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Plaintiff's Counsel

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO:
SOUTHERN DIVISION**

WESTERN WATERSHEDS PROJECT,

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
INTERIOR,**

Defendant.

Case No. 1:19-cv-369

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act Case
Administrative Procedure Act Case

Plaintiff, Western Watersheds Project (“WWP”), alleges as follows:

INTRODUCTION

1. In this action, brought pursuant to the Freedom of Information Act (“FOIA” or “the Act”), 5 U.S.C. § 552 *et. seq.*, or, in the alternative, the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.*, WWP challenges the unlawful acts of the United States Bureau of Land Management (“BLM”), acting on behalf of the Defendant United States Department of Interior

(“DOI” or “the Agency”) as well as unlawful acts of the DOI itself in relation to WWP’s April 24, 2018 FOIA request to BLM (as amended by a May 2, 2018 letter) and WWP’s December 6, 2018 appeal to DOI of BLM’s adverse determination regarding that request.

2. WWP’s FOIA request sought information related to BLM’s “outcome-based grazing” initiative and eleven projects implementing the program in six western states. The request noted that WWP sought the records because “we wish to understand how BLM has been selecting allotments for its outcome-based demonstration project[s]” and that the records were needed to “understand the scope and scale” of the projects. WWP submitted its FOIA request, in part, so that it could continue to provide meaningful oversight of grazing management decisions by the BLM and DOI.

3. BLM never made a final determination on WWP’s FOIA request nor did DOI make a decision on WWP’s appeal.

4. The actions of BLM and DOI in relation to WWP’s FOIA requests and appeal violate FOIA in several ways. First, BLM failed to make a timely determination regarding WWP’s original FOIA request. Second, DOI has failed to make a determination on WWP’s appeal within the prescribed statutory period. Third, DOI failed to provide WWP with either a tracking number WWP’s FOIA appeal or an estimated date on which it would make a determination on the appeal.

5. These failures amount to illegal, constructive withholding of records responsive to WWP’s FOIA request and appeal.

6. Each of these failures violates FOIA, or, in the alternative, the APA.

7. WWP is engaged in ongoing public outreach, education, and government “watchdog” efforts regarding state and federal compliance with environmental statutes, and prompt access to the requested information is crucial to provide public oversight of Defendant’s activities in this

regard. DOI's repeated failures to comply with FOIA frustrate WWP's mission.

8. Accordingly, WWP seeks a declaration from this Court that DOI has violated FOIA, or in the alternative, the APA. WWP also seeks an injunction from this Court that directs DOI to promptly provide WWP with the requested records.

JURISDICTION, VENUE AND BASIS FOR RELIEF

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

10. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue in this District because Plaintiff has its headquarters in Hailey, Idaho which is located in Blaine County. Plaintiff also has members and staff that work or reside within this judicial division. Additionally, the requested records are located within this district in the Boise District Office of the BLM, headquartered in Boise, Idaho. Accordingly, assignment is proper in the Southern judicial division.

11. Declaratory relief is appropriate under 28 U.S.C. § 2201.

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

PARTIES

13. Plaintiff Western Watersheds Project is an Idaho non-profit membership organization dedicated to protecting and restoring watersheds and wildlife in the American West through education, public policy initiatives, and legal advocacy. WWP has over 9,500 members and supporters, including many members who live in Idaho. WWP is headquartered in Hailey, Idaho, and has staff in Boise, Idaho, as well as in other western states.

14. WWP is active in seeking to protect and improve the public lands, wildlife, and other natural resources and ecological values of western watersheds, particularly by addressing impacts caused by domestic livestock grazing. WWP has long-standing concerns about impacts of BLM's grazing management on sage-grouse and other species. WWP has been in operation since 1993 and has a long track record of success in its work to watchdog compliance with environmental laws on public lands. WWP made the information request and appeal at issue in this case.

15. To further its mission, WWP often requests information regarding federal programs and activities through the FOIA. WWP then compiles and analyzes the information it obtains through the requests and disseminates it to the public by: (1) presenting the material to its members and supporters, as well as members of other state and national conservation organizations, through its newsletter, social media, and email alerts; (2) presenting the materials at national and regional conferences; (3) participating in other public forums, such as local government hearings; (4) issuing press releases and presenting the information to national, regional and local media; (5) posting the information (in a compiled and more readily understandable form) on WWP's internet web site, which has over 2,000 views each month; and (6) periodically posting information in a compiled and more readily understandable form to a heavily trafficked weblog, The Wildlife News (<http://www.thewildlifeneeds.com>) which receives on average over 7,000 visits each week. The records requested in the FOIA requests at issue here will help WWP inform and educate its members and the public about BLM's grazing management policies and decisions, and how they may affect the environment.

