VIA FAX AND ELECTRONIC MAIL

TO: Karen Schul
U.S. Fish and Wildlife Service
Division of Human Resources
1 Federal Drive
Ft. Snelling, MN 55111
Karen_Schul@fws.gov
612-713-5267 - phone
612-713-5282 - fax

REQUEST FOR MATERIALS UNDER FREEDOM OF INFORMATION ACT

The Center for Biological Diversity (“CBD”) is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission and consistent with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I respectfully request the following information on behalf of CBD:

1. All records of informal consultations conducted pursuant to the Endangered Species Act and its implementing regulations for the Hine’s emerald dragonfly and the Hungerford’s crawling water beetle.

2. All records of formal and/or informal consultations conducted pursuant to the Endangered Species Act and its implementing regulations for activities that occur in and/or may affect critical habitat for the Niangua darter, gray wolf, piping plover, and/or the Indiana bat.

3. All records of Region 3’s listing and critical habitat designation budget and expenditure on an annual basis from Fiscal Year 1974 through Fiscal Year 2004.
4. All records that indicate that protecting critical habitat for ESA listed species does not provide additional protection to the species.

5. All records that indicate that the protections afforded by critical habitat designations are outweighed by the costs of such designations.

This request is being sent to the Region 3 Office of the U.S. Fish and Wildlife Service (“FWS”) with the understanding that it will be forwarded to any other offices containing the requested information, if applicable.

REQUEST FOR FEE-WAIVER

CBD requests that you waive all fees in connection with this matter. As shown below, CBD meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Interior’s fee-waiver regulations at 43 C.F.R. § 2.21(a). See also Judicial Watch v. Rossotti, 02-5154 (D.C. Cir. May 2, 2003). I would like to remind Region 3 that its decision to deny CBD a fee-waiver for similar materials was recently overturned by the Office of the Solicitor. Such fee-waiver denials unlawfully delay responses to CBD’s FOIA requests. Continued unlawful fee waiver denials will leave Region 3 vulnerable to a pattern and practice lawsuit.

In considering whether CBD meets the fee-waiver criteria, it is imperative that the FWS remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as CBD access to government documents without the payment of fees. As stated by one Senator, “[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 Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). Both the Ninth Circuit and the DC Circuit have stated that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” Id.; Judicial Watch, supra at 11.

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court has stated, this 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 clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups. Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).
I. 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 requested information will significantly contribute to public understanding of the issues involved, as defined by the Department of Interior at 43 C.F.R. § 2.21(a).

A. The subject of the request concerns “the operations and activities of the government.”

The subject matter of this request relates to the FWS’ implementation of the Endangered Species Act (“ESA”). It is clear that implementation of the ESA is a specific and identifiable activity of the government, in this case the executive branch agency FWS. See Judicial Watch, supra at 8 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

B. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

The information requested will help provide CBD with crucial insight into the policies and decision-making processes of FWS as they relate to the implementation of the ESA. These documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of the ESA program in general, the process by which FWS Region 3 evaluates species for protection through critical habitat and listing, and the interplay between the amount of protection provided to species and the number of exceptions granted under the Act. CBD has ascertained that FWS has taken the unlawful position that critical habitat is not beneficial to many species. The information requested will likely contribute to an understanding of whether or not the FWS Region 3 is in fact operating under such illegal and unfounded assumptions. 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, supra at 8-9 (“[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.”).

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public oversight and enhanced understanding of the FWS’ ESA enforcement is absolutely necessary. CBD members’ track record of active participation in oversight of governmental agency activities and its consistent contribution to the public’s understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. 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 requested information is certain to shed light on the FWS’s compliance with the ESA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. CBD intends to fulfill its well-established function of public oversight of agency action. CBD is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of CBD’s request may currently be in the public domain, because CBD requests considerably more than any piece of information that may currently be available to other individuals. Judicial Watch at 10.

II. Obtaining the information is of no commercial interest to CBD.

Access to government documents, disclosure forms, and similar materials 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.

III. CBD has a recognized ability to disseminate this information broadly.

CBD is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. CBD has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA fee-waivers.

In consistently granting CBD’s fee-waivers, all of these agencies have recognized that (1) CBD’s requested information contributes significantly to the public understanding of the operations or activities of the government, (2) CBD’s requested information enhances the public’s understanding to a greater degree than currently exists, (3) CBD possesses the expertise to explain the requested information to the public, (4) CBD possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that CBD is an established expert in the field of imperiled species, biodiversity, and impacts on protected species.

