental Studies and Toxicology and the Water Science and Technology Board at the National Research Council, the action agency for the National Academy of Sciences. He has also served on three committees under that organization: the Committee on Hydrology, Ecology, and Fishes of the Klamath River, the Committee on Endangered and Threatened Species in the Platte River Basin, and the Committee on Scientific Issues in the Endangered Species Act. He is the lead author, editor, and team leader of the Forest Service's Lake Tahoe Watershed Assessment. He has worked with a wide variety of threatened and endangered species and is familiar with the life history and needs of the endangered yellow-legged frog. Dr. Murphy expects to share the requested records, thereby contributing to a public understanding of the decision to proceed with the Project; in particular, the records should shed light on the bases for the Project for the members of the Echo Lakes Association, who have seasonal residences in the Project area and are directly affected by the Project. He will also coordinate an effort to provide pertinent records or a summary of those records to the public through the Save Upper Echo Lake web blog, <http://saveecholake.blogspot.com/>. The blog was established more than six months ago and has had over 1200 visitors. It makes information about Upper Echo Lake available to all members of the public.

With respect to factor 4, the significance of the contribution to public understanding, it is difficult to provide a complete answer without first reviewing the requested records. That noted, the records may well assist the public in understanding why, for example, in 2012 prior to issuance of the decision memo for the Project, Ms. Muskopf indicated that the Project would have "no effect" on the yellow-legged frog, but in 2014 the Forest Service determined that the Project "may affect" the yellow-legged frog and engaged in consultation with the Fish and Wildlife Service to analyze the effects of the Project. Information that the Forest Service should have in its records will assist the public in understanding Ms. Muskopf's conclusion about the listed frog in light of subsequent correspondence between the Regional Office and recreational residence permittees, correspondence which characterized the Project area as "suitable habitat" for the yellow-legged frog. Likewise, the records may assist the public in understanding the basis for the characterization of fire risk in the area as medium to high in the November 2012 decision memo for the Project signed by Ms. Gibson. These are just several examples of the contribution to public understanding that will likely result from release of the records.

In light of the foregoing, we respectfully request a fee waiver and the immediate production of the requested records.

Sincerely,



Paul S. Weiland
of Nossaman LLP

Attorneys for Dennis D. Murphy, Ph.D.

PSW/art
Enclosure



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Service

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FOIA No. 2014-FS-R5-05523-F

Date: September 24, 2014

Mr. Paul S. Weiland
Nossaman LLP
18101 Von Karman Ave., Suite 1800
Irvine, CA 92612

Dear Mr. Weiland:

This is in response to your request for a fee waiver for your Freedom of Information Act (FOIA) request dated September 18, 2014, submitted to the Lake Tahoe Basin Management Unit (LTBMU). On behalf of Dr. Dennis Murphy, you requested documents related to the Upper Echo Lake Hazardous Fuels Reduction Project.

Your September 18, 2014, letter did not include any willingness to pay fees and included a request for a fee waiver. A waiver or reduction of fees involves the expenditure of public funds. The Forest Service evaluates fee waiver requests based on the six factors identified in the enclosed Fee Waiver Criteria. After review of the information provided in your September 18, 2014 letter, your request for a fee waiver is denied. We have determined from the information you provided in your letter that Dr. Murphy has not met all of the six factors identified in the enclosed Fee Waiver Criteria. Specifically, the information provided to address fee waiver factors 2, 3 and 4 was insufficient.

The information you are requesting concerns the operations or activities of the government, thereby satisfying fee waiver factor 1.

Regarding fee waiver factors 2, 3 and 4, you did not provide information to show that releasing the requested information to Dr. Murphy specifically, is "likely to contribute . . . significantly" to public understanding of government operations or activities and would significantly benefit the public.

In order for a fee waiver to be granted, a requester must demonstrate sufficient subject matter expertise to be able to analyze the requested information in such a manner that would benefit the general public by specific disclosure of the information to that particular requester. You indicated Dr. Murphy's primary interest motivating the request is to ensure that the project is consistent with the Endangered Species Act and National Environmental Policy Act. However, you have not demonstrated or provided any documentation to show Dr. Murphy's specific expertise to inform the public in these matters.



You did not provide any indication that Dr. Murphy has the knowledge and capability to analyze and disseminate information to the public; nor did you provide information showing he has disseminated information to the public in the past or any other information which demonstrates to this office his ability to effectively analyze and disseminate the information requested. You stated that the records disclosed will be shared with the homeowners directly affected by the proposed project. Simply providing copies of documents obtained to a small number of individuals does not satisfy this factor.