16. The records at issue in this litigation are requested in support of WWP's ongoing efforts to improve protection of species and ecosystem health through oversight of grazing management decisions by the BLM and DOI. Because the information requested herein has not been publicly

disclosed, its disclosure would significantly enhance public understanding concerning Defendant's land management decisions.

17. WWP and its staff and members are directly injured by BLM's and DOI's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. WWP brings this suit on behalf of itself, its staff and its members.

18. Defendant DOI is an agency of the executive branch of the United States government, and is in possession, custody, or control of the records sought by WWP, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f). The BLM is an administrative component of the DOI.

STATUTORY BACKGROUND

19. FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1st Sess. 1965). As the Supreme Court has affirmed, "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Accordingly, "the basic purpose" of FOIA is "to open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

20. FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). The 20-business-day period commences on the date on which the request is first received by the appropriate component of

the agency, “but in any event not later than ten days after the request is first received by any component of the agency” that is designated in the agency’s regulations to receive requests under FOIA. *Id.* If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A).

21. Within the relevant time period, the agency must notify the requester of the scope of the documents that the agency will produce, the scope of the documents that the agency plans to withhold under any FOIA exemptions, the reasons for any withholdings, and of the requester’s right to appeal to the head of the agency any adverse determination. *Id.*; 5 U.S.C. § 552(a)(6)(A)(i). “The requirement that the agency notify the requester about administrative appeal rights [] indicates that the ‘determination’ must be substantive, not just a statement of a future intent to produce non-exempt responsive documents.” *Citizens for Responsibility and Ethics in Wash. v. Federal Election Com’n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (*CREW*).

22. If the requester appeals an agency’s determination, the agency must make a determination with respect to that appeal within 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii).

23. In determining whether to comply with an initial request, an agency must first gather and review the requested documents. *CREW*, 711 F.3d at 188.

24. Then, the agency making the determination “must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decides to later decide.” *CREW*, 711 F.3d at 186.

25. Congress set forth the circumstances in which federal agencies may take longer than 20 business days to make the initial determination. The agency may toll the 20-business-day

deadline for up to ten additional business days if the agency is waiting for information that it has reasonably requested from the requester. 5 U.S.C. § 552(a)(6)(A)(ii)(I).

26. The agency may also toll the 20-business-day deadline for up to ten additional business days if it needs to clarify with the requester any issues regarding fee assessment. 5 U.S.C. § 552(a)(6)(A)(ii)(II). If the agency faces “unusual circumstances,” the agency may extend the 20-business-day deadline if the agency sets forth in writing “the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). No extension may exceed 10 business days unless the agency: (1) provides written notice to the requester explaining the “unusual circumstances” requiring an extension; (2) establishes the date on which the agency expects to make the determination; and (3) gives the requester “an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii).

27. Under FOIA, “unusual circumstances” are defined as “the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request[,]” or “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” or “the need for consultations . . . with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

28. An untimely determination or response is a violation of FOIA, regardless of the final outcome of the request. *Gilmore v. U.S. Dept. of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998), *Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006).

29. Administrative remedies are deemed exhausted when an agency fails to comply with

applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i); *CREW*, 711 F.3d at 277.

30. If the agency fails to meet FOIA's disclosure deadlines, including the deadline to determine within 20 business days whether to respond to the request, the agency may not charge the requester for the costs incurred in searching for or duplicating the requested documents unless unusual or exceptional circumstances apply. 5 U.S.C. § 552(a)(4)(A)(viii).

31. Unless an agency subject to FOIA properly establishes a different timeline for disclosing responsive records, FOIA's mandate to make public records "promptly available" to a requester requires federal agencies to provide responsive records to a requester within or shortly after the 20-business-day deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

32. FOIA requires federal agencies to provide the requester with information about the status of the agency's response to the request, including the date it originally received a request as well as an estimated date on which the agency will complete action on the request. 5 U.S.C. § 552(a)(7)(B)(i) & (ii).

