

ATTACHMENT F



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July 8, 2019

David Smith, Superintendent
Joshua Tree National Park
74485 National Park Drive
Twentynine Palms, CA 92277-3597

Re: Expedited Processing Request for the February 21, 2019 Freedom of Information Act Request and the July 8, 2019 Supplemental Freedom of Information Act Request

Dear Superintendent Smith:

Pursuant to the Freedom of Information Act (“FOIA”), and on behalf of National Parks Conservation Association (“NPCA”), I request that you expedite the FOIA Request submitted to you on February 21, 2019 (the “Initial Request”) and the Supplemental FOIA Request submitted to you on July 8, 2019 (the “Supplemental Request”) (together, the “Requests”).

Background

On February 21, 2019, I submitted the Initial Request on behalf of NPCA to you via email. The Initial Request, a copy of which is attached, sought records in the possession or control of Joshua Tree National Park (“JOTR”) relating to the Department of the Interior’s and NPS’s (together, the “Department”) January 2018 contingency plan (the “2018 NPSCP”), under which units of the National Park System were to be kept accessible to visitors during any lapse of appropriations. The Initial Request also sought records relating to the Department’s January 2019 updated contingency plan (the “2019 Revised Plan”), which readopted the 2018 NPSCP but also included a provision that “[p]arks that collect fees under the Federal Lands Recreation Enhancement Act (“FLREA”) will utilize available retained recreation fees balances to provides basic visitor services . . .”¹ The Initial Request also sought records relating to implementation of these Plans at JOTR, and the effects of the implementation, during the 2018-2019 lapse of appropriations and consequent shutdown of the federal Government.

¹ *National Park Service’s Revised Contingency Plan*, <https://www.doi.gov/sites/doi.gov/files/2018-01-nps-contingency-plan.pdf> (Jan. 2019).

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On February 21, 2019, you acknowledged receipt of the Initial Request. On June 5, 2019, I notified you via email that I had not received a response to the Initial Request and asked for an update regarding when to expect a response and the requested documents. On the same day, you asked Karin Messaros via email to check on the status of the Initial Request. Neither I nor NPCA have received any other correspondence from you or other JOTR or NPS personnel in response to the Initial Request.

On July 8, 2019, I submitted the Supplemental Request, a copy of which is attached, on behalf of NPCA to you via email. The Supplemental Request seeks documents sought in the Initial Request dated or created between February 21, 2019 (the date of the Initial Request) and July 8, 2019 (the date of the Supplemental Request).

Recently, the media has reported disagreements about spending and budgetary issues between and among branches and members of Congress and the Trump Administration.² Articles have noted that another Government shutdown would occur in September or October 2019 if no agreement can be reached on the next fiscal year's budget and appropriations.³ In the meantime, Secretary of the Interior David Bernhardt has publicly suggested that, in the event of another lapse of appropriations, the Department will again keep units of the National Parks System open to public visitors under the 2019 Revised Plan and will again direct parks to use fees collected under FLREA as operating funds during the shutdown.⁴

Request for Expedited Processing

In light of the forgoing, NPCA now seeks expedited processing of the Requests pursuant to 43 C.F.R. § 2.20(c). Expedited processing is appropriate here because “a compelling need” exists for the disclosure of the requested information. 5 U.S.C. § 552(a)(6)(E)(i)(I). A compelling need exists “[w]here there is an urgency to inform the public about an actual or alleged Federal

² See Wash. Post, *GOP in disarray as budget impasse threatens shutdown, deep cuts — and default*, <https://wapo.st/2WMVBXi> (June 15, 2019); POLITICO, *House backs \$1T spending bill amid fears of a fall shutdown*, <https://www.politico.com/story/2019/06/19/house-spending-bill-1540683> (June 19, 2019). See also Wash. Post., *Trump's fallback strategy in budget battle rattles key GOP allies in Congress* (July 4, 2019) at A3.

³ See *id.*

⁴ Bernhardt Responses to Questions from Chairman Murkowski, Senate Energy and Natural Resources Committee, *available at* https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=0DAC1334-E79F-4002-841C-F4352ABF7EFA (Mar. 28, 2019).

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Government activity and the request is made by a person primarily engaged in disseminating information.” 43 C.F.R. § 2.20(a)(2).

