

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

CENTER FOR BIOLOGICAL DIVERSITY,  
P.O. Box 710  
Tucson, AZ 85702

*Plaintiff,*

v.

U.S. DEPARTMENT OF AGRICULTURE,  
1400 Independence Ave. SW  
Washington, DC 20250

and

FOOD SAFETY AND INSPECTION  
SERVICE,  
1400 Independence Ave. SW  
Washington, DC 20250-3700

*Defendants.*

Civil Action No.: 20-cv-00764

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**(Freedom of Information Act,  
5 U.S.C. § 552)**

**INTRODUCTION**

1. In this action, Plaintiff Center for Biological Diversity (Center)—an environmental conservation organization that works to protect native wildlife and their habitats—challenges the failure and refusal of Defendants U.S. Department of Agriculture (USDA) and the Food Safety and Inspection Service (FSIS) to provide to the Center agency records related to their review and consideration of the environmental and endangered species effects of the Modernization of Swine Slaughter Inspection rule. The Center brings this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

2. On August 6, 2019, the Center made a request for public records in writing to Defendants. In that written request, the Center asked that Defendants disclose records generated

in connection with any environmental assessment, categorical exclusion analysis, and/or any other environmental reviews prepared by FSIS pursuant to its requirements under the federal National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, and in connection with the then-proposed Modernization of Swine Slaughter Inspection rule. Plaintiff's written request additionally asked that Defendants disclose records generated in connection with any Section 7 consultation activities conducted by FSIS pursuant to its requirements under the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544, and in connection with the then-proposed Modernization of Swine Slaughter Inspection rule.

3. It has been over six months since the Center made the August 6, 2019 request for public records at issue in this action, and Defendants have yet to provide a lawful final determination or identify or disclose any records responsive to the Center's request. By failing to search for and provide all responsive records, Defendants are unlawfully withholding the records requested by Plaintiff in violation of FOIA.

4. In the time since the Center made its FOIA request, Defendants finalized their Modernization of Swine Slaughter Inspection rulemaking activities and established a New Swine Inspection System (NSIS) for market hog slaughter establishments, 84 Fed. Reg. 52,300 (Oct. 1, 2019). The rule, which dramatically changes the federal oversight and the speed by which pigs are slaughtered and processed for human consumption in the United States, poses serious risks to animal welfare, consumer health, worker safety, and the environment.

5. Specifically, the final rule removes federal caps on the maximum speeds by which slaughter lines are allowed to operate in hog slaughter establishments that enter into the new program. The final rule also drastically reduces the number of government-employed safety inspectors in those plants, and replaces the inspectors with plant employees.

6. In taking this action, Defendants failed to disclose or reasonably consider the significant environmental impacts related to this rulemaking. Further, as a result of the rulemaking, plants entering into the new program are expected to significantly increase the number of animals being slaughtered, significantly increase the speed at which those animals will be slaughtered, and markedly reduce already inadequate federal oversight over slaughter activities at pig slaughterhouses. Individually and collectively, such changes concern issues of significant public interest.

7. Prompt access to public records is necessary to effectuate FOIA's purpose of transparency. The Center thus seeks from the Court declaratory relief establishing that Defendants have violated FOIA. The Center also seeks injunctive relief directing Defendants to conduct lawful searches and provide all responsive records without further delay.

### **JURISDICTION AND VENUE**

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

9. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

10. Declaratory relief is appropriate pursuant to 28 U.S.C. § 2201.

11. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States and internationally, that works through science, law, and policy to secure a future for all species, great and small, hovering on the brink of extinction. Informing the public about the activities of the federal

government is central to the Center's mission. The Center educates and counsels its members and the public on environmental issues, policies, and laws through media, advocacy, its website, and publications that are widely distributed.

13. The Center and its over 74,000 members are harmed by Defendants' violations of FOIA because such violations preclude the Center from gaining a full understanding of the environmental and human health impacts of Defendants' Modernization of Swine Slaughter Inspection rulemaking. Defendants' actions in failing to comply with their obligations under FOIA further harm the Center's ability to provide full, accurate, and current information to the public on a matter of public interest. For the Center to be successful in its mission to protect native species and their habitats, along with human health, it is critical that it is able to maintain access and transparency to records containing such information.