CBD need not show how it intends to distribute the information requested here, because “[n]othing in FOIA, the [agency] regulation, or our case law require[es] such pointless specificity.” Judicial Watch, supra at 10. It is sufficient for CBD to show how it distributes information to the public generally. Id. at 9.

The documents requested in this FOIA request will be used to determine whether and how FWS is complying with and implementing the mandates of the ESA. Concurrent with any action that CBD may take after obtaining the requested documents, CBD will publicize the reasons for the action and the underlying actions of the FWS and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of the FWS’ ESA responsibilities. CBD has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests similar to this one. CBD intends to use the documents requested in this request in a similar manner.

In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our membership today includes approximately 9,000 individuals. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which sends 18,000 to 24,000 electronic newsletters each month, and our web page, which is accessed approximately 150,000 times each month. Previously requested information from Region 3 has been reviewed, summarized, and distributed to the media, resulting in newspaper articles in the Milwaukee Journal-Sentinel, the Chicago Tribune, the Detroit Free Press, the Detroit News, and other papers. The information is also available on our website at
http://www.biologicaldiversity.org/swcbd/press/dragon2-4-04.html. Region 3’s ESA implementation will likely be disseminated through all of these means.

The Center also receives media coverage of its activities, which serves to distribute information obtained through FOIA. Through the first nine months of 2003, CBD had generated over 660 media articles across the country. These articles were published in every state in the U.S. and also U.S. protectorates such as Puerto Rico and Guam. Combined, the domestic readership of these articles is in the many millions of Americans.

I hope that this letter has demonstrated to your satisfaction that CBD qualifies for a full fee-waiver, and that you will immediately begin to search and copy the requested material. Should you decide not to waive fees, CBD plans to immediately appeal such a decision.

Should you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

1) Why is each document predecisional?
   A. To what decision are each of the documents leading?
   B. Has this decision been finalized?

2) Why is each document deliberative?
   A. To what extent does each make a recommendation on a legal or policy matter?

3) What policy recommendation qualifies this document for exemption?

I look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. 552(a)(6)(A)(i). Please send all materials to the address on the letterhead. Please call me at (510) 663-0616 if you have any further questions about this request.

Sincerely,

Brent Plater
April 9, 2004

Mr. Brent Plater
Center for Biological Diversity
370 Grand Avenue, suite 5
Oakland, California 94610

Dear Mr. Plater:

This letter completes our response to your Freedom of Information Act (FOIA) request of February 18, 2004. You requested:

1. All records of informal consultations conducted pursuant to the Endangered Species Act and its implementing regulations for the Hine's emerald dragonfly and the Hungerford's crawling water beetle.

2. All records of formal and/or informal consultations conducted pursuant to the Endangered Species Act and its implementing regulations for activities that occur in and/or may affect critical habitat for the Niangua darter, gray wolf, piping plover, and/or the Indiana bat.

3. All records of Region 3's listing and critical habitat designation budget and expenditure on an annual basis from Fiscal Year 1974 through Fiscal Year 2004.

4. All records that indicate that protecting critical habitat for ESA listed species does not provide additional protection to the species.

5. All records that indicate that the protections afforded by critical habitat designations are outweighed by the costs of such designations.

We have completed examining files under our jurisdiction and are enclosing the remaining documents that are responsive to items 1 and 2 of your request.

With regard to item 3, all records responsive to that request were provided in our response of March 17, 2004.

Items 4 and 5 were referred to our Washington, D.C. office for response. They informed us that they have no records responsive to your request.
You may treat this response as a partial denial. You may appeal this denial to:

U.S. Department of the Interior
Freedom of Information Act Appeal Officer
Office of Information Resources Management
Mail Stop 5312, MIB
1849 C Street, NW
Washington, DC 20240

Your appeal must be in writing and received no later than 30 working days after the date of this letter. A copy of your original request and this letter should accompany the appeal as well as a brief statement of the reasons why you believe this initial decision to be in error. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" both on the envelope and the face of the letter.

If you have questions, please contact Lynn Lewis at (612) 713-5345 or T.J. Miller at (612) 713-5334.