The factor relating to the person making then request for expedition is met here. *See* 43 C.F.R. § 2.20(a)(2)(ii) (factor met where “main professional activity or occupation is information dissemination, although it need not be [the] sole occupation”). NPCA is a non-profit organization whose mission is the protection and enhancement of the National Park System. NPCA has 1.3 million members and supporters. While this is not NPCA’s only function, NPCA plays a significant role in educating its members, the public generally and Government officials about developments impacting the National Park System. NPCA regularly sends informational notices about such developments to those audiences by email, twitter and facebook; frequently comments on such matters to the media for publication; publishes and distributes fliers, a monthly magazine and quarterly “field reports” reporting on those matters; and constantly updates its website, where it publishes a significant amount of information about issues impacting the National Park System, www.npca.org. NPCA regularly publishes reports on specific issues related to parks such as air pollution and oil and gas development. In recent years, there have been a number of lapses in appropriations for the National Park System, and NPCA’s primary function as to those events has been to disseminate information to the various audiences described above about the impact of those events on the National Park System. In 2013, NPCA did so, among other means, by publishing advertisements in major newspapers.

There is also an urgency to inform the public about the records sought, because (1) the Requests concern “a matter of current exigency to the American public”; (2) “the consequences of delaying a response would compromise a significant recognized interest”; and (3) the Requests concern “federal government activity.” *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001). We address those factors below.

The Requests relate to a matter of current exigency to the American public. The information sought by the Requests concern a matter of current exigency to the public because the Department has indicated it would again implement the 2019 Revised Plan in the event that another lapse of appropriations to the Department occurs in September 2019. Both the 2018 NPSCP and the 2019 Revised Plan have proven to be controversial policies. Throughout and after the 2018-2019 shutdown, media outlets, park experts, and visitors have noted the devastating effects that the decision to keep the parks open without funding has had on numerous parks, including JOTR.⁵

⁵ *See* AP News, *Seal takeovers, downed trees: Parks clean up post-shutdown*, <https://www.apnews.com/0fd0d3b74bf24d3bb753fb1ed75148a2> (Feb. 1, 2019); Business Insider, *It could take 300 years for Joshua Tree National Park to recover from the government shutdown*, <https://www.theguardian.com/environment/2019/jan/28/joshuatree->

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Lawmakers and other observers have continued to question whether the 2018 NPSCP and the 2019 Revised Plan violate federal laws, including FLREA.⁶ A search on the Lexis Nexis database on July 7, 2019 by this firm's staff identified 7,925 news articles, starting from December 21, 2018 (the date that the media announced the Department's decision to keep the parks open),⁷ relating to national parks during the Government shutdown.⁸ 385 of these articles are dated *after* February 21, 2019 (the date of the Initial Request).⁹ Additionally, in recent months, members of Congress have questioned Mr. Bernhardt about the decision to keep the parks open and the use of FLREA funds during the shutdown.¹⁰ Other Department officials have also been questioned by members

[national-park-damage-government-shutdown](#) (Jan. 30, 2019); ThinkProgress, *Here's what happened in Death Valley during the shutdown, according to staff logs*, <https://thinkprogress.org/death-valley-national-park-shutdown-beeae102c9f1> (Feb. 6, 2019); CNN, *National Park Visitors Cut Down Protected Joshua Trees During Partial Government Shutdown*, <https://www.cnn.com/2019/01/11/us/california-joshua-trees-cut-down-during-shutdown-trnd/index.html> (Jan. 12, 2019); Wash. Post, *Three Dead in National Park System Accidents as Shutdown Wears On*, https://www.washingtonpost.com/energy-environment/2019/01/04/three-dead-national-parks-shutdown-wears/?noredirect=on&utm_term=.4258d30c9423 (Jan. 4, 2019).

⁶ See The Hill, *Dem chairwoman seeks watchdog probe of Park Service's shutdown operations*, <https://thehill.com/policy/energy-environment/437159-park-service-defends-funds-used-to-stay-open-during-shutdown> (Apr. 4, 2019); The Hill, *Park Service defends funds used to stay open during shutdown*, <https://thehill.com/policy/energy-environment/437159-park-service-defends-funds-used-to-stay-open-during-shutdown> (Apr. 3, 2019); Slate, *Close the National Parks Now*, <https://slate.com/technology/2019/01/close-national-parks-government-shutdown.html> (Jan. 16, 2019); E&E News, *Keeping Sites Open Violates U.S. Laws - Groups*, <https://www.eenews.net/eenewspm/stories/1060111729/search> (Jan. 11, 2019).

⁷ The Hill, *National Parks to Stay Open Without Staff in Government Shutdown*, <https://thehill.com/policy/energy-environment/422487-under-shutdown-national-parks-to-stay-open-without-staff> (Dec. 21, 2018).

⁸ Lexis Advance Research, Results for: "National Parks" AND "Shutdown", Lexis Nexis (July 7, 2019).

