

FOIA APPEAL AND REQUEST FOR RELEASE OF PUBLIC RECORDS
FILE CODE 6270-1 R1-RO-04-067

By Email and Fax (14 pages of attachments will be sent by fax)

October 28, 2004

FOIA Appeal
USDA Forest Service, Chief's Office
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Dear USDA Forest Service,

This letter constitutes an appeal of the US 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 R1-RO-04-067.

Accordingly, by this letter, and for the additional reasons set forth below, we are asking the US Forest Service to overturn its decision denying public disclosure of agency records surrounding the Royal Teton Ranch land deal. We respectfully ask that the US Forest Service expeditiously grant our FOIA appeal and consider the following in its decision:

1) Our FOIA request was properly submitted for agency records already inspected but held for review by the Gallatin National Forest (June 24, 2004 FOIA request for release of public records and granting of fee petition waiver, Darrell Geist, and Dan Brister Buffalo Field Campaign).

2) The US Forest Service failed to follow 5 U.S.C. 552(a)(6)(A)(i) and inform us of its determination, the reasons for its determination, the responsible person to contact and our right to appeal (July 15, 2004 USFS letter, John Allen, Acting Forest Supervisor, Gallatin National Forest).

3) The US Forest Service constructively denied our right to appeal such denial by failing to provide a final response within the timelines allowed by the FOIA (August 19, 2004 FOIA RECORDS REQUEST FOLLOW-UP, Darrell Geist; August 20, 2004 USFS letter, Martin L. Prather, Director of Information Systems, Region One; September 23, 2004 FOIA RECORDS REQUEST ADDITIONAL FOLLOW-UP, Darrell Geist and Dan Brister, Buffalo Field Campaign).

4) The US Forest has not provided any legal rationale, or reasoning or chance to objectively weigh its claimed Exemption 5 under FOIA (October 7, 2004 USFS letter). The US Department of Justice's Freedom of Information Guide (May 2004) cites the following:

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." (1) The courts have construed this somewhat opaque language, with its sometimes confusing threshold requirement, (2) to "exempt those documents, and only those documents that are normally privileged in the civil discovery context." (3)

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)

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

To our knowledge, there is no civil discovery or litigation underway precluding the US Forest Service from releasing the records under the FOIA. Additionally, the US Forest Service has not shown any burden it would suffer from releasing the withheld records under its deliberative process. The appraisal and land exchange documents withheld by the agency involve a land deal reached in 1999 in which the US Forest Service gained legal title and possession. Clearly, the US Forest Service has failed to establish any factual argument or basis to support its Exemption 5 claim.

5) Records withheld by the US Forest Service fail to meet valid claims for an Exemption 6 determination under the Freedom of Information Act. 5 U.S.C. § 552(b)(6). 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") (emphasis in original).

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).

As 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.

In each of these precedents, the US Forest Service has not demonstrated a valid Exemption 6 claim. Simply stating that the US Forest Service has made a determination that an exemption applies does not make it a valid exemption. Nowhere does the US Forest Service offer proof to back its exemption claim, or shown that it has considered the public interest in its determination.

6) No attempt was made by the Gallatin Forest to file these claimed exempt records separate from agency records.

7) Filing claimed exempt records with the agency's project record is preventing the public from inspecting Gallatin National Forest files on the Royal Teton Ranch land deal (Statement of Darrell Geist, October 9, 2004).

8) Additional FOIA requests to the Gallatin National Forest for releasing agency records on the Royal Teton Ranch are also

being withheld from public disclosure (October 5, 2004 USFS letter Ken Britton Gardiner District Ranger; (October 18, 2004 USFS letter, Ken Britton, Gardiner District Ranger). Again, the US Forest Service is failing to follow 5 U.S.C. 552(a)(6)(A)(i) in stipulating why it is withholding records, its' reasoning, and our right to appeal.

9) The US Forest Service claims that agency records it collected, or received or was provided a copy of from the Department of Interior are "entire records originating with another agency." The US Department of Justice Freedom of Information Guide (May 2004) cites the following:

The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. (18) Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record, (19) courts have identified four relevant factors for an agency to consider when making such a determination: the intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree to which the record was integrated into the agency's recordkeeping system or files. (20) Agency "control" is also the predominant consideration in determining the "agency record" status of records that are either generated (21) or maintained (22) by a government contractor.

<http://www.usdoj.gov/oip/procereq.htm#agency>

In all frankness, we believe the US Forest Service is trying to delay public disclosure and complicate the public's attempt to access agency records. These eight Department of Interior records are clearly under US Forest Service control, were found in the agency's project record, were present in agency files at the time the FOIA was made, and do not constitute an entire record from another agency.

10) The public clearly has a compelling interest in disclosure of records gathered by the US Forest Service in a \$13 million dollar taxpayer financed project to protect native wildlife and the ecosystems upon which they depend in Yellowstone.

11) The records are part of the US Forest Service's project or administrative record for the Royal Teton Ranch land deal subject to public disclosure and scrutiny under the FOIA.

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

We will protect the public's interest if the US Forest Service refuses to promptly release agency records now in dispute, and make its files available for public inspection under the Freedom of Information Act. We ask that the US Forest Service expeditiously grant our appeal to resolve this dispute by disclosing the records and resolving this issue on the side of public disclosure.

Sincerely,

/s/
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cc: Liz Mitchell, attorney