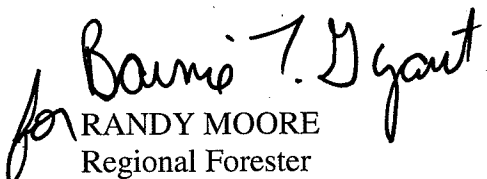
Regarding fee waiver factors 5 and 6, you do not appear to have a commercial interest that would be furthered by release of the information.

The LTBMU estimates 2 hours of search performed by a GS 14 employee, for a total of \$139.43 and 5 hours of search performed by a GS 11 employee, for a total of \$195.46; minus 2 free hours for a total minimal cost estimate of \$195.46. The estimate is based on Dr. Murphy being considered in the "other" category of requester, which entitles him to 2 free hours of search time and 100 free pages. The LTBMU does not estimate finding more than 100 responsive pages. This is an estimate only and is subject to change. Once the actual search is underway, you will be responsible for all costs and there is no guarantee that any documents located will be granted to you. If you are willing to pay all fees, please contact Lisa Herron at 530-543-2815 or laherron@fs.fed.us and you will be sent instructions to remit payment. If you do not contact Ms. Herron within 21 calendar days of the date of this letter, the LTBMU will consider your request to be withdrawn and will close their FOIA file.

The FOIA provides you the right to appeal my denial of expedited processing and fee waiver for your request. Any appeal must be made in writing, within 45 days from the date of this letter, to the Chief, USDA, Forest Service: by email to wo_foia@fs.fed.us, by regular mail to Mail Stop 1143, 1400 Independence Avenue, SW, Washington, DC 20250-1143, by Fed Ex or UPS to Mail Stop 1143, 201 14th Street SW, Washington, DC 20250-1143, or by fax to (202) 260-3245. The term "FOIA APPEAL" should be placed in capital letters on the subject line of the email or on the front of the envelope. To facilitate the processing of your appeal, please include a copy of this letter and/or the FOIA control number assigned to your FOIA request 2014-FS-R5-05523-F.

If you have any questions regarding this response or if further assistance is required, you may contact Ms. Latanga Rush, Regional FOIA Coordinator, via phone: (707) 562-9193, or e-mail: lrush@fs.fed.us. Thank you for your interest in public land management, forest programs and projects.

Sincerely,


for RANDY MOORE
Regional Forester

Enclosure

Fee Waiver Criteria

The Freedom of Information Reform Act of 1986 mandates reduced or waived fees if disclosure of records “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

The Department of Agriculture has published FOIA guidelines for the Forest Service to follow in making fee waiver determinations. The guidelines, found at 7 C.F.R. Subtitle A, Part 1, Subpart A, Appendix A. Sections 6, list six factors to be taken into consideration when reviewing fee waiver requests:

- (1) The subject of the request, i.e., whether the subject of the requested records concerns “the operations or activities of the government”;
- (2) The informative value of the information to be disclosed, i.e., whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The requester bears the burden of identifying “with reasonable specificity” the public interest served.
- (3) The contribution to an understanding of the subject by the general public likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to “public understanding”. Factor 3 concerns whether disclosure of the information will contribute to an understanding by “a reasonably broad audience of persons interested in the subject,” and requires the requester to have the subject area expertise necessary to effectively disseminate the information to the general public and not merely to passively make it available. Requesters have the burden of demonstrating with particularity that the information will be communicated to the public.
- (4) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public benefit should be “identified with reasonable specificity.”
- (5) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so,
- (6) The primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” Factor 6 requires an agency to balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is “primary.”

Fee Waiver Criteria (cont.)

In addition to supplying information addressing each of the above fee waiver factors, you might consider submitting copies of or references to the articles of incorporation of your organization, the constitution and bylaws of the organization, and publications of your organization including, but not limited to, newsletters, membership brochures, and fund-raising solicitations.

It may also be beneficial for you to demonstrate past instances where your organization used information provided by the Forest Service to significantly benefit the public at large. To do this you might consider providing samples including brochures, books, educational videos, newsletters, internet submissions, memoranda from public meetings your organization has conducted, educational presentations your organization has given, television and radio interviews, press releases, testimony before Congress, and newspaper articles.

Please provide information in response to each of the six factors so that a determination can be made regarding your request for a fee waiver.