

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

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, an agency of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Friends of Animals, brings this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Specifically, Friends of Animals challenges the failure of the United States Bureau of Land Management (BLM) to provide responsive documents within the time required under FOIA.

2. On January 29, 2019, Friends of Animals submitted a FOIA request to BLM for documents and records held by BLM, BLM's Oregon/Washington State Office, and/or BLM's Oregon District Offices for the time period starting January 1, 2017 through the date of the FOIA request, related to wild horses and burros euthanized and/or otherwise killed on public and private land in Oregon (Control Number FOIA 2019-00440).

3. Friends of Animals requested all records in BLM's possession, whether received, created, and/or distributed by BLM, that relate to or mention: (1) wild horses and burros euthanized or otherwise killed by BLM employees on public and private land in Oregon; (2) wild horses and burros euthanized or otherwise killed by BLM contractors on public and private land in Oregon; (3) discoveries of remains of more than one wild horse

or burro, including bone remains, on public and private land in Oregon; and (4) discoveries or evidence of poaching incidents of wild horses and burros on public and private land in Oregon.

4. As of the date of this Complaint, BLM has not issued any documents in response to this request.

5. BLM is unlawfully withholding public disclosure of information that Friends of Animals is entitled to receive under FOIA. BLM failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide documents resolving Friends of Animals' request within the time required by law. Accordingly, Friends of Animals seeks declaratory relief establishing that BLM violated FOIA. Friends of Animals also seeks injunctive relief directing BLM to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

7. This Court has the authority to grant 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) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiff and Defendant. This 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).

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

under 28 U.S.C. § 1391(b) because Defendant is subject to the Court's personal jurisdiction in this judicial district.

PARTIES

9. Plaintiff, FRIENDS OF ANIMALS, is a non-profit international advocacy organization incorporated in the State of New York since 1957. Friends of Animals has nearly 200,000 members and is the requester of the records that Defendant, BLM, is now withholding. Friends of Animals has offices in Darien, Connecticut and Centennial, Colorado. Friends of Animals' Wildlife Law Program, the office filing this Complaint was established in 2013 and is located at 7500 E. Arapahoe Road, Suite 385, Centennial, Colorado.

10. Friends of Animals 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. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues, and the organization's progress in addressing these issues, through its magazine, *Action Line*, its website, social media, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife species, including wild horses, so that they can live unfettered in their natural habitats. Friends of Animals regularly submits requests under FOIA to further its goals and mission. BLM's refusal to comply with FOIA injures Friends of Animals, its members, and its staff by preventing them from using the requested information to advocate for their mission.

11. Defendant, UNITED STATES BUREAU OF LAND MANAGEMENT, is an agency of the United States housed within the Department of the Interior and has possession of the documents that Plaintiff, Friends of Animals, seeks. BLM is an agency within the meaning of 5 U.S.C. § 552(f). BLM has possession and control of the requested records and is responsible for fulfilling Friends of Animals' FOIA request.

LEGAL FRAMEWORK: FREEDOM OF INFORMATION ACT

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. *Dep't of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires agencies of the United States government to promptly disclose their records, unless the government can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the public—to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

13. 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 therefor” and, in the case of an adverse determination, the right of such person to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

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

15. In “unusual circumstances” an agency may extend the time limits 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.* § 552(a)(6)(B). 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 specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

17. 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).

18. Department FOIA regulations provide for a tracked response process that distinguishes requests based on the estimated number of workdays needed to respond. 43 C.F.R. § 2.15(a). “Simple” requests take between one to five workdays to process; “Normal” requests take between six to twenty workdays to process; “Complex” requests take between twenty-one and sixty workdays to process; and “Exceptional/Voluminous” requests, which involve “very complex processing challenges” and potentially include a large number of responsive records, take over sixty workdays to process. *Id.* § 2.15(c)(1)-(4).

19. The agency must advise the requestor of the track into which the request falls. *Id.* § 2.15(e).

20. The use of multi-track processing does not alter FOIA’s statutory deadline for an agency to determine whether to comply with the FOIA request. *Id.* § 2.15(f). An agency must make a determination whether to comply with the FOIA request, and notify the requester accordingly, within the mandatory deadlines described above.

21. United States district courts have 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).

FACTUAL BACKGROUND

22. Friends of Animals submitted its FOIA request to BLM’s National FOIA Office on January 29, 2019. The FOIA request was submitted via email and via certified mail.

23. Friends of Animals requested “copies of all documents and records held by BLM, BLM’s Oregon/Washington State Office, and/or BLM’s Oregon District Offices relating to wild horses and burros euthanized and/or otherwise killed in Oregon for the time period starting January 1, 2017 through the date of this FOIA request.”

24. Specifically, Friends of Animals requested all records in the possession of BLM, “whether received, created, and/or distributed by BLM, BLM’s Oregon/Washington State Office, and/or BLM’s Oregon District Offices, that relate to or mention: (1) wild horses and burros euthanized or otherwise killed by BLM employees on public and private land in Oregon from January 1, 2017 to the date of the FOIA request; (2) wild horses and burros euthanized or otherwise killed by BLM contractors on public and private land in Oregon from January 1, 2017 to the date of the FOIA request; (3) discoveries of remains of more than one wild horse or burro, including bone remains, on public and private land in Oregon from January 1, 2017 to the date of the FOIA request; and (4) discoveries or evidence of poaching incidents of wild horses and burros on public and private land in Oregon from January 1, 2017 to the date of the FOIA request.”

