



**HUMANE SOCIETY
INTERNATIONAL**



June 11, 2021

Via Electronic Mail

U.S. Fish and Wildlife Service,
Office of Law Enforcement (FOIA)
5275 Leesburg Pike (MS: OLE)
Falls Church, Virginia 22041
Submitter_Notice@fws.gov

Re: The Urgent Need to Release the Law Enforcement Management Information System Data

Dear Department of Interior and U.S. Fish and Wildlife Service Officials,

The undersigned 21 organizations submit these comments on the U.S. Fish and Wildlife Service's Freedom of Information Act (FOIA) notice regarding the review process for releasing data stored in the Law Enforcement Management Information System (LEMIS) database.¹ We thank the U.S. Fish and Wildlife Service (Service) for taking a step toward releasing LEMIS data to the public, though we believe this submitter notice is unnecessary, as the relevant information is not confidential, as detailed below. Many of our organizations have been waiting since 2016 for responses to FOIA requests for LEMIS data and urgently need these much-delayed records. We write to urge the prompt release of this information in full under the FOIA.

1. The Importance of LEMIS Data to Our Work

The LEMIS database contains the most basic and essential data on all wildlife species, parts, and products in trade and how they are imported or exported from the U.S. This data is crucial for protecting wildlife and plants from exploitation through trade, ensuring legal obligations are met by the Service as well as by importers and exporters, aiding in scientific research, influencing policy and law enforcement, and curtailing the spread of disease. For example, LEMIS data are critical to tracking wildlife and plant trade trends and ensuring that species under threat are protected under the Convention on International Trade in Endangered Species of Fauna and Flora (CITES). Yet the United States' public comment period seeking input on CITES proposals opened and closed² without any post-2015 LEMIS data having been released publicly.

As other examples, many of our organizations use LEMIS data to ensure that species that are overutilized in trade receive necessary legal protections, to keep our members and other

¹ Available at:

https://www.fws.gov/irm/bpim/docs/Wildlife_Flora_Import_and_Export_Data_stored_in_LEMIS.pdf

² See Docket No. FWS-HQ-IA-2021-0008 on regulations.gov.

members of the public informed about the impacts that the international wildlife trade has on many species of great public interest, and to provide information and resources to legislators on issues relating to wildlife trade. Additionally, the COVID-19 pandemic has highlighted the devastating link between the wildlife trade and disease risk. Without LEMIS data, the public has been without critical information for understanding the implications of the wildlife trade on human and animal health, including informing members of the media and others on the international wildlife trade’s potential connection with COVID-19 and other zoonotic diseases.

The LEMIS database is one of the most important resources available not just to our organizations and our work but to innumerable scientists, journalists, and others. Its value to conservation and public understanding cannot be overstated. We appreciate the government’s efforts in collecting and collating this information, and we cannot stress enough the importance of also disclosing it to the public.

2. Exemption 4 Should Not Foreclose Release of the LEMIS Data

We are deeply concerned about the Service’s 2021 notice to submitters and recent practice of withholding LEMIS data under Exemption 4 after over a decade of disclosure. Exemption 4 of the FOIA can be used to withhold information that is “commercial or financial information obtained from a person and privileged or confidential.” 5 U. S. C. §552(b)(4). In 2019, the Supreme Court held that for information to be withheld under Exemption 4 it must be “both customarily and actually treated as private.” *Food Marketing v. Argus Leader Media*, -- U.S. --, 139 S. Ct. 2356, 2366 (2019). The Court suggested that, to be exempt from disclosure, the information may *also* need to be given to the government with an assurance of privacy. *Id.*

Again, the basic data from the LEMIS database was routinely released to the public for over a decade and thus was not customarily treated as private. *See, e.g., Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. CV-16-00527-TUC-BGM, 2018 U.S. Dist. LEXIS 55551, at *4 (D. Ariz. Mar. 30, 2018) (“From 2001 until approximately mid-2014 or 2015, USFWS released LEMIS data without exemption”) *vacated in part* 802 F. App’x 309, 311 (9th Cir. 2020); *Humane Soc’y Int’l v. United States Fish & Wildlife Serv.*, Civil Action No. 16-720 (TJK), 2021 U.S. Dist. LEXIS 59429, at *16 (D.D.C. Mar. 29, 2021) (“for over a decade before its FOIA request in this case, the Service did not ‘redact[] any LEMIS data . . .’”).³

