



Protecting endangered species and wild places through science, policy, education, and environmental law.

Undersecretary for Natural Resources
Office of the Secretary
U.S. Department of Agriculture,
14th & Independence Ave. SW,
Washington, D.C. 20250

By certified mail no. 7001 1140 0000 8591 3259

Oct 14, 2002

REQUEST FOR MATERIALS UNDER THE FOIA

The Center for Biological Diversity (CBD) is a non-profit, public interest conservation organization whose mission is to conserve imperiled native species and their habitat and to fulfill our goal of educating our membership and the general public about these issues.

Our mission is of special importance on public lands administered by federal agencies, because of the large amount of land under federal jurisdiction in the western United States and the great diversity of life that is dependent on these lands.

Consistent with our mission, and consistent with the Freedom of Information Act, 5 U.S.C. § 552, we respectfully request copies of:

All documents including correspondence whether to, from or within the secretary's offices, emails, memos, meeting notes or any other records held by the secretary's offices that deal with changes in livestock grazing in response to the 2002 drought in the Southwest region 3 of the Forest Service. Of particular concern are communications to or from the office of Under-secretary Mark Rey concerning the destocking of the Tonto National Forest.

FEE WAIVER REQUEST

The Center for Biological Diversity (CBD) is a non-commercial, non-profit "watchdog" organization engaged in research, education and legal action in the public interest. Accordingly a fee waiver is requested should the volume of responsive documents exceed the limit for a fee.

FOIA's fee standard mandates a waiver if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 USC 552(a)(4)(A)(iii).

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Main Office
PO Box 710 • Tucson, AZ • 85702-0710
PHONE: (520) 623-5252 • FAX: (520) 623-9797
www.biologicaldiversity.org

By enacting the fee waiver provision of FOIA, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for under-funded organizations and individuals." Coalition for Safe Power v. U.S. Dep't of Energy, Civ. No. 87-1380PA, slip op. at 7 (D.Or. July 22, 1988) (citing Better Gov't Ass'n v. Department of State, 780 F.2d 86, 94 (D.C. Cir. 1986)).

Congress was particularly concerned that agencies were using search and copying costs to prevent critical monitoring of their activities: "Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information...." 132 Cong. Rec. S14298 (Sen. Leahy).

FOIA's expanded fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov't Ass'n v. Department of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to the CBD, which:

"rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions...."

Moreover, "[t]he waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups." Better Gov't Ass'n, 780 F.2d at 93-94.

One of the prime goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups such as the CBD which actively challenge agency actions and policies, especially in the courts: "A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Reps. English and Kindness).

This request satisfies the analytical factors for a fee waiver request [5 U.S.C. § 552(a)(4)(A)(iii)], viz:-

Factor 1. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

This request asks for documents that will reveal how the USDA makes decisions concerning livestock grazing during drought. Of specific concern are the decisions to allow some livestock grazing to continue on certain allotments, while others are closed to livestock in the same national Forests.

The documents requested are clearly to do with "operations or activities of government," as they are documents that will reveal to the public how grazing decisions are made by the USDA under circumstances of drought.

However, the accessibility of this information, so as to contribute to "understanding of the operations or activities of government" in this specific matter is limited. This information is not available in the public domain other than by specific request. Search with the "Google" website search engine revealed that the information is not posted in any detail for free public access on any of the Forest Service or other likely websites, and therefore this release of this information will "significantly contribute to public understanding" of the matter of concern. A search turned up only a few generic documents.

One newspaper article has reported on the reductions in grazing on the TontoNF and others have dealt with reductions on the Santa Fe but this gives the public no details of the higher level policy and decision making process, in particular to explain why grazing is allowed to continue on some allotments.

Factor 2: Disclosure of the requested information is likely to contribute to public understanding of the issues involved and the records are "meaningfully informative in relation to the matter of the request".

The request is for specific documents that record the details of decisions made to keep some livestock on certain allotments, despite the drought. As such, they cannot be anything other than "meaningfully informative" in the matter of the request.

It is established in law that "inability to disseminate the information to the public . . . alone is a sufficient basis for denying the fee waiver request." *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

The CBD's capacity for dissemination of information in such a manner as to be sure to contribute to public understanding of Forest Service actions is well known to your office. The capacity of the CBD to disseminate information supplied by the Service is established by the fact that at least 51 newspaper articles linking the CBD and the Forest Service were produced in the past year according to the Lexis-Nexis database. All of our public information actions are based on documents obtained by FOIA from federal agencies.

