### **EXHIBIT A**



## Sea Shepherd Legal

P.O. Box 340 Greenbank, WA 98253 +1 206-453-0012 www.seashepherdlegal.org

March 13, 2017

### Submitted exclusively via FOIA Online

Office of the Naval Inspector General ATTN: Legal Office FOIA Officer 1254 9th Street, S.E. Building 172 Washington Navy Yard, DC 20374-5006

Re: Freedom of Information Act Request for Records Regarding Vaquita Capture Plan

### Greetings:

I am writing on behalf of Sea Shepherd Legal (SSL) with a request for records maintained by the Department of the Navy (Navy) regarding a reported plan to locate and capture critically endangered *Phocoena sinus* (vaquita) in the Gulf of California using Navy-trained dolphins. Consistent with SSL's mission and pursuant to 32 C.F.R. Chapter VI, Part 701 and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I respectfully request the following records from the Navy:

- 1. All records regarding compliance with the National Environmental Policy Act in connection with any plan, proposal, or idea to locate and capture vaquita using Navy resources.
- 2. All records regarding compliance with the Endangered Species Act, including but not limited to records regarding permits under Section 10, in connection with any plan, proposal, or idea to locate and capture vaquita using Navy resources.
- 3. All records regarding compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including any permits associated with export or import of covered species, in connection with any plan, proposal, or idea to locate and capture vaquita using Navy resources. Here, we note that the vaquita is listed in CITES Appendix I, while the bottle-nosed dolphin (Tursiops truncates) is listed in CITES Appendix II.

- 4. All records regarding any communications between the Navy and the National Oceanic and Atmospheric Administration, including but not limited to communications with the Southwest Fisheries Science Center, related to any plan, proposal, or idea to locate and capture vaquita using Navy resources.
- 5. All records regarding any communications between the Navy and government officials in Mexico, including but not limited to communications with agents of the Mexican Navy, the National Institute of Fisheries and Aquaculture (INAPESCA), the National Commission of Fisheries and Aquaculture (CONAPESCA), and the Secretariat of Environment and Natural Resources (SEMARNAT), related to any plan, proposal, or idea to locate and capture vaquita using Navy resources.
- 6. All records regarding any communications between the Navy and the International Committee for the Recovery of the Vaquita (CIRVA) related to any plan, proposal, or idea to locate and capture vaquita using Navy resources.

The items specifically requested are not meant to be exclusive of any other documents that, although not specially requested, have a reasonable relationship to the subject matter of this request. "Documents" and "records" includes, but are not limited to, all permits, agreements, contracts, surveys, field notes, correspondence, minutes, memoranda, maps, plans, drawings, emails, reports, databases, emails, faxes, and notes. This request includes all documents that have ever been within your custody or control, including all inter- and intra-agency documents, whether they exist in agency working, investigative, retired, electronic mail, or other files currently or at any other time.

#### REQUEST FOR FEE WAIVER

SSL requests that the Navy waive all fees in connection with the procurement of this information pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). As demonstrated below, the nature of this request meets the test for fee waiver as expressed in FOIA, 5 U.S.C. § 552(a)(4)(A)(iii).

In deciding whether the fee waiver criteria are satisfied, SSL respectfully reminds the Navy that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01 (statement of Sen. Leahy) ("[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information."). Furthermore, the federal appellate courts have interpreted this fee waiver section broadly, holding that the section is to be "liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir.1987) (citing Sen. Leahy)); *accord Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

# I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

# A. The subject of the disclosure concerns "the operations and activities of the government."

The requested information pertains to the Navy's involvement in efforts to save the vaquita porpoise from extinction. The vaquita is the world's most endangered marine mammal. Its population numbers have declined dramatically over the past decade, with the most recent estimate pointing to fewer than 30 vaquita remaining.<sup>1</sup>

According to widely published reports, the Navy is planning to assist in a last-ditch effort to save the vaquita through capture and breeding.<sup>2</sup> News reports state that "U.S. Navy dolphins trained in San Diego may soon be flown to Mexico to round up and capture endangered vaquita porpoises."<sup>3</sup> While this capture plan was once viewed as only a remote possibility, recent reports suggest that the Navy and others are actively preparing for its execution in the near future, perhaps as soon as October 2017.<sup>4</sup>

The information sought by SSL is of the utmost concern to the public. The Navy's activities relating to the vaquita capture plan are clearly identifiable operations and activities of the government. This disclosure will demonstrate to the public at large how the Navy's resources might be used in a highly controversial effort to save one of the world's most endangered animals.