Moreover, the Service has not provided submitters of LEMIS data any assurance of privacy; indeed, the only “assurance” given is an assurance of *disclosure*. The form from which most of the LEMIS data is collected—Form 3-177—contains several notices to submitters. It specifies that: “submission of the requested information is required to enforce any regulations that pertain to the wildlife contained in the shipment,” the data is used as an “enforcement tool and management aid,” and “[i]nformation collected is also used to respond to requests made under the Freedom of Information Act.”⁴ The government has expressly provided notice that the

³ It is worth pointing out that most, if not all, the information in the LEMIS database is very basic information such as the species’ common and scientific names, country of origin, port of entry, quantity, and the entity importing and exporting the shipments. This data can hardly be considered commercial within the meaning of Exemption 4.

⁴ Available at: <https://www.fws.gov/le/pdf/3177.pdf>

information is disclosed including “to respond” to FOIA requests. Of course, “the circumstances under which a company submits information to the government bears on whether that information remains confidential.” *Humane Soc’y Int’l*, 2021 U.S. Dist. LEXIS 59429, at *15. Thus, the information is not confidential under *Food Marketing*, and the agency must release it to the public.

A recent ruling in a FOIA case challenging the withholding of LEMIS data under Exemption 4 confirms this outcome. In *Humane Society International v. U.S. Fish and Wildlife Service*, the judge found that the submitters do not “customarily and actually treat the information as private” and, therefore, the LEMIS data could not be withheld under FOIA Exemption 4. 2021 U.S. Dist. LEXIS 59429, at *17. In deciding this information must be released, the judge found that: 1) the Service was unable to provide evidence of confidentiality; 2) the language of Form 3-177 disclaimed confidentiality; and 3) the fact that the Service released LEMIS data for over a decade demonstrates it is not confidential. *Id.* at *14–17. Regarding Form 3-177, the court held:

[T]he Privacy Act Notice on Form 3-177 during the relevant years informed [the submitters] that the information they submitted “may be subject to disclosure under provisions of the Freedom of Information Act.” Pl.’s SOF ¶¶ 35–37; ECF No. 54-1 ¶¶ 5–10; *id.* at 5–53. Thus, this notice warned these companies that the government would not keep the information at issue confidential and might disclose it pursuant to a FOIA request. In effect, then, the notice *disclaimed* confidentiality, rather than provided an assurance of it. *Cf. WP Co. v. U.S. Small Bus. Admin.*, -- F. Supp. 3d --, 2020 WL 6504534, at *9 (D.D.C. Nov. 5, 2020) (determining that Exemption 4 was inapplicable because loan application expressly warned that applicants’ “names and loan amounts would be ‘automatically released’ upon a FOIA request”).

Id. at *15–16 (emphasis in original). Noting the importance of the “circumstances under which a company submits information,” the court found that Form 3-177 clearly “disclaims confidentiality.” *Id.*

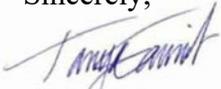
We urge you to apply common sense and the ruling in *Humane Society International* and deny any requests by submitters that the LEMIS data be deemed confidential. Releasing the LEMIS data in full is consistent with the Service’s prior practice and the federal court’s ruling, and is logical and in the public interest.⁵

⁵ We note with concern that the notice posted on your website asks submitters of Form 3-177 “whether the information was provided to the government under an assurance that the government would keep it private.” This request is misleading. As just discussed, Form 3-177 by its own notification language warns of the uses of the data therein and assures submitters of disclosure. Thus, Form 3-177 and the data therein is undeniably submitted with **no assurance** of privacy. As the court found in *Humane Society International*, “given what Defendants actually told these companies through the [Form 3-177] Notice, their representations about what they would have told them if given a do-over are simply of no moment.” 2021 U.S. Dist. LEXIS 59429, at *16.

CONCLUSION

For the last several years, LEMIS data have been withheld from the public with significant negative repercussions to our conservation work and the public interest. We write to urge you to rectify this situation and immediately make this information available to the public.

Sincerely,



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