Documents obtained through FOIA from the Forest Service were used to construct a published report on compliance of the Forests with certain biological opinions on the impacts of grazing on listed species. This report is posted online at <http://mfjtaylor.tripod.com/bo-compl.pdf>

The report was the subject of 4 newspaper articles (Az republic 1/23/01, Az Daily Sun 1/23/01, Az Daily Star 1/23/01, E Az Courier 2/7/01) and we have distributed it to approximately 30 different members of the public who asked to see it.

A more recent report on the role of grazing and logging in the Rodeo Chediski fire was also based largely on documents obtained through FOIA. This report is also posted online at http://www.biologicaldiversity.org/swcbd/Programs/fire/r-c_report.pdf

Other Biodiversity alerts most of which also are based heavily on responses to FOIA requests are posted online at:-

<http://www.biologicaldiversity.org/swcbd/alerts/indexes/alerts.html>

Factor 3: Disclosure is likely to contribute significantly to understanding of the public at large rather than a narrow segment of interested persons.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is:

"whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added).

The meaning of "dissemination" does not mean copying and distributing original documents themselves, but drawing public attention to the substantive content of the documents. CBD does not have the capacity or resources to disseminate all original documents received through FOIA to all members of the public. For the small number of requests we get from the general public to see or obtain copies of original documents obtained by FOIA, we do routinely copy and disseminate selected original documents free of charge. However, CBD accepts no responsibility to act as a proxy or branch office of the Forest Service in providing copies of all Forest Service documents to all comers.

Rather CBD commits to disseminate the result of our analyses of information obtained by FOIA to the public at large, to the best of our ability. Primary documents that we consider to be sufficiently important we may post on our website for the convenience of the general public, and then notify our membership or other interested parties that the document is available for viewing there; for example the recent letter by Regional Range Director David Stewart regarding drought and grazing on the Santa Fe N.F. is posted at:

<http://www.biologicaldiversity.org/swcbd/Programs/grazing/StewartLetter.html>

Dissemination will occur after the CBD has had time to analyze the documents provided. Dissemination will take the form of a report or reports on our analysis of the data contained in the documents, press releases, newspaper articles, TV or radio interviews and presentations.

Our informational publications, reports, news alerts, action alerts or digests of news items posted on our website will supply information not only to our membership, but also to the memberships of many other conservation organizations, locally as well as nationally, and to the general public. Our Biodiversity Alerts and other informational bulletins are posted online at <http://www.biologicaldiversity.org/swcbd/news/bioalerts.html>, which is accessed by internet several hundred times each month, sent out by e-mail to nearly 3,000 people 3-4 times a month, or mailed to our 7,500+ members.

Information obtained from the current request will be disseminated through such means. The capacity of the CBD to disseminate information received through FOIA is established by the fact that over 570 western newspaper articles mentioning the Center for Biological Diversity were produced in the past five years. This establishes that the CBD has a strong record of dissemination of information obtained under FOIA to a "reasonably broad audience." It is fundamental to our mission to disseminate information concerning actions and analyses that are based on documents obtained by FOIA.

All of CBD's fee waiver requests have been granted to the CBD by federal agencies including the Forest Service, testifying to the CBD's standing as a non profit watchdog with a confirmed capacity to disseminate information acquired through the FOIA. In the few cases in which fee waivers have been denied to the CBD, the CBD has won on appeal or in Court.

Factor 4: "The public's understanding of the subject matter in question, as compared to the level of public understanding prior to the disclosure, must be likely to be enhanced to a significant extent"

Public sentiment in favor of protections for wildlife and wild places is strong as revealed by an LA Times poll (April 30, 2001). The general public's knowledge of the details of public land management decisions and how they impact imperiled species and other public resources depends on independent watchdog organizations such as CBD bringing such matters to light through the courts or through available media instruments. While public lands grazing management in the Southwest is of great public interest, the Forest Service has not posted specific documents online that might inform the public of why the southwest region of the Forest Service has elected to continue grazing some allotments while closing others, in response to drought conditions.

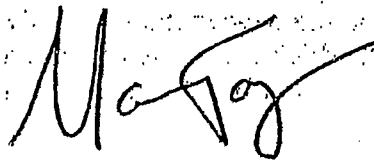
Factor 5: Obtaining the information is of no commercial interest to CBD.

Access to government documents through FOIA requests is essential to CBD's role of educating the general public. CBD, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information. There has never been not will there be any price attached to information that we disseminate to the public such as requested here. It is in our interest and is part of our mission to give as wide and free a public airing of this information as we possibly can.

We look forward to your reply within twenty working days of receipt of this request as required by FOIA, 5 USC 552(a)(6)(A)(i).

Please call me at (520) 623.5252 x 307 if you have any questions about this request.

Sincerely,



Martin Taylor, Ph.D.

Coordinator, Grazing Reform Program