

**HEADQUARTERS**

120 Shelton McMurphey Blvd.
Suite 340
Eugene, OR 97401
(541) 485-2471
info@westernlaw.org

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WESTERN ENVIRONMENTAL LAW CENTER

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Sent via FOIA.gov Electronic Transmission

William Holzerland, FOIA Officer
Office of the Secretary of Interior
MS-7328, MIB
1849 C Street, NW
Washington, DC 20240
E-Mail: osfoia@ios.doi.gov

Lance Purvis, FOIA Officer
Office of the Solicitor, Department of Interior
MS-6540, MIB
1849 C Street, NW
Washington, DC 20240
E-Mail: sol.foia@sol.doi.gov

Ryan Witt, FOIA Officer
Bureau of Land Management
Attn: FOIA Office (WO-640)
1849 C St. N.W.
Washington, DC 20240
Email: rwitt@blm.gov

Ashley Rychak, FOIA Officer
Bureau of Ocean Energy Management
45600 Woodland Road
Sterling, Virginia 20166
Email: boemfoia@boem.gov

FREEDOM OF INFORMATION ACT REQUEST

Dear Mr. Holzerland, Mr. Purvis, Mr. Witt, and Ms. Rychak:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. I make this request on behalf of the Center for Biological Diversity, the Montana Environmental Information Center, and WildEarth Guardians, collectively “Conservation Groups.”

REQUESTED RECORDS

Pursuant to FOIA, Conservation Groups request the following:

1. Any and all documents or reports, or drafts, outlines, or portions of such documents or reports prepared by the Department of Interior or its subsidiary agencies, the Bureau of Land Management, and Bureau of Ocean Energy Management, collectively (“Interior”), between January 28, 2021 and November 25, 2021, in response to Section 208 of Executive Order 14008 of January 27, 2020, entitled “Tackling the Climate Crisis at Home and Abroad,” Fed. Reg. Vol. 86, No. 19.
2. Any communications between Interior and other agencies regarding Section 208 of Executive Order 14008, in response to the Order’s direction that Interior complete “a comprehensive review and reconsideration of the federal oil and gas leasing” program “in consultation with the Secretary of Agriculture, the Secretary of Commerce, through the National Oceanic and Atmospheric Administration, and the Secretary of Energy.”
3. Any and all drafts or prior iterations or sections of the document titled “Report on the Federal Oil and Gas Leasing Program Prepared in Response to Executive Order 14008, Section 208, U.S. Department of the Interior, November 2021,” which was released on November 26, 2021, produced between January 28, 2021 and November 25, 2021.
4. Any and all records regarding items 1-3, above, created, produced, or under the control of Interior, such records to include communications between or among appointed officials, employees, staff members, or consultants of Interior or other agencies, produced or sent between January 28, 2021 and November 25, 2021.

For purposes of this request, the definition of the term “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, emails, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), correspondence, letters, memoranda, reports, consultations, notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, photographs, videos, meeting notes or minutes, and electronic and magnetic recordings of meetings. All of the foregoing is included in this request if it is in Interior’s possession and control. If such recordings are no longer under the control of the above listed parties but were at any time, please refer this request to the relevant federal agency, agencies, or other executive branch of government.

This request is not meant to exclude any other records that, although not specifically requested, are reasonably related to the subject matter of this request. Please provide responsive records in digital format whenever possible.

* * *

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524). Please identify and inform us of all responsive or potentially responsive records within 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Washington v. Federal Election Com’n*, 711 F.3d 180, 182-183 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA’s limited exemptions. *Department of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Public Law 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your offices take the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A Vaughn index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. U.S. Department of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release and why this is so.

Presumption of Openness and “Foreseeable Harm” Standard

On his first full day in office, former President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are timely made, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the former President’s directives, on March 19, 2009, then Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

Former Attorney General Holder “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, available at http://www.justice.gov/oip/foia_guide09.htm.

While President Biden’s Administration has yet to formally address FOIA, Attorney General Merrick Garland has committed to a reaffirmation of Justice Department policy “that read[s] the Freedom of Information Act generously.” Opening Statement of Merrick Brian Garland submitted to the Senate Judiciary Committee in advance of his Confirmation Hearing, February 22, 2021, available at:

<https://www.judiciary.senate.gov/imo/media/doc/SJC%20Testimony.final.pdf>. We expect the current administration to adhere to this commitment and to the spirit, if not the letter, of former Attorney General Holder's FOIA guidelines.

Request for Fee Waiver

FOIA was designed to grant a broad right of access to government information, with a focus on the public's "right to be informed about what their government is up to," thereby "open[ing] agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA's fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that "[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . 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."

FOIA's fee waiver requirement is to be "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations like Conservation Groups access to government documents without the payment of fees. As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA's waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

Conservation Groups, all non-commercial and public-interest requesters, hereby request a waiver of all fees associated with this request because disclosure "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 U.S.C. § 552(a)(4)(A)(iii); see also 43 C.F.R § 2.45.

