

FOIA APPEAL - REQUEST FOR RELEASE OF WITHHELD AGENCY RECORDS AND
FULL DISCLOSURE OF REDACTED RECORDS

FILE CODE 6270-1-1 R1-RO-05-019

By Email and Fax

April 12, 2005

FOIA Appeal
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Dear USDA Forest Service,

This letter constitutes an appeal of the Forest Service's denial of our Freedom of Information Act, 5 U.S.C. s 551, et seq. ("FOIA" or "Act") request FILE CODE 6270-1-1 R1-RO-05-019.

By this letter, and for all of the reasons set forth below, we are appealing the Forest Service's decisions to withhold agency records and to redact requested information by claiming that the information is exempt from the FOIA's disclosure mandate pursuant to three of the Act's narrow statutory exemptions.

We submit the following facts and legal principles in support of this appeal:

1) Our FOIA request was properly submitted for agency records that we had already inspected but which were subsequently withheld from disclosure by the Gallatin National Forest (September 14, 2004 FOIA request for release of public records and waiver of copy fees, Darrell Geist, and Dan Brister Buffalo Field Campaign).

2) The Forest Service failed to comply with 5 U.S.C. 552(a)(6)(A)(i) and inform us of its determination to withhold records within 20 business days, including the reasons for its determination and the responsible person to contact and our right to appeal (October 5, 2004 letter from Ken Britton, Gardiner District Ranger; October 18, 2004 letter from Ken Britton, District Ranger, Gardiner Ranger District).

3) The Forest Service constructively denied, and delayed our right to appeal our original FOIA request by subjecting it first to outside, private parties for review, and then for further review to the Northern Region Headquarters (November 12, 2004 letter from Rebecca Heath, Forest Supervisor, Gallatin National Forest). The Forest Service also failed to make a reasonable effort to provide us with a list of the records withheld so we could adequately consider the Forest Service's reasoning for withholding records (March 22, 2005 email from Darrell Geist and Dan Brister Buffalo Field Campaign to Abigail R. Kimbell Regional Forester, Northern Region).

4) The Forest Service has failed to support its Exemption 4 claim under FOIA (March 17, 2005 letter from Abigail R. Kimbell, Regional Forester, Northern Region). It is unclear from the agency's determination how release of these records would "compromise current negotiations." It is our understanding that Phase I and II of the Royal Teton Ranch land purchase and conservation easement is complete. It is our position that valuable information on the government's action in this \$13,000,000 Congressional appropriation is contained in the withheld records. The government offers a conclusion and no supporting facts to base its claim of injury e.g. negotiations would be compromised. Nor has the agency followed its rules in requiring the submitter to "explain fully all grounds upon which disclosure is opposed."

Additionally, we contest the claim that the withheld information is in itself a trade secret or commercial or financial business information or that any competitive harm would result from its disclosure. The public rightfully has an interest in the financial information that formed the basis for a \$13,000,000 project funded through appropriations from Congress. The value, and valuations of the land conservation agreement, is of public interest and public disclosure does not injure any submitter's financial or business position. There is no defined or supporting information provided by the submitter or through the Forest Service that would constitute "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

National Parks & Conservation Ass'n v. Morton established a two-part prong test for whether information is "confidential" under Exemption 4: "To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of

the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770 (D.C. Cir. 1974).

The government has made no showing of how it would be adversely affected from obtaining similar information in the future, or how any submitter would suffer "substantial harm" from disclosure of this information. Accordingly, the Forest Service has failed to support its Exemption 4 claim under the FOIA.

5) The Forest Service has also failed to support its Exemption 5 claims under the FOIA. As the Department of Justice's Freedom of Information Guide (May 2004) provides:

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. (73) First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." (74) Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." (75) The burden is upon the agency to show that the information in question satisfies both requirements." (76)

See <http://www.usdoj.gov/oip/exemption5.htm#deliberative>.

The Forest Service has not shown any burden it would suffer to its deliberative process by releasing the withheld records. Rather, it has simply parroted existing Department of Justice guidelines and case precedent as its basis for withholding draft documents.

The documents withheld by the agency involve a land conservation agreement reached in 1999 in which the Forest Service gained legal title and possession and a public trust responsibility. The agency's action is complete. Open and frank discussions informing the agency's decisions have already occurred. The deliberative process has reached its end. Releasing the records will clarify for the public how, in fact, the agency reached its decision.

Insofar as the agency believes that this claimed exemption lawfully applies to consultants, lawyers or other parties acting

on behalf of the private parties involved -- such as, here, Rocky Mountain Elk Foundation, Church Universal and Triumphant - - the Supreme Court has held in Department of the Interior v. Klamath Water Users Protective Ass'n. that information provided by these parties may be lawfully withheld under Exemption 5 only in very limited circumstances that do not apply here. 532 U.S. 425 (2001).

The withheld information also fails to qualify for withholding under the attorney-client or "work-product" privileges that are codified by Exemption 5. There are no proceedings implicated by the records that would reveal a litigation strategy or legal theory or any legal case brought over the Royal Teton Ranch project. Furthermore, attorney-client privilege is intended to protect confidential communications between an attorney and their client. The records held by the Forest Service were submitted by the attorneys acting on behalf of the private parties to inform the agency of its positions on the land agreement. Those positions, whether submitted by attorneys or the private parties themselves, are not privileged information and are properly the public's business as they shed light on the substantive positions being posed to the Forest Service for its consideration.

In sum, Forest Service has failed to establish any factual argument or basis to support its Exemption 5 claim under the FOIA.