33. An agency may avoid disclosure of information responsive to a FOIA request only if the agency proves that the requested documents fall within one of the nine enumerated exemptions to the general disclosure requirement. *See* 5 U.S.C. § 552(b)(1)–(9). FOIA requires an agency withholding information responsive to a FOIA request must provide the requester with "the reasons therefore." 5 USC § 552(a)(6)(A)(i).

34. Consistent with encouraging disclosure, the exemptions under § 552(b) are discretionary, not mandatory. *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 (1979). "Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure." *Id.* at 292.

35. An agency bears the burden of proving that a requested document falls within one of the nine exemptions. *See Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (“Under FOIA, ‘the burden is on the agency to sustain its action.’”); *Assembly of State of California v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (“The government has the burden to prove that a requested document falls within one of FOIA’s exemptions.”).

36. Given the policy behind the FOIA, the federal courts have consistently refused to allow agencies to meet their burden of proving the requested documents fall within one of the FOIA’s exemptions by making conclusory and generalized allegations of confidentiality. “We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980); *see also Anderson v. Dep’t of Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990) (“The district court must determine whether all of the requested materials fall within an exemption to the FOIA and may not simply conclude that an entire file or body of information is protected without consideration of the component parts.”).

37. “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Anderson*, 907 F.2d at 941. Defendant BLM cannot simply redact entire records or pages if a small portion is subject to an exemption. *Oglesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (“If a document contains exempt information, the agency must still release ‘any reasonably segregable portion’ after deletion of the nondisclosable portions.”) (quoting 5 U.S.C. § 552(b)). “[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” *Arieff v. Dep’t of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983).

38. A U.S. district court has jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

39. If the government can show that “exceptional circumstances” exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. 5 U.S.C. § 552(a)(6)(C)(i).

Notably, the term “exceptional circumstances” does *not* include a delay that results from a predictable agency workload of FOIA requests, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. 5 U.S.C. § 552(a)(6)(C)(ii).

40. Agency action arising under FOIA has also been subject to judicial review under the APA. *See, e.g., Oregon Natural Desert Ass’n. v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D.Or. 2006) (finding that violation of the FOIA’s decision deadline constitutes APA violation for an agency action that is not in accordance with the law), *affirmed in part, reversed on other grounds, Oregon Natural Desert Ass’n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

41. Under the judicial review provisions of the APA, district courts are authorized to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts must also set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or made without observation of required procedures. 5 U.S.C. § 706(2).

STATEMENT OF FACTS

42. On April 24, 2018, via email, WWP’s Deputy Director Greta Anderson submitted a FOIA request to BLM’s Washington Office seeking five categories of public records regarding BLM’s “Outcome-based grazing” initiative and eleven demonstration projects implementing the program in six states: Idaho, Nevada, Oregon, Montana, Wyoming, and Colorado. The request

noted that WWP sought the records because “we wish to understand how BLM has been selecting allotments for its outcome-based demonstration project[s]” and that the records were needed to “understand the scope and scale” of the projects.

43. On May 2, 2018, WWP amended the request to clarify that the dates of the records sought were “since January 2017.” According to DOI’s online FOIA tracker, BLM asserted that it received the amendment of the request on May 7, 2018, notwithstanding that it was submitted electronically on May 2, 2018.

44. On May 14, 2018, BLM’s Washington Office responded to Ms. Anderson, acknowledging its receipt of the request, and assigning the request control number 2018-00815. BLM assigned the request to the Complex track, “for requests that can be processed in twenty-one to sixty workdays,” although the response noted that “we will prioritize and process your request as the records become available.”

45. On May 15, 2018, Ms. Anderson and BLM exchanged a series of emails confirming that BLM had accounted for the clarification that dates of the records sought were “since January 2017.”

46. To comply with FOIA and the 20 business day decision deadline imposed by the FOIA and DOI’s request resolution regulations at 5 U.S.C. 552(1)(6)(A)(i) and 43 C.F.R. § 2.16(a) respectively, the deadline for BLM to issue a final determination on WWP’s amended request (accounting for the Memorial Day holiday) was no later than June 5, 2018. Regardless, DOI’s online FOIA tracker listed the due date for a determination as June 11, 2018.

47. BLM did not issue a final determination on WWP’s May 2, 2018 request by June 5, 2018 or by June 11, 2018.

48. Having received no further communications from BLM, nor any records, Ms. Anderson contacted BLM on November 8, 2018 requesting a status update. BLM did not respond to Plaintiff's November 8, 2018 status request.