This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.¹ Below are the criteria the DOI considers in assessing requests for fee waivers, followed by an explanation of Conservation Groups' satisfaction of those requirements. These criteria are set forth in the order and numbered consistently with their counterparts in 43 C.F.R § 2.48(a) and

¹ Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

(b).² Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

(1) The subject of Conservation Groups' request concerns the operations or activities of the federal government:

- The subject matter of the requested records directly and specifically concerns operations or activities of the federal government, with a connection that is direct and clear, not remote;
- Conservation Groups request records related to Interior policy on the federal oil and gas leasing program, the impacts of that program and possible policy on mitigation with regard to climate change, and records produced in response to Executive Order 14008.
- The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by a federal agency will meet this threshold" of identifiable operations or activities of the government. See Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

(2) How disclosure is likely to contribute to public understanding of those operations or activities:

Disclosure of these records is likely to contribute to public understanding of the operations and activities of the federal government. Interior "must not make value judgments about whether the information at issue is 'important' enough to be made public; it is not Department's role to attempt to determine the level of public interest in requested information." 43 C.F.R. § 2.45(f).

(i) How the contents of the records are meaningfully informative:

- The requested records are meaningfully informative about government operations or activities and are likely to contribute to an increased public understanding of those operations or activities. The records requested will provide Conservation Groups with the ability to communicate to the public and their respective memberships about the activities of Interior, and, more broadly, of the federal government. The documents will give Conservation Groups, and therefore the public, crucial insight into Interior's policy with regard to the federal oil and gas leasing program and the climate crisis, including future implementation of that policy and recent changes to that policy. Regarding this issue, the actions and communications of Interior officials and others, which would be revealed by records in the possession of Interior, are of concern to the public.

² See also Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att'y Gen. (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm.

Disclosure of the requested records will enhance the public's knowledge of this issue and support public oversight of federal agency operations.

These documents are not currently in the public domain. Their release is "likely to contribute" to better public understanding of the federal government's policy. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. *See Judicial Watch*, 326 F.3d at 1314 ("[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.").

- (ii) The logical connection between the content of the records and the operations or activities:
- The requested records directly concern the operations or activities of an executive branch agency, the Department of the Interior, and its two subsidiary agencies, the Bureau of Land Management and Bureau of Ocean Energy Management, and are directly related to communications and records of those agency about federal policy.
- (iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:
- The public currently does not have the ability to fully evaluate the actions and inactions of Interior regarding the federal oil and gas leasing program generally, the programmatic response to climate change, and Interior's response to Executive Order 14008, in particular Section 208 of that Order. Disclosure of these records will contribute to the understanding of a reasonably broad audience of persons interested in the subject because Conservation Groups will disseminate the information they receive to a large audience of interested persons. Once the information is made available, it will be analyzed and presented to the public in a manner that will meaningfully enhance the public's understanding of this issue.
- (iv) Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:
- Conservation Groups are all nonprofit organizations dedicated to environmental protection. The Center for Biological Diversity is a nonprofit membership organization predicated on the idea that diversity has intrinsic value and that its loss impoverishes society; its work is geared to secure a future for all species, great and small, hovering on the brink of

extinction through the use of science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive. The Montana Environmental Information Center is a non-partisan, non-profit environmental advocacy group dedicated to ensuring clean air and water for Montana's future generations. WildEarth Guardians is a nonprofit membership organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West through activism, legal action, and public education.

Conservation Groups have specifically and consistently demonstrated their ability to disseminate information relative to the operations of the U.S. Department of the Interior and the Office of the Secretary of Interior. Conservation Groups accomplish this dissemination of information through printed media (both paid media and earned media), an email list, list-serves to which they post, printed publications staff write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by Conservation Groups, other nonprofit public interest entities, and federal agencies. The Department of Interior, Office of the Secretary, and its agencies have consistently granted fee waivers for Conservation Groups and similarly situated organizations, acknowledging their ability to effectively disseminate information received pursuant to FOIA.

- Other Interior Department agencies, including the U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, U.S. Office of Surface Mining Reclamation and Enforcement, and U.S. Bureau of Reclamation, have consistently granted Conservation Groups' and other similarly situated groups' requests for fee waivers. Other federal agencies, including the U.S. Environmental Protection Agency, U.S. Department of Agriculture, and U.S. Forest Service also consistently grant Conservation Groups' and other similarly situated groups' requests for fee waivers.
- Conservation Groups are non-profit organizations that inform, educate, and empower the public and their respective memberships regarding environmental issues, policies, and laws. Specifically, the work of all three Conservation Groups involves understanding, scrutinizing, and engaging in Interior Department management of public lands and resources at every level, including, with particular relevance to this request, matters concerning oil and gas leasing and production on federal public lands. The work of Conservation Groups is intertwined with Interior Department management of fish and wildlife, public lands and minerals, Indian trust resources, National Parks and Monuments, waters, coal mining, geologic resources, and more. The organizations have been involved in Interior Department operations for many years.
- Conservation Groups collectively and severally actively engage on issues related to threatened and endangered species management by the U.S. Fish and Wildlife Service, wildlife refuge management by the U.S. Fish and Wildlife Service, National Parks and Monuments management by the

National Park Service, U.S. Bureau of Land Management activities relating to the management of lands, minerals, and other resources, U.S. Bureau of Reclamation management of water in the western United States, regulation of coal mining by the U.S. Office of Surface Mining Reclamation and Enforcement, and management and regulation of other resources by other agencies under the Interior Department's authority.