# B. The disclosure is "likely to contribute significantly to public understanding" of government operations or activities.

As discussed in the previous section, the present disclosure by the Navy will provide the public a better understanding of the nature of the Navy's plans and activities regarding the vaquita. SSL is a public interest organization that will utilize this information to gain a better understanding of the Navy's operations. We inform, educate and counsel the public—via legal action, our website, our weblog, and ongoing training and capacity-building activities—on risks to marine wildlife and habitat. SSL works to achieve its goals through policy work, education, and

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<sup>&</sup>lt;sup>1</sup> Elisabeth Malkin, *Before Vaquitas Vanish, a Desperate Bid To Save Them*, THE NEW YORK TIMES (Feb. 27, 2017).

<sup>&</sup>lt;sup>3</sup> CBS 8 (San Diego), *Risky Roundup: Navy Dolphins To Help Capture Mexican Porpoises* (Feb. 25, 2017), available at <a href="http://www.cbs8.com/story/34602912/risky-roundup-navy-dolphins-to-help-capture-mexican-porpoises">http://www.cbs8.com/story/34602912/risky-roundup-navy-dolphins-to-help-capture-mexican-porpoises</a>.

<sup>4</sup> Id.

litigation. Accordingly, SSL is an effective vehicle to disseminate information on the activities of the Navy as they relate to the critically endangered vaquita.

Simultaneously, this FOIA request will help SSL fulfill its well-established function of public oversight of government action. Public oversight of agency action is a vital component in our democratic system and is the bedrock principle upon which FOIA is built.

#### II. Obtaining the information is of no commercial interest to SSL.

SSL is a 501(c)(3) nonprofit, public interest environmental law firm with a mission to save marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. SSL works on a range of matters from ensuring proper governmental agency action to developing innovative policy approaches to encourage greater protections for marine wildlife and ecosystems.

Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does SSL seek information from the Navy for commercial gain or interest. Upon request and free of charge, SSL will provide members of the public with relevant information obtained from the Navy.

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Based upon the foregoing, SSL asks that this FOIA request be classified within the Navy's fee waiver category and that the Navy send the requested information as required by law.

As this is a time-sensitive matter, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous, please contact me to discuss the proper scope of the response.

If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink and provide a ledger with as much information as possible regarding the redacted information. Please provide any and all non-exempt portions of any document that may be partially exempt, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

To expedite our review of the records, we kindly ask that you upload responsive documents to FOIA Online or send responsive documents via electronic mail to the address listed below.

Should physical delivery be necessary, please send all materials to P.O. Box 340, Greenbank, Washington 98253.

You may call me at (503) 836-5260 if you have any further questions about this request. Thank you for your prompt attention to this matter.

Sincerely,

### s/Nicholas Fromherz

Nicholas Fromherz Senior Attorney Sea Shepherd Legal (503) 836-5260 nick@seashepherdlegal.org

### **EXHIBIT B**

### Case 2:17-cv-00720-RSM Document 1-6 Filed 05/08/17 Page 8 of 20



#### **DEPARTMENT OF THE NAVY**

OFFICE OF THE CHIEF OF NAVAL OPERATIONS 2000 NAVY PENTAGON WASHINGTON, DC 20350-2000

> 5720 Ser DNS-36DB/17U104665 April 17, 2017

Sent via email to: nick@seashepherdlegal.org

Mr. Nicholas Fromherz P.O. Box 340 Greenbank, WA 98253

Dear Mr. Fromherz:

This is reference to your Freedom of Information Act (FOIA) request dated March 13, 2017. Your request was received in our office on March 15, 2017 and was assigned case number DON-NAVY-2017-004425.

Although the FOIA/PA stipulates a response to your request in 20 days, in "unusual circumstances" an agency can extend the twenty-day time for processing a FOIA/PA request if it informs the requester of why it needs the extension and of when it will make a determination on the request. The FOIA/PA defines unusual circumstances as (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous amount of records required by the request; (3) the need to consult with another agency or agency component and rely upon them to locate and review the records.

In this instance, we must consult with other Naval components and we are relying upon them to accept cognizance over the request and review the records requested. We are availing ourselves of the 10 working days extension of response time provided in the Department of the Navy FOIA/PA regulations (32 CFR  $\S701.8(g)(2)$ ). We will notify you of an anticipated date for a final determination as soon as we can make such an estimate.