6) Requested information that has been redacted by the Forest Service also fails to meet the threshold requirements for withholding pursuant to Exemption 6 under the FOIA.

Exemption 6's application is very narrow. Exemption 6 of the FOIA exempts from disclosure records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To lawfully withhold records from a requester under Exemption 6, an agency must balance the "individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act," which is "to open agency action to the light of public scrutiny." Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); accord, Department of State v. Ray, 502 U.S. 164 (1991); U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) ("a democracy cannot function unless the people are permitted to know what their government is up to").

In applying this balancing test, the phrase "clearly unwarranted" means that the balance must "tilt . . . in favor of disclosure," Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971), stay denied, 404 U.S. 1204 (1971); see also Rose, 425 U.S. at 378 n.16 (phrase is the major restraining feature of Exemption 6 which controls the ability of the agency to withhold information); United Assn. of Journeymen and Apprentices of Plumbing and Pipefitting Industry, Local 598 v. Dep't of the Air Force, Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir. 1988) ("particularly under Exemption [6], there is a strong presumption in favor of disclosure"). Under this test, "corporations, businesses and partnerships have no privacy interest whatsoever." Washington Post Co. v. Department of Agriculture, 943 F. Supp. 31, 37 n.6 (D.D.C. 1996).

In defending all decisions to invoke one or more of the FOIA's exemption claims, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). Thus, in invoking Exemption 6, the agency must prove both that the records reveal a "significant or substantial" individual privacy interest, and that disclosure of that interest is "clearly unwarranted" – i.e., that protection of the interest clearly outweighs the public's interest in "knowing what the Government is up to." Reporters Committee, 489 U.S. at 772-73.

Here, the Forest Service has not demonstrated that it may lawfully redact the requested information pursuant to Exemption 6. Simply stating that the Forest Service has made a determination that an exemption applies does not make it a valid exemption. Nowhere does the Forest Service offer proof or precedent to back its Exemption 6 claim, or shown that it has considered the public interest in its determination to redact records at all.

Moreover, in this instance, it is clear from the letters submitted to the Forest Service that the agency was re-evaluating cattle grazing allotment(s) on the District, and that the letter writers had a stake in the Forest Service's and the permittee's decision making regarding whether to continue grazing allotment(s) on the Gallatin National Forest. This point is clear and is found throughout the redacted letters:

"I understand the U.S. Forest Service is reevaluating [REDACTED] grazing permit for the [REDACTED], which encompasses parts of [REDACTED], as well as the [REDACTED]."

"I've owned my property above [REDACTED], and have been plagued with the encroachment of domestic cattle every since. Myself and virtually all of my neighbors have tried without success to drive the cattle to authorized Grazing Sections but it's a losing battle."

"My [REDACTED] and I have discussed and carefully considered our position as it relates to the [REDACTED] cattle grazing allotment. As co-owners of the northeast corner of [REDACTED] we do not want cattle on our land."

Information about grazing impacts and the identity of allotments and permits – including the identity of permittees – simply is not the kind of information that is protected from disclosure by Exemption 6. A permittee who grazes cattle on our public lands at agency sanction cannot reasonably believe that the agency will hide their identity or keep public scrutiny of the permittee's actions to itself. Clearly, the letter writers wanted the Forest Service to know how the agency's actions or inactions and those of its permittee were impacting them directly. To claim otherwise would conceal public scrutiny of the agency's actions.

Further, any privacy interest in the identities of letter writers is belied by the fact that the letters were submitted to the agency to compel the Forest Service to take action through its management authority over the grazing allotments. Clearly, and very publicly, these letter writers submitted their comments and their identities as part of the public record to compel agency action, and the agency has offered no argument to support its claim that releasing the identifying information of the letter writers would constitute an unwarranted invasion of their privacy.

Thus, the Forest Service violated the FOIA by redacting information that discloses grazing impacts caused by the permittee. The Forest Service also violated the FOIA by redacting information about the permittees' and letter writers' identities.

7) The public clearly has a compelling interest in complete disclosure of records gathered, maintained, and collected by the Forest Service in a \$13,000,000 taxpayer financed project to protect native wildlife and the ecosystems upon which they depend in Yellowstone. Full and complete public disclosure would shed light on the agency's action, and enable the public to gather more information about the substance, context and purpose

of this important taxpayer financed land conservation agreement. Withholding the records may have adverse implications for how the land was intended to be, and or will be, managed for decades to come.

8) The records are part of the Forest Service's project or administrative record for the Royal Teton Ranch land agreement and grazing allotment program subject to public disclosure and scrutiny under the FOIA.

The American people have a long tradition supporting the conservation of wildlife habitat, native wildlife and the ecosystems upon which they depend. The acquisition of land and conservation easements by the Forest Service with taxpayer moneys appropriated by Congress is rightly the public's business. The records gathered, submitted, and shared with the Forest Service in its pursuit of such endeavors are rightly in the public domain subject to inspection and disclosure under the FOIA. Forest Service grazing allotments, the actions of Forest Service permittees, and public concerns raised about the permittees and public lands grazing allotments, is also rightfully the public's business.

We ask that the Forest Service expeditiously grant our appeal and resolve this dispute by disclosing the withheld records, and releasing in full, redacted records, and resolve this issue on the side of public disclosure. We look forward to receiving your determination on this appeal within 20 working days, as required by the FOIA. 5 U.S.C. § 552(a)(6)(B).

Sincerely,

/s/
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cc: Amy Atwood, attorney