- The organizations collectively and severally play active roles in informing the American public about the Interior Department's actions and activities. To this end, Conservation Groups each qualify as representatives of the news media pursuant to 43 C.F.R. § 2.70. The organizations have and continue to regularly provide information to the public related to the Interior Department's management of public resources, including wildlife, minerals, and lands, and are regularly interviewed and quoted by the news media with regards to Interior Department management decisions. With the requested information, the organizations will continue to inform, educate, and empower the public regarding the operations of the Department of the Interior.
 - In granting a fee waiver to Conservation Groups, it is important to recognize that (1) the requested information will contribute significantly to the public understanding of the operations or activities of the government, (2) the requested information will enhance the public's understanding to a greater degree than currently exists, (3) Conservation Groups possess the expertise to explain the requested information to the public, (4) Conservation Groups possess the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that Conservation Groups, individually, are established experts in the field of Interior Department actions and operations.
 - Conservation Groups' staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner possess the requisite experience, intelligence and expertise to carry out this task. Conservation Groups have consistently proven their ability to gather and disseminate information obtained from the Interior Department and other agencies.
- (v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information). If we have categorized you as a representative of the news media under § 2.38, we will presume you have this ability and intent.
- Conservation Groups individually and collectively have the ability and intention to disseminate the information requested to the public and their many members and supporters. Therefore, the disclosure of the requested documents will contribute to the understanding of a broad audience of persons interested in the subject.

- Conservation Groups plan to disseminate the information they obtain pursuant to this FOIA request in various effective ways, including through their respective websites, newsletters, press releases, Facebook pages, public education events, comments on proposed agency actions, and other public interest advocacy. Conservation Groups' staff will first analyze and digest the documents. The information will then be disseminated to Conservation Groups' respective members and supporters, members of other conservation organizations, and other interested members of the public.
- (vi) Whether the information would confirm or clarify data that has been released previously:
- The information requested has not, to our knowledge, been released previously.
- (vii) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure:
- Because this information is not currently in the public domain, disclosure of these records will increase the level of public understanding of the operations or activities of DOI that existed prior to disclosure. Conservation Groups will disseminate the information obtained from this FOIA request to a large public audience, as explained above, and will help the public understand the information in a simple and informative way.
 - The public's understanding of the federal government's evolving policy with regard to the federal oil and gas program, the climate crisis, and its response to Executive Order 14008 will be enhanced to a significant extent by the disclosure of these records.
 - Dissemination of the information obtained pursuant to this FOIA request will enhance the public's understanding of this issue because this information is not currently available to the public. *See Federal CURE*, 602 F. Supp. 2d at 205 (the existing public availability of the information is weighed when determining the degree of significance that will be derived from the disclosure of the information) (*citing Forest Guardians*, 416 F.3d at 1181). As described above, Conservation Groups will disseminate the information they obtain pursuant to this FOIA in various effective ways, including through their websites, newsletters, press releases, Facebook pages, and public education events. Furthermore, the information obtained through this FOIA request will be used to contribute to one or more of the following: public interest litigation, petitions, newsletters, public presentations, e-mail and postal mail publications, press releases, and local and national news stories.

- Given Conservation Groups' positions and abilities, described above, disclosure will lead to a significant enhancement of the public's understanding of the government operations and activities at issue.

Finally, 43 C.F.R § 2.48 (b), inquires whether Conservation Groups have any commercial interests that would be furthered by the requested disclosure:

Conservation Groups have no commercial, trade, or profit interests that would be furthered by the requested disclosure. Conservation Groups are all tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code. As such, Conservation Groups have no commercial interests. The requested records will be used in the furtherance of Conservation Groups' respective missions as education and advocacy groups focused on the protection and restoration of the natural environment and its dependent species.

Conservation Groups, all non-profit organizations, have no commercial interests and will realize no commercial benefit from the release of the requested information. Therefore, no assessment of the magnitude of the interest is required. See 43 C.F.R. § 2.48(b)(2)-(3).

Conclusion

Given Conservation Groups' demonstrably successful efforts at educating the public on environmental issues, and the fact that their education programs have significantly contributed to an understanding of government operations and activities, it is clear that Conservation Groups are collectively and individually entitled to a waiver of fees associated with this request. See 43 C.F.R § 2.48. In the event that your agency denies our request for a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact me for authorization before incurring any costs in excess of \$50.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day statutory deadline is also applicable to our fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

Sincerely,



Melissa A. Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Ph: 406-471-3173
Email: mhornbein@westernlaw.org

For:

Taylor McKinnon
Senior Campaigner
Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710
Email: TMcKinnon@biologicaldiversity.org

Anne Hedges, Co-Director
Director of Policy and Legislative Affairs
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
Email: ahedges@meic.org

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
301 N. Guadalupe, Suite 201
Santa Fe, NM 87501
jnichols@wildearthguardians.org