14. Defendant U.S. DEPARTMENT OF AGRICULTURE is an independent agency of the U.S. government. USDA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f) and is responsible for fulfilling the Center's FOIA request to it.

15. Defendant FOOD SAFETY AND INSPECTION SERVICE is an agency of the USDA. FSIS is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f) and is responsible for fulfilling the Center's FOIA request to it.

### **LEGAL BACKGROUND**

16. The basic purpose of FOIA is to sustain an informed citizenry through government transparency, which is vital to the functioning of a democratic society.

17. FOIA establishes the public's right of access to all federal agency records upon request unless the agency can demonstrate that one of nine narrowly enumerated disclosure exemptions applies. 5 U.S.C. § 552(a), (b)(1)-(9).

18. FOIA places the burden on the federal agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

19. The scope of federal agency records considered to be public and subject to release under FOIA is broad. *Id.* § 552(a)(2).

20. FOIA imposes strict deadlines on agencies to respond to requests. *Id.* § 552(a)(6)(A). FOIA obligates an agency responding to a FOIA request to issue a determination on the request within 20 working days of receipt (the "determination deadline"). *Id.* § 552(a)(6)(A)(i).

21. In order to make a lawful "determination," the agency must at least: (1) gather and review responsive records; (2) determine and communicate the scope of the records it intends to produce and withhold, and the reasons for withholding any records, and (3) inform the requester that it has a right to appeal the agency's determination. *Id.*; *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

22. FOIA provides a limited set of circumstances under which federal agencies may obtain more time to make the determination that is required by FOIA. *See* 5 U.S.C. § 552(a)(6)(A), (B). The federal agency must explicitly invoke these circumstances for this provision to apply.

23. In "unusual circumstances," an agency may extend the time to make a determination by no more than 10 additional working days, but it must provide written notice to the requester setting forth the unusual circumstances for the extension and "the date on which a determination is expected to be dispatched." *Id.* § 552(a)(6)(B)(i). If the agency provides written

notice that the request cannot be processed within the specified time limit, the agency shall provide “an opportunity to limit the scope of the request so that it may be processed within” the statutory time limit or “an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request,” and shall make available its FOIA Public Liaison to “assist in the resolution of any disputes between the requester and the agency.” *Id.* § 552(a)(6)(B)(ii).

24. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate the records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). Using the date of a FOIA request as the cut-off date for the search is not always reasonable, while using the date that the agency commences its search has consistently been found to be reasonable.

25. FOIA requires federal agencies to promptly disclose requested records. *Id.* § 552(a)(3)(A), (a)(6)(C)(i). Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

26. In certain limited instances an agency may withhold records from FOIA’s broad disclosure mandate. *Id.* § 552(b)(1)-(9). In light of FOIA’s dominant objective of disclosure over secrecy, these exemptions must be narrowly construed and must be communicated to the requester.

27. A requester “shall be deemed to have exhausted his [or her] administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions” of FOIA. *Id.* § 552(a)(6)(C)(i). In that event, FOIA authorizes the requester to sue the agency in federal court. *Id.* § 552(a)(4)(B).

28. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

### **FACTUAL BACKGROUND**

29. On August 6, 2019, the Center submitted a FOIA request to FSIS seeking the following records from January 1, 2017 to the date of the search:

All records generated in connection with the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA) Section 7 consultation activities undertaken by FSIS in connection with the proposed Modernization of Swine Slaughter Inspection rule, Docket No. FSIS-2016-2017 (RIN 0583-AD62); and

All records generated in connection with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA) environmental assessments, categorical exclusion analysis, and/or other environmental reviews undertaken by FSIS in connection with the proposed Modernization of Swine Slaughter Inspection rule, Docket No. FSIS-2016-2017 (RIN 0583-AD62).

30. On August 7, 2019, FSIS sent the Center an email acknowledging receipt of the FOIA request and stated an acknowledgment letter would be forthcoming.

31. On August 16, 2019, FSIS sent a letter stating that it had received the Center’s FOIA request and assigning it tracking number FOIA-2019-00472. In that same letter, FSIS provided to the Center a waiver of all fees associated with processing the request.