49. On December 6, 2018, WWP's Nevada-Oregon Director Paul Ruprecht filed a timely appeal of BLM's failure to properly respond and produce records under the FOIA. The appeal noted that according to DOI's online FOIA tracker, the due date for the request was June 11, 2018 and the estimated processing completion date was August 7, 2018, but that WWP had received no determination, records or other information before or after August 7, 2018 despite the statutory and regulatory deadlines and the follow up request for a status update on November 8, 2018. The appeal requested that DOI "order BLM to immediately provide all records responsive to WWP's request as of the date the Department decides this appeal."

50. To comply with FOIA and the 20 business day decision deadline imposed by the FOIA and DOI's appeal resolution regulations at 5 U.S.C. 552(1)(6)(A)(ii) and 43 C.F.R. § 2.62 respectively, the deadline for DOI to issue a final determination on WWP's December 6, 2018 appeal (and accounting for the Christmas and New Year holidays) was January 8, 2019.

51. DOI did not issue a final determination on WWP's December 6, 2018 appeal by January 8, 2019.

52. DOI is required to notify WWP within the 20 business day decision deadline imposed by the FOIA and DOI's appeal resolution regulations of its statutory right to seek judicial review. 5 U.S.C. § 552(a)(6)(A)(ii); 43 C.F.R. § 2.62(b).

53. Defendant DOI did not provide WWP of its statutory right to seek judicial review, nor did it provide a written acknowledgement of receipt or a tracking number, of the FOIA appeal.

54. On January 30, 2019, Mr. Ruprecht emailed DOI and BLM requesting an update on the status of the FOIA request and appeal, including a determination date and date for providing responsive records. Neither BLM nor DOI responded.

55. On March 8, 2019, Mr. Ruprecht again emailed DOI and BLM notifying the agencies that the statutory deadline for responding to the appeal had passed; and seeking a response with a determination document and an initial release of records to WWP by March 15, 2019. Neither BLM nor DOI responded.

56. On September 9, 2019, Mr. Ruprecht again emailed DOI and BLM notifying them that they were in violation of the FOIA, and requesting a determination as well as an estimated date of completion, and release of records to WWP. Neither BLM nor DOI has responded.

57. As of the date of filing this Complaint, Plaintiff has received no response to either its request or its appeal. DOI has not requested any extension to respond, nor has it notified Plaintiff of circumstances preventing it from responding within the statutory timeframe.

58. On September 18, 2019, the undersigned counsel logged onto DOI's FOIA request tracker web page (<https://foia.doi.gov/requeststatus/Foia.do>) and used the request control number (2018-00815). The inquiry produced no result of any type and it appeared the system did not contain any information relevant to an estimated date by which the request or appeal would be completed.

59. Thus, WWP has not been able to obtain any information about the status of its FOIA appeal through the DOI office by email, letter, telephone or using the DOI's FOIA tracker.

60. As noted above, prompt access to the requested information is crucial to provide public oversight of Defendant's "outcome based" grazing projects.

61. DOI violated FOIA by failing to make a timely decision on, to or acknowledge in writing its receipt of or a tracking number for, Plaintiff's FOIA appeal and by failing to provide a determination letter that advises WWP of its statutory right to judicial review.

62. As of the date this action was filed, DOI has not provided an estimated completion date for FOIA appeal.

63. As of the date this action was filed, WWP has contacted DOI on multiple occasions to inquire about the status of its FOIA appeal and to request a tracking number and estimated date of completion for the DOI's determination on the appeal. In so doing, WWP invoked 5 U.S.C. § 552(a)(7)(B).

64. DOI has not responded to any of WWP's requests for information about the status of its appeal.

65. As of the date this action was filed, DOI has failed to make a final determination resolving WWP's FOIA appeal of FOIA request number 2018-00815, and violated the deadline requiring such a decision within 20 business days from its receipt.

66. As of the date this action was filed, BLM has failed to provide WWP with a written notice setting forth any unusual circumstances that would justify extension of any of FOIA's deadlines, as required by 5 U.S.C. 552(a)(6)(B)(i).

67. Defendant is overdue in its regulatory obligations to respond to WWP's FOIA appeal and to review and provide non-exempt responsive records. Accordingly, Plaintiff seeks declaratory relief establishing that Defendants have violated FOIA and an order to provide non-exempt documents in a reasonable amount of time.

68. Because DOI has failed to respond to WWP's FOIA appeal within the period required by FOIA, WWP has constructively exhausted all administrative remedies required by FOIA and may seek immediate judicial review. 5 U.S.C. §§ 552(a)(6)(A)(ii), (a)(6)(C)(i).