If you are not satisfied with this action, under 32 CFR §701.12(a), you may appeal the extension of the statutory twenty days for processing your request by writing to:

Office of the Judge Advocate General 1322 Patterson Ave, SE, Ste. 3000 Washington Navy Yard, DC 20374-5066

Your appeal must be postmarked within ninety calendar days from the date of this letter. A copy of your initial request and this letter must accompany the appeal. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" both on the envelope and the face of the letter.

In order to expedite the appellate process and ensure full consideration of your appeal, your appeal should contain a brief statement of the reasons you believe this initial decision to be in error.

For this determination, you have the right to seek dispute resolution services from either the DoD Navy Component FOIA Public Liaison, Mr. Chris Julka, at:

Christopher.a.julka@navy.mil, via phone: (703) 697-0031; or by contacting the Office of Government Information Services at: (<a href="https://ogis.archives.gov/">https://ogis.archives.gov/</a>), (202) 741-5770, ogis@nara.gov.

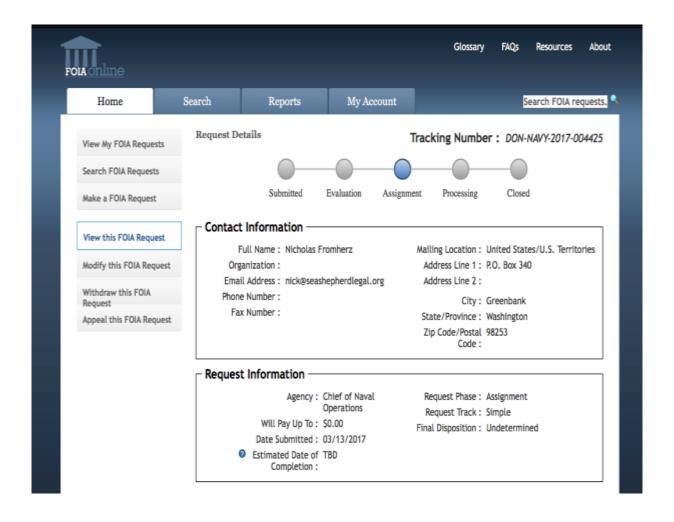
Questions regarding the action this office has taken during the initial processing of your request may be directed to our FOIA service center at (202) 685-0412.

Sincerely,

R. Patterson

Head, DON PA/FOIA Policy Office

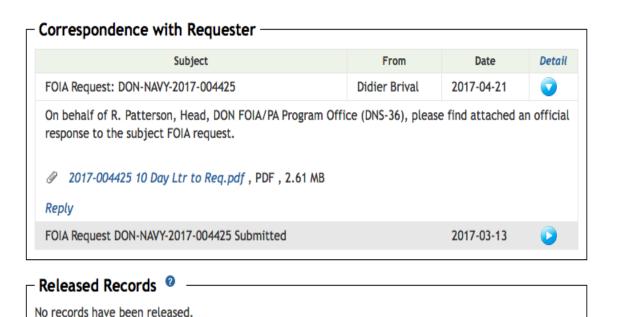
### **EXHIBIT C**



### **EXHIBIT D**



On behalf of R. Patterson, Head, DON FOIA/PA Program Office (DNS-36), please find attached an official response to the subject FOIA request.



CANCEL

### **EXHIBIT E**



## Sea Shepherd Legal

P.O. Box 340 Greenbank, WA 98253 +1 206-453-0012 www.seashepherdlegal.org

April 24, 2017

### Submitted via Email Only

Robin Patterson
Head, DON FOIA/PA Policy Office
Department of the Navy
Office of the Chief of Naval Operations
2000 Navy Pentagon
Washington, DC 20350-2000
DONFOIA-PA@navy.mil

Re: Case Number DON-NAVY-2017-004425

Dear Ms. Patterson:

This letter serves as Sea Shepherd Legal's (SSL) response to your correspondence dated April 17, 2017. As explained below, the Department of the Navy (Navy) has violated the statutory time limits under the Freedom of Information Act (FOIA). Moreover, given this clear violation, the law holds that SSL has exhausted its administrative remedies and may proceed directly with litigation in federal court.