25. The certified mail receipt indicates that Friends of Animals’ FOIA request was received by BLM’s National FOIA Office on February 4, 2019. Therefore, an initial response from BLM was due by March 4, 2019.

26. After receiving no response or correspondence from BLM by March 4, 2019, Friends of Animals emailed BLM’s National FOIA Office on March 7, 2019 asking for acknowledgment that the request was received as well as a date when Friends of Animals could expect records and a date of completion.

27. On the same day, Friends of Animals received two emails from BLM’s National FOIA Office. The first email acknowledged receipt of the request dated January 29, 2019 and noted that BLM logged the request in under control number 2019-00440. The first email also classified Friends of Animals as a representative of the news media and

noted that it did “not anticipate any charges for the cost of processing this request.” BLM also stated that the request fell under the “complex” track.

28. The second email “updated” the acknowledgment, but reclassified Friends of Animals as an “other” requester and stated that Friends of Animals may be charged for some search and duplication costs.

29. On the same day, in response to the second email, Friends of Animals emailed BLM’s National FOIA Office requesting that BLM verify whether information in the first email applied, including: (1) whether BLM still did not anticipate any charges for the cost of processing the request; (2) whether the request still fell within the “complex” track; and (3) whether BLM still anticipates that any fees associated with the request will not exceed the agency threshold of \$50.

30. On the same day, in response to Friends of Animals verification email, BLM stated that it could not verify whether information in the first email applied because “that would be up to the subject matter expert to determine.” BLM also noted that Friends of Animals would be notified if there were costs associated with the request before BLM proceeded with the request.

31. After receiving no documents or additional correspondence from BLM, on May 22, 2019, Friends of Animals sent another email to BLM’s National FOIA Office asking for a date of completion as well as any other additional information as to when Friends of Animals could expect to receive documents in response to the FOIA request.

32. Friends of Animals received no response to the May 22, 2019 email.

33. On May 24, 2019, Friends of Animals emailed the Acting FOIA Officer and Public Liaison at BLM’s National FOIA Office requesting a date of completion as well as any other additional information as to when Friends of Animals could expect to receive documents related to the FOIA request.

34. On May 29, 2019, the Acting FOIA Officer and Public Liaison at BLM's National FOIA Office responded to Friends of Animals' email from May 24, 2019 stating that she would "look into this and get right back" to Friends of Animals.

35. As of the date of the Complaint, Friends of Animals has not received any additional email responses or correspondence from BLM's National FOIA Office or BLM's Acting FOIA Officer and Public Liaison at BLM's National FOIA Office.

36. After receiving no documents and no additional correspondence from BLM, Friends of Animals sent a final email on June 12, 2019 once again requesting a date of completion as well as any other relevant information that could inform Friends of Animals as to when Friends of Animals would receive a response to the FOIA request.

37. Friends of Animals received no response to the June 12, 2019 email.

38. As of the date of this Complaint, BLM has not provided any documents in response to Friends of Animals' FOIA request.

39. BLM has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will comply with its obligations under FOIA.

40. BLM is unlawfully withholding public disclosure of information sought by Friends of Animals, information to which Friends of Animals is entitled to receive, and for which BLM has not provided a valid disclosure exemption.

CLAIM FOR RELIEF
(Violation of the Freedom of Information Act)

41. Friends of Animals herein incorporates all information and allegations contained in the preceding paragraphs.

42. Friends of Animals properly requested records within the control of BLM on January 29, 2019.

43. BLM failed to release the records Friends of Animals requested and failed to make any claims of statutory exemption regarding the requested records.

44. As of the date of this Complaint, BLM has not provided any documents or records in response to Friends of Animals' FOIA request.

45. As of the date of the Complaint, BLM has not made any claims of statutory exemption with regard to the records and documents requested in Friends of Animals' FOIA request.

46. Accordingly, Friends of Animals is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

- A. Declare that BLM violated the Freedom of Information Act by failing to lawfully satisfy Friends of Animals' request under the Freedom of Information Act;
- B. Order BLM to process and immediately release all records responsive to Friends of Animals' request at no cost to Friends of Animals;
- C. Retain jurisdiction of this action to ensure the processing of Friends of Animals' request, and to ensure that no agency records are wrongfully withheld;
- D. Award Friends of Animals costs, including reasonable attorney fees and litigation costs in this action, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); and
- E. Grant Plaintiff any other relief that the Court deems just and proper.

Dated: June 13, 2019

Respectfully submitted,

/s/ Courtney R. McVean

Courtney Renee McVean (CO Bar # 48358)

Friends of Animals, Wildlife Law Program

7500 E. Arapahoe Rd., Suite 385

Centennial, CO 80112

720-949-7791

courtney.mcvean@friendsofanimals.org

Attorney for Plaintiff