⁹ *Id.*

¹⁰ See Bernhardt Responses to Questions from Chairman Murkowski, Senate Energy and Natural Resources Committee, *available at* https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=0DAC1334-E79F-4002-841C-F4352ABF7EFA (Mar. 28, 2019); The Hill, *Dem chairwoman seeks watchdog probe of Park Service's shutdown operations*, <https://thehill.com/policy/energy-environment/437159-park-service-defends-funds-used-to-stay-open-during-shutdown> (Apr. 4, 2019).

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of Congress regarding these matters.¹¹ This extensive and recent media and congressional attention shows that the requested information is currently exigent given the concerns about another imminent application of the 2019 Revised Plan.

In the words of the D.C. Court of Appeals, the information sought is therefore “the subject of a currently unfolding story.” *Al-Fayed*, 254 F.3d at 310. It is critical that the public be able to understand these controversial governmental decisions and their implications as promptly as possible, and in any event before another government shutdown.

The consequences of delaying a response would compromise significant recognized interests. Further delay in your responding to the Requests would harm the public’s interest in transparency regarding how the Department reached the decisions underlying 2018 NPSCP and the 2019 Revised Plan, the implications of those decisions on JOTR and its visitors, and the legality of these decisions. Four months have already passed since NPCA submitted the Initial Request. Given the devastation to the environment and public health that occurred earlier this year when JOTR and other National Parks were allowed to remain open during the shutdown with only a skeletal staff, it is important that you respond to the Requests promptly to allow NPCA to inform the public, its members and supporters and policy makers about these facts as soon as possible, in the hope that they will prevail on the Department to take a different approach to managing the National Park System if another shutdown occurs than it followed in the 2018-2019 shutdown.

In addition, in NPCA’s view, the Department violated legal mandates governing its management of the National Park System, including JOTR, by implementing the NPSCP and the 2019 Revised Plan during the 2018-2019 Government shutdown. There is an urgent need for the information requested to assist NPCA in exercising its legal rights to assert that view, including by petitioning the government to comply with those mandates, by seeking judicial relief or by exercising its first amendment rights to express that view to the public and to its members and supporters.

The information requested concerns federal governmental activity. The Requests seek records concerning decisions made by a federal agency. *See Bloomberg, L.P. v. United States Food & Drug Admin.*, 500 F. Supp. 2d 371, 377 (S.D.N.Y. 2007) (agency decision constitutes federal Governmental “activity”). The Requests accordingly meet the third factor for urgency as stated in *Al-Fayed*.

¹¹ *See, e.g.,* The Hill, *Park Service defends funds used to stay open during shutdown*, <https://thehill.com/policy/energy-environment/437159-park-service-defends-funds-used-to-stay-open-during-shutdown> (Apr. 3, 2019).

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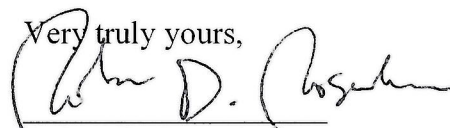
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In conclusion, NPCA has established that “a compelling need” exists for the disclosure of the requested information, 5 U.S.C. § 552(a)(6)(E)(i)(I), entitling it to expediated treatment of its Requests. NPCA is an organization “primarily engaged in disseminating information.” 43 C.F.R. § 2.20(a)(2). There is here “an urgency to inform the public about an actual or alleged Federal Government activity.” *Id.* NPCA accordingly respectfully asks that you expedite your responses to the Requests.

In compliance with 43 C.F.R. § 2.20(b), attached is a certification by Elizabeth Fayad, Vice President and General Counsel of NPCA, that the above information pertaining to NPCA’s request for expedited processing is true and correct to the best of her knowledge and belief.

* * *

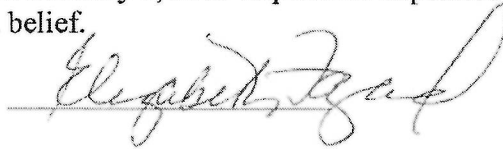
If you have any question about this matter, please call me at 202-942-5862. Pursuant to the applicable FOIA provision, please respond to this request within the ten (10) working day time limit set by law. 5 U.S.C. § 552(a)(6)(E). Thank you in advance for your assistance.

Very truly yours,

Robert D. Rosenbaum

CERTIFICATION

I, Elizabeth Fayad, Esq. am Vice President and General Counsel of National Parks Conservation Association ("NPCA"). I submit this Certification in support of the July 8, 2019 request for expedited treatment by NPCA's counsel as to its request to Joshua Tree National Park under the Freedom of Information Act dated February 21, 2019, to which this certification is attached. I hereby certify that the information set forth in that July 8, 2019 request for expedited treat is true and correct to the best of my knowledge and belief.

July 8, 2019

A handwritten signature in cursive script, appearing to read "Elizabeth Fayad", written over a horizontal line.

Elizabeth Fayad, Esq.