69. The filing of this lawsuit is necessary to compel Defendant to disclose all records that are responsive to WWP's FOIA request number 2018-00815.

70. WWP's claims presented herein are not insubstantial within the meaning of 5 U.S.C. § 552(a)(4)(E)(ii)(II).

71. No exceptional circumstances exist within the meaning of FOIA, 5 U.S.C. § 552(a)(6)(C), which would allow this Court to grant Defendant more time to review and disclose requested records.

72. Defendant has not exercised due diligence in searching for and releasing records responsive to WWP's request.

73. The delays at issue in this case result from a predictable agency workload of FOIA requests and appeals. Defendant has not made reasonable progress in reducing its backlog of pending requests.

74. The circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholdings at issue in this case.

75. Based on the nature of WWP's professional activities, WWP will continue to employ FOIA's provisions in information requests to BLM and DOI in the foreseeable future. Indeed, WWP has firm and definite plans to submit additional FOIA requests to BLM and DOI in the near future. WWP's professional activities will be adversely affected if BLM or DOI are allowed to continue violating FOIA's disclosure provisions. Unless enjoined and made subject to a declaration of WWP's legal rights by this Court, BLM will continue to violate the rights of WWP to receive public records under FOIA.

76. WWP has been required to expend costs and to obtain the services of attorneys to prosecute this action.

CAUSES OF ACTION

COUNT I

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
UNLAWFUL, CONSTRUCTIVE DENIAL OF FOIA REQUEST AND APPEAL AND
WITHHOLDING OF INFORMATION**

77. WWP hereby incorporates by reference the allegations in the preceding paragraphs.
78. WWP has a statutory right to the records it seeks, which are “agency records” within the meaning of FOIA, and there is no legal basis for Defendant to assert that any of FOIA’s nine disclosure exemptions apply to the records requested. *See* 5 U.S.C. § 552(b)(1)-(9).
79. Defendant violated WWP’s rights under FOIA by failing to comply with the Act’s decision deadlines and to make a determination on WWP’s FOIA request and appeal and by thus constructively withholding information responsive to WWP’s FOIA request and appeal.
80. Based on the nature of WWP’s professional activities, it will continue to employ FOIA’s provisions in information requests to Defendant in the foreseeable future.
81. WWP’s professional activities will be adversely affected if Defendant is allowed to continue violating FOIA’s disclosure provisions as it has in this case.
82. Unless enjoined and made subject to a declaration of WWP’s legal rights by this Court, Defendant will continue to violate the rights of WWP to receive public records under FOIA.
83. WWP is entitled to reasonable costs of litigation, including attorneys’ fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
UNLAWFUL APPLICATION OF DISCLOSURE EXEMPTION**

84. WWP hereby incorporates by reference the allegations in the preceding paragraphs.
85. Plaintiff has a statutory right to the records it seeks, which are “agency records” within

the meaning of FOIA, and there is no legal basis for Defendant DOI to assert that any of the FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

86. Defendant DOI violated Plaintiff's rights under FOIA by unlawfully withholding information responsive to Plaintiff's FOIA request and appeal.

87. Based on the nature of Plaintiff's professional activities, it will continue to employ FOIA's provisions in information requests to Defendant DOI in the foreseeable future.

88. Plaintiff's professional activities will be adversely affected if Defendant DOI is allowed to continue to violate FOIA's disclosure provisions as it has in this case.

89. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant DOI will continue to violate the rights of Plaintiffs to receive public records under FOIA.

90. Plaintiffs are entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT III

VIOLATION OF THE FREEDOM OF INFORMATION ACT: DECISION DEADLINE VIOLATIONS

91. WWP hereby incorporates by reference the allegations in the preceding paragraphs.

92. WWP has a statutory right to have Defendant process its FOIA request and appeal in a manner that complies with FOIA. WWP's rights in this regard were violated when the Defendant failed to make a determination on WWP's FOIA request and appeal by the deadlines imposed by FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i); 552(a)(6)(A)(ii).

93. Defendant is unlawfully withholding public disclosure of records sought by WWP, records which are "agency records" within the meaning of FOIA, to which WWP is entitled, and for which no valid disclosure exemption applies.

94. Based on the nature of WWP's professional activities, it will continue to employ FOIA's provisions in information request to Defendant in the foreseeable future.