### I. The Navy Has Violated FOIA and May Not Invoke "Unusual Circumstances."

FOIA is designed to achieve the "goal of prompt disclosure of information." *Stonehill v. IRS*, 558 F.3d 534, 538 (D.C. Cir. 2009). As such, when an agency receives a FOIA request, the default rule provides that the agency has only twenty working days in which to make a determination on the request. 5 U.S.C. § 552(a)(6)(A)(i). Exceptions to this default, including the "unusual circumstances" exception, are "narrowly defined" so as not to undermine the overall goal of prompt disclosure. *See Piper v. R. J. Corman R.R. Group*, 2005 U.S. Dist. LEXIS 13042, \*28 (E.D. Ky. Jun. 28, 2005) ("Under certain narrowly defined unusual circumstances, the amended FOIA grants agencies an extra ten business days to process a request if the agency provides notice of this extension to the requester.") (internal quotation marks omitted).

As always, there is a mathematical component to determining compliance with FOIA's deadlines. Unfortunately, this normally simple exercise is complicated by the Navy's use of inconsistent dates in this matter.

While acknowledging that SSL's FOIA request was sent on March 13, 2017 (a Monday), the Navy states that the request was "received in our office on March 15, 2017" (a Wednesday). *See* Letter from NAVY (dated April 17, 2017) at 1. However, this assertion is completely at odds with the fact that SSL submitted its request electronically via FOIAonline, which shows a received submission on March 13. *See* Appendix I, FOIAonline Screenshot. The Navy has provided no explanation for this lag time of two full business days.

Yet, even if we use the receipt date most generous to the Navy (March 15), twenty working days have long since passed. The twentieth working day following March 15 was April 12. (Notably, there were no federal holidays during this period.) Despite the expiration of this time-period, the agency has failed to make a determination.

To escape the consequences of this *prima facie* FOIA violation, the Navy attempts to invoke the ten-day extension available for "unusual circumstances." Nevertheless, for two principal reasons, the Navy has *not* properly invoked the "unusual circumstances" provision.

## A. The Navy failed to notify SSL of its invocation of "unusual circumstances" until after the twenty-day period had lapsed.

First, and most importantly, the Navy failed to notify SSL of its invocation of "unusual circumstances" until several days *after* the twenty-day period had lapsed. The authority for an extension in the event of "unusual circumstances" comes from 5 U.S.C. § 552(a)(6)(B)(i), which provides as follows:

In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) [the twenty-day period] *may be extended by written notice* to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

5 U.S.C. § 552(a)(6)(B)(i) (emphasis added). As this language and common sense make clear—and as case-law confirms—this provision requires notice *prior* to the expiration of the twenty-day period.

Were they any doubt, the Fourth Circuit's decision in *Coleman v. DEA*, 714 F.3d 816 (4th Cir. 2013), puts the matter to rest. In *Coleman*, the court recited the basic rule governing an extension for "unusual circumstances," and then went on to hold that the DEA failed to properly invoke the extension by not asserting it prior to expiration of the twenty-day period. The court ruled as follows:

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<sup>&</sup>lt;sup>1</sup> Notably, per the Navy FOIA Business Process and FOIAonline Integration Training manual, the received date indicated on the FOIAonline system is the "perfected" date from which the twenty-day determination period begins to run. *See* <a href="http://www.doncio.navy.mil/uploads/FOIA%20SOP%20(6-4-14).pdf">http://www.doncio.navy.mil/uploads/FOIA%20SOP%20(6-4-14).pdf</a> (last accessed April 24, 2017).

The DEA received the request several days later on March 4, 2008. Pursuant to FOIA, the agency had twenty working days to determine whether to comply with the request and notify Coleman of that determination. See 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day period expired on April 1, 2008, and no response or notice of unusual circumstances was sent to Coleman by that date, placing the DEA in violation of FOIA's time-limit provisions.

Id. at 820-21 (emphasis added).

Like the DEA in *Coleman*, the Navy in the present matter did not attempt to invoke "unusual circumstances" prior to the expiration of the twenty-day period. In fact, the Navy held its peace until well after the twenty-day period expired. Even if the date of receipt were, as the Navy asserts, March 15, the twentieth working day thereafter was April 12. The Navy did not send its letter until April 21. *See* Appendix II, Screenshot of Email with Letter Attached (email date-stamped April 21, 2017; letter dated April 17, 2017). No matter the approach, the Navy has lost any opportunity to invoke the ten-day extension.

