

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FRIENDS OF ANIMALS)	
7500 E. Arapahoe Rd., Suite 385)	Civ. No. _____
Centennial, CO 80112;)	
)	
Plaintiff,)	
)	
v.)	
)	
Bureau of Indian Affairs)	
an agency of the United States)	
1849 C Street, N.W.)	
MS 3070 - MIB)	
Washington, DC 20240)	
)	
Defendant.)	

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This action is brought to remedy violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.* Specifically, it challenges the failure of the Defendant, U.S. Fish & Wildlife Service (“FWS”), to make a determination and provide responsive documents within the time required by FOIA in regard to a request for information.

2. FWS failed to make any determination or even respond to Friends of Animals’ (“FoA”) July 7, 2015, FOIA request for information seeking seeks records since July 1, 2012 pertaining to wild horses on federal public lands (hereinafter “the Request” and attached as Exhibit A). Specifically, FoA requested documentation of 1) the location of wild horses and/or burros on lands managed by FWS, including those held in trust for Native American tribes; (2) the population size of each wild horse and/or burro herd located on lands

managed or held in trust by BIA; and (3) the management of each wild horse and/or burro herd located on lands managed or held in trust by BIA since the above stated date.

3. As of the date on this Complaint, BIA has not provided any information in response to FoA's Request.

4. BIA is unlawfully withholding public disclosure of information that FoA is entitled to receive under FOIA. BIA failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving these requests within the time required by law. Accordingly, Plaintiff seeks declaratory relief establishing that BIA has violated FOIA. Plaintiff also seeks injunctive relief directing BIA to promptly provide FoA with the requested material free of cost.

JURISDICTION AND VENUE

5. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between FoA and BIA FWS. The Court has jurisdiction, upon receipt of a complaint, "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).

6. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in a judicial district where the complainant resides or has a principle place of business. Here Friends of Animals' Wildlife Law Program, which submitted the Request, resides in Colorado and has a principle place of business in Centennial, Colorado.

PARTIES

7. Friends of Animals is a non-profit international advocacy organization with nearly 200,000 members. FoA incorporated in the state of New York since 1957, and has offices in Darien, CT, New York, NY, Ashville, N.C. and Centennial, CO.

8. FoA seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. FoA engages in a variety of advocacy programs in support of these goals. FoA informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called ActionLine, its website, and other reports. FoA has published articles and information advocating for the protection of species so that they can live unfettered in their natural habitats. As part of its mission to inform its members about issues affecting animals, FoA has submitted several FOIA requests in the past, and FoA plans to continue submitting FOIA requests in the future.

9. FoA's Wildlife Law Program was established in 2013. The mission of the program is to fill a niche between animal and environmental activism. Animal activists often fail to fully utilize the array of local, state, federal and international environmental laws as a means to protect the rights of animals to live free from human interference. Environmental activists often utilize these laws, but do so to achieve broad environmental objectives that may not always protect the rights of free-living animals. The mission of the Wildlife Law Project is to utilize the law for a singular purpose: to ensure the right of all wildlife to live in an ecosystem free from human manipulation, exploitation, or abuse.

10. The Wildlife Law Program is located in offices at 7500 E. Arapahoe Road, Suite 385, Centennial, CO 80108.

11. FoA and the Wildlife Law Program have been actively advocating for the protection of the wild horses that are subject of Request. FoA is a leading organization advocating for the preservation of wild horses on public lands. FoA has published articles

on wild horses. Members of FoA regularly visit herd management areas to view, appreciate, study, and photograph wild horses.

12. FoA qualifies as a noncommercial requester under the standard established by Congress in the FOIA.

13. BIA, the Bureau of Indian Affairs, is an agency housed within the Department of Interior. BIA is an agency within the meaning of 5 U.S.C. § 552(f). BIA has possession and control of the requested records and is responsible for fulfilling FoA's FOIA Request. The requested records, which the agency has not previously disclosed to the public, will be informative to FoA and will increase FoA's, its members', and the public's understanding of the location, population size and management of horses on BIA administered lands.