95. WWP's professional activities will be adversely affected if Defendant is allowed to continue violating FOIA's decision deadlines as it has in this case.

96. Unless enjoined and made subject to a declaration of WWP's legal rights by this Court, Defendant will continue to violate the rights of WWP to have its information requests and appeals processed as required by FOIA.

97. WWP is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT IV

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO INFORM OF DATE OF RECEIPT,
PROVIDE TRACKING NUMBER OR AN ESTIMATED DATE ON WHICH THE
AGENCY WILL COMPLETE ACTION ON PLAINTIFF'S FOIA APPEAL**

98. WWP hereby incorporates by reference the allegations in the preceding paragraphs.

99. FOIA requires federal agencies to acknowledge receipt of requesters' requests and appeals of FOIA determinations, provide requesters with the date upon which the agency received FOIA requests and appeals and provide an individualized tracking number for each request and appeal received that will take longer than ten days to process. 5 U.S.C. §§ 552(a)(7)(A), (B)(i).

100. FOIA requires federal agencies to provide the requester with information about the status of the agency's response to an appeal, including an estimated date on which the agency will complete action on the appeal. 5 U.S.C. § 552(a)(7)(B)(ii).

101. WWP has repeatedly asked Defendant for the date it received Plaintiff's appeal as well as a tracking number and an estimated date on which Defendant would complete action on WWP's

appeal. In so doing, WWP constructively invoked 5 U.S.C. §§ 552(a)(7)(A) and (B).

102. As of the date this action was filed, Defendant has failed to provide the date it received WWP's appeal or a tracking number or an estimated date on which Defendant would complete action on WWP's pending FOIA appeal.

103. Defendant has repeatedly violated and continues to violate FOIA by failing to provide the date it received WWP's appeal or a tracking number or an estimated date of completion for WWP's pending FOIA appeal.

104. WWP is entitled to reasonable costs of litigation and attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT V

(In the alternative to Counts I through IV)

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT: FAILING TO COMPLY WITH FOIA IN RESPONDING TO WWP'S FOIA REQUEST AND APPEAL

105. WWP hereby incorporates by reference the allegations in the preceding paragraphs.

106. Defendant has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) issue a timely final determination of WWP's FOIA request and appeal, and; (2) provide WWP with the date it received WWP's appeal or a tracking number or the estimated completion date for its appeal.

107. WWP has been adversely affected and aggrieved by the Defendant's failure to comply with the mandates of FOIA. Defendant's failure and refusal to: (1) issue a timely final determination of WWP's FOIA request and appeal, and; (2) provide WWP with the date it received WWP's appeal or a tracking number or the estimated completion date for its appeal has injured WWP's interests in public oversight of governmental operations and constitute a violation of Defendant's statutory duties under the APA.

108. WWP has suffered a legal wrong as a result of the Defendant's failure to comply with the mandates of FOIA. Defendant DOI's failure and refusal to: (1) issue a timely final determination of WWP's FOIA request and appeal, and; (2) provide WWP with the date it received WWP's appeal or a tracking number or the estimated completion date for its appeal has injured WWP's interests in public oversight of governmental operations and constitute a violation of Defendant's statutory duties under the APA.

109. Defendant's failure and refusal to: (1) issue a timely final determination of WWP's FOIA request and appeal, and; (2) provide WWP with the date it received WWP's appeal or a tracking number or the estimated completion date for its appeal, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

110. Alternatively, Defendant's failure and refusal to: (1) issue a timely final determination of WWP's FOIA request and appeal, and; (2) provide WWP with the date it received WWP's appeal or a tracking number or the estimated completion date for its appeal, is a violation of FOIA and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

111. WWP is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702, 706.

112. WWP is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

REQUESTS FOR RELIEF

WHEREFORE, WWP requests that this Court:

1. Adjudge and declare that Defendant has violated FOIA — or in the alternative, the APA — for the reasons set forth above;
2. Order Defendant to comply immediately with FOIA by providing WWP all non-exempt public records subject to WWP’s FOIA request and appeal;
3. Award WWP its reasonable attorneys’ fees and litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) and/or award WWP its reasonable fees, expenses, costs, and disbursements, including attorneys’ fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412;
4. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and
5. Grant such further and additional relief as this Court may deem just and proper.

Respectfully submitted for the Court’s consideration, this 24th day of September, 2019.

/s/ David A Bahr
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(*pro hac vice* application pending)
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