Sincerely,

James T. Leach
Acting Assistant Regional Director
Ecological Services

Enclosures
U.S. Department of the Interior
Freedom of Information Act Appeals Officer
Office of Information Resources Management
Room 5312, Main Interior Building
1849 C Street, N.W.
Washington, D.C. 20240

RE: Freedom of Information Act Appeal

Dear FOIA Appeal Officer:

On behalf of the Center for Biological Diversity (“the Center”), and pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq. (“FOIA”), I am writing to appeal the United States Fish and Wildlife Service’s (“the Service”) April 9, 2004 FOIA response, exhibit B, to the Center’s February 18, 2004 FOIA request, Exhibit A. In the February 18 letter, the Center requested, among other things:

4. All records that indicate that protecting critical habitat for ESA listed species does not provide additional protection to the species.

5. All records that indicate that the protections afforded by critical habitat designations are outweighed by the costs of such designations.

Although the Service did respond adequately to the first three items covered in this FOIA request, the Service failed to produce any documents in response to this request. Indeed, the request, originally sent to the Service’s Region 3, was subsequently sent to DC for responsive documents, but even after an apparent review no documents were provided. Finally, on April 9, 2004, the Service formally responded to this request, stating that the Service has “no records responsive to your request.” No exemption from disclosure of the documents was cited.

The Service’s response is untenable. On April 10, 2003, Secretary Manson testified before Congress, saying this about critical habitat: “A process that provides little
real conservation benefit consumes enormous agency resources and imposes huge social and economic costs.” Exhibit C. In the April 28, 2004 designation of critical habitat for the arroyo toad, the Service said the following:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 et seq.), we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources.

69 Fed. Reg. 23253. Similar statements have been in literally dozens of critical habitat designations and hundreds of press statements. Documents to support such statements must exist, and yet none have been provided to the Center and no exemption was cited.

Thus, the Service has failed to conduct an adequate search for the documents requested, see Steinberg v. United States DOJ, 306 U.S. App. D.C. 240, 23F.3d 548, 551 (D.C. Cir.1994); Schaldetsch v. HUD, No. 99-0175, slip op. at 10 (D.D.C. Apr. 4, 2000) (for electronic searching requirements) and/or has failed to provide documents responsive to the Center’s request.

As you are aware, you have 20 business days to respond to this appeal. If I do not receive a response within this time, I will seek judicial review of your action or inaction. Should we have to go to federal court to resolve this dispute, the FOIA provides for the following: “the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). See also Id. § 552 (a)(4)(F) (where court orders production of records improperly withheld and assesses against the United States reasonable attorney fees and costs, and issues written finding regarding arbitrary or capricious action by agency personnel, Special Counsel shall initiate proceeding to determine whether disciplinary action is warranted).

Please direct all responses and questions regarding this matter to me at the address provided. Thank you for your prompt attention to this matter.

Sincerely,

Brent Plater
Mr. Brent Plater  
Center for Biological Diversity  
370 Grand Avenue, Suite 5  
Oakland, CA 94610  

Dear Mr. Plater:

This concerns your May 4, 2004, Freedom of Information Act (FOIA) appeal (FOIA 2004-169), which was received in this Office on May 5, 2004. Your FOIA appeal is related to your February 18, 2004, FOIA request to the Fish and Wildlife Service (FWS), Division of Human Resources, Fort Snelling, Minnesota, and the FWS response dated April 9, 2004. In this appeal you indicated that the FWS response did not produce any documents for the following two items:

4. All records that indicate that protecting critical habitat for ESA listed species does not provide additional protection to the species.

5. All records that indicate that the protections afforded by critical habitat designations are outweighed by the costs of such designations.

Upon receipt of your appeal the Department directed FWS to review the file searches that were conducted in response to your FOIA request. The FWS, Washington, DC Office has advised the Department that it has conducted a thorough search of its files, including the Office of the Assistant Secretary for Fish, Wildlife and Parks (FW) concerning these two issues. However, these searches did not locate any responsive documents.

Based on the results of this search by FW and an additional search conducted by the FWS, your appeal is denied. The Department has no reason to question the findings of FWS. The Department is of the opinion that FWS has met its obligation under the FOIA by conducting a reasonable search of the files where the documents subject to your FOIA appeal would likely be located.

The FOIA requires an agency to disclose, upon request by any person, nonexempt documents that are in its possession and are retrievable by a reasonable search. An agency is not required under the FOIA to produce records which it does not have or cannot locate through a reasonable search (5 U.S.C. § 552(a)(3)).
This is a final determination of your appeal for this Department. If you consider this determination to be a denial of your appeal, you have a right to obtain judicial review of this decision in the United States District Court for the District in which the requested records would likely be located, or in which you reside, or have your principal place of business, or in the United States District Court for the District of Columbia.

Sincerely,

[Signature]
Julia Laws
Freedom of Information Act Appeals Officer