LEGAL FRAMEWORK

A. Freedom of Information Act.

14. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose those records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

15. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

16. Upon determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

17. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual

circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B).

18. With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit; (2) provide the requester with an opportunity to limit the scope of the request so that it may be processed within that time limit or provide an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request; and (3) make available its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the agency. *Id.* at 5 U.S.C. § 552(a)(6)(B)(ii).

19. As a general matter, a FOIA requester must exhaust administrative appeal remedies before seeking judicial redress. However, if an agency does not adhere to certain statutory timelines (twenty workdays or thirty workdays in “unusual circumstances”), then by statute the requester is deemed to have fulfilled the exhaustion requirement. *See id.* at § 552(a)(6)(C)(i).

B. Fee Waiver Requests

20. In general, a FOIA requester must pay reasonable costs for the search, review, and duplication of the records sought. *Id.* at § 552(a)(4)(A)(ii)(I). However, an agency must waive or reduce fees for furnishing documents if: (1) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “is not primarily in the commercial interest of the requester.” *Id.* at § 552(a)(4)(A)(iii).

21. In reviewing an agency’s determination on a fee waiver issue, a district court must apply a *de novo* standard of review and look only to the administrative record that was before the agency at the time of its decision. 5 U.S.C. § 552(a)(4)(A)(vii)

22. FOIA’s fee waiver provision “is to be liberally construed in favor of waivers

for noncommercial requesters.” 132 Cong. Rec. 27, 90 (1986).

23. According to the Department of Interior’s regulations, if an agency denies your request for a fee waiver, it will notify you, in writing, of the following:

- 1) The reasons for the denial;
- 2) The name and title or position of each person responsible for the denial of the request;
- 3) The requester’s right to appeal such denial and the title and address of the official to whom such appeal is to be addressed; and
- 4) The requirement that such appeal be made within 30 days of the date of the denial.

43 C.F.R. § 2.19(c).

24. If the agency fails to respond to a waiver request within twenty days, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review.

25. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

26. FoA submitted Request on July 7, 2015 to BIA.

27. FoA has not received any acknowledgement of the FOIA from an employee of BIA.

28. The twenty-day workday time limit for responding to the Request passed on or about August 4, 2015.

29. BIA did not respond by August 4, 2015, and to this date has still not produced any information responsive to Request.

30. BIA has not made a determination on FoA’s fee waiver request with respect to Request in this case.

31. BIA is unlawfully withholding public disclosure of information sought by FoA, information to which it is entitled to receive, and for which BIA has not provided a valid disclosure exemption.

32. BIA has offered no reasonable explanation for its delay, and it has been unwilling to estimate when it will finally be able to comply with its obligations under the FOIA.

CAUSE OF ACTION

(Violation of Freedom of Information Act)

33. FoA herein incorporates all allegations contained in the proceeding paragraphs.

34. FoA properly requested records within BIA's control with regard to Request.

35. BIA has failed to produce records to FoA in a full and timely response to the FOIA requests, has failed to make any claims of statutory exemption with regard to the requested documents, and has failed to make a timely determination on FoA's request for a fee waiver.

36. Accordingly, FoA is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested in Request.

PRAYER FOR RELIEF

FoA respectfully requests that the Court enter judgment providing the following relief:

1. Declare that the BIA violated the Freedom of Information Act by failing to lawfully satisfy, in full, FoA's Request;
2. Order the BIA to process and release immediately all records responsive to Request at no cost to Plaintiff;
3. Retain jurisdiction of this action to ensure the processing of Request and ensure that no agency records are wrongfully withheld;
4. Award FoA costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and

5. Grant FoA any other relief that the Court deems just and proper.

Dated: January 26, 2016

Respectfully Submitted,

/s/ Michael Harris
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