## B. The Navy failed to indicate "the date on which a determination is expected to be dispatched."

Section 552(a)(6)(B)(i) does not simply require the agency to provide prior written notice setting forth the unusual circumstances; it also requires the agency to set forth "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i). The Navy has also failed to satisfy this basic requirement, simply stating that it "will notify [SSL] of an anticipated date for a final determination as soon as we can make such an estimate." Letter from NAVY (dated April 17, 2017) at 1.

Finally, it bears mentioning that, even if we use March 15 as the date of receipt and further assume that the Navy has properly invoked "unusual circumstances"—which it has not—the thirtieth working day following receipt is April 26. This means that the Navy, even had it properly invoked "unusual circumstances," would have just two working days from the date of the present communication to make a determination.

## II. SSL Has Exhausted Its Administrative Remedies and May Proceed Directly with Litigation.

In light of the above statutory violation, the Navy improperly suggests that SSL must pursue an administrative appeal if unsatisfied with the agency's action to date. Because the Navy has failed to comply with the statutory framework, the law allows SSL to file suit directly in federal court.

As a general proposition, a FOIA requester must exhaust administrative remedies prior to suing in court. "But if an agency does not adhere to certain statutory timelines in responding to a FOIA request, the requester is deemed by statute to have fulfilled the exhaustion requirement." Citizens for Responsibility & Ethics in Wash. v. FEC, 711 F.3d 180, 182 (D.C. Cir. 2013); see also 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records under

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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.").

As the court explained in *Citizens for Responsibility*, the consequence of an agency's failure to comply with the statutory deadline is the lifting of the exhaustion bar: "[I]f the agency has not issued its 'determination' within the required time period, the requester may bring suit directly in federal district court without exhausting administrative appeal remedies." *Citizens for Responsibility & Ethics in Wash.*, 711 F.3d at 182.<sup>2</sup>

In this case, the Navy has "not issued its 'determination' within the required time period[.]" *Id.* As a consequence, SSL may forgo an administrative appeal and file suit under 5 U.S.C. § 552(a)(4)(B). Should SSL substantially prevail, it will be entitled to collect its reasonable fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

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In sum, the Navy is not entitled to a ten-day extension for "unusual circumstances," and SSL need not exhaust administrative remedies prior to suing in federal court. Nevertheless, in the spirit of compromise, SSL is willing to wait until April 26 for the Navy's determination on SSL's FOIA request. If the Navy fails to meet this generous deadline, SSL intends to file suit under 5 U.S.C. § 552(a)(4)(B). Please note, that by offering this compromise solution, SSL is not acknowledging (and, in fact, directly disputes) that April 26 is the correct date on which the Navy's determination is due, or otherwise waiving any of its rights in subsequent litigation.

Should you wish to discuss this matter further, please contact me at the below email address or telephone number.

Sincerely,

s/Nicholas A. Fromherz

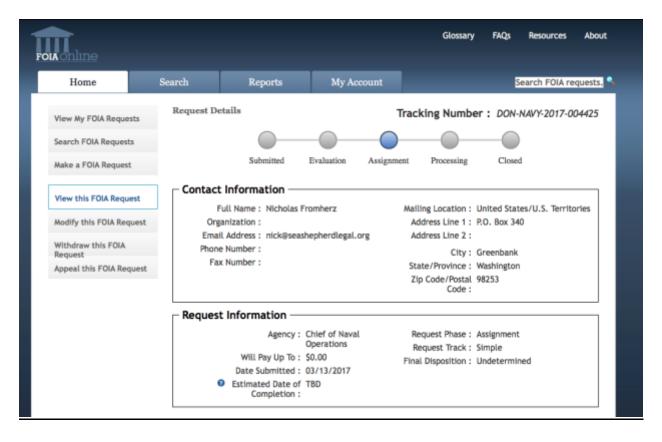
Nicholas A. Fromherz Senior Attorney Sea Shepherd Legal (503) 836-5260 nick@seashepherdlegal.org

Enclosures: Appendices (2)

<sup>&</sup>lt;sup>2</sup> We also note the court's holding that "[t]he agency cannot make the requisite 'determination' by simply stating its future intent to produce some non-exempt documents." *Citizens for Responsibility & Ethics in Wash.*, 711 F.3d at 188. In this case, of course, the Navy has not even done that much.

### **APPENDIX I:**

#### FOIAonline Screenshot



### **APPENDIX II:**

Screenshot of Email with Letter Attached (email date-stamped April 21, 2017; letter dated April 17, 2017)