32. On October 22, 2019, after receiving no further substantive communications from FSIS regarding its production of records responsive to the request, the Center sent a letter notifying the agency that it had violated FOIA by failing to make a lawful determination on the Center’s FOIA request within FOIA’s statutory deadline, offering to assist the agency in responding to the request, and requesting an estimated date of completion of the FOIA request.

33. Neither FSIS nor any other FOIA officer in USDA has responded to the Center's October 22, 2019 letter and offer of assistance or provided any other communications to the Center beyond the agency's August 16, 2019 acknowledgement letter, tracking number, and fee waiver.

34. The Center has received no records responsive to its August 6, 2019 FOIA request, FOIA-2019-00472.

35. Defendants have not requested additional information from the Center or notified the Center of any unusual circumstances that would prevent lawful compliance with FOIA's deadlines for determination. *See* 5 U.S.C. § 552(a)(6)(A)-(B).

36. Defendants have provided no lawful basis under FOIA for their delay and have provided no lawful basis to withhold or redact the records the Center requested in request FOIA-2019-00472.

37. The Center has exhausted its administrative remedies with respect to claims related to this FOIA request. *Id.* § 552(a)(6)(C)(i).

38. The Center has been required to expend resources to prosecute this action.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF:** **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

##### **(Failure to Comply with FOIA's Mandatory Determination Deadline)**

39. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

40. The Center properly requested records within the control of Defendants through its August 6, 2019 FOIA request to the agency, FOIA-2019-00472.



41. The Center has a statutory right to receive a lawful final determination from Defendants on its FOIA Request, FOIA-2019-00472, in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3)(A). Defendants have violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. *Id.* § 552(a)(6)(A)(i).

42. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in records requests to Defendants in the foreseeable future.

43. The Center's organizational activities will be adversely affected if Defendants are allowed to continue violating FOIA's disclosure provisions.

44. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Defendants will likely continue violating the Center's rights to receive public records under FOIA.

45. The Center is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

**SECOND CLAIM FOR RELIEF:**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Failure to Conduct an Adequate Search for All Responsive Records)**

46. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

47. The Center has a statutory right to have Defendants process its FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3)(A).

48. Defendants violated the Center's rights in this regard when it unlawfully failed to conduct an adequate search that was reasonably calculated to locate all records that are responsive to the Center's FOIA request, FOIA-2019-00472.

49. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in records requests to Defendants in the foreseeable future.

50. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Defendants will likely continue violating the Center's rights to receive public records under FOIA.

51. The Center is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

**THIRD CLAIM FOR RELIEF:**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Failure to Promptly Disclose All Responsive Records)**

52. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

53. The Center has a statutory right to the records that it requested. 5 U.S.C. § 552(a)(3)(A). Defendants have violated the Center's rights in this regard by failing to promptly provide all responsive records—and reasonably segregable, nonexempt portions of responsive records—related to FOIA request FOIA-2019-00472.

54. Defendants have provided no lawful basis to withhold records pursuant to any of FOIA's nine exemptions to mandatory disclosure or to withhold any segregable, nonexempt portion of the records. *See* 5 U.S.C. § 552(a)(3)(A), (a)(8), (b).

55. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in records requests to Defendants in the foreseeable future.

56. Unless enjoined and made subject to a declaration of the Center's legal rights by

this Court, Defendants will likely continue violating the Center's rights to receive public records under FOIA.

57. The Center is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

- (1) Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff's August 6, 2019 FOIA request;
- (2) Order Defendants to search for all responsive records to Plaintiff's August 6, 2019 FOIA request using search methods reasonably likely to lead to discovery of all responsive records, with the cut-off date for such searches being the date each agency initiates its search;
- (3) Order Defendants to produce, by a date certain, all nonexempt responsive records and reasonably segregable portions of the records, and a *Vaughn* index of any responsive records or portion of responsive records withheld under a claim of exemption, at no cost to Plaintiff;
- (4) Enjoin Defendants from continuing to withhold nonexempt responsive records or segregable portion of the records responsive to Plaintiff's FOIA request;
- (5) Retain jurisdiction of this action to ensure the lawful processing of Plaintiff's FOIA request;
- (6) Award Plaintiff its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412; and
- (7) Grant any such further relief as the Court may deem just and proper.

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Dated this 18th day of March, 2020.

Respectfully submitted,

/s/ Hannah M.M. Connor

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