

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS)	
516 Alto Street)	
Santa Fe, New Mexico 87501)	Civil Action No. 14-1828
)	
Plaintiff,)	
vs.)	COMPLAINT FOR
)	DECLARATORY AND
UNITED STATES FISH AND WILDLIFE SERVICE, a)	INJUNCTIVE RELIEF
federal agency within the U.S. Department of the Interior)	
1849 C Street, N.W.)	
Washington, D.C. 20240)	
)	
Federal Defendant.)	
)	

Plaintiff, WILDEARTH GUARDIANS, alleges as follows:

I. INTRODUCTION

1. This action is premised upon, and consequent to, violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.* It challenges the unlawful failure of the above-named Federal Defendant, UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”), to respond to two different FOIA requests submitted by WildEarth Guardians within 20 working days, as required pursuant to 5 U.S.C. § 552(a)(6)(A)(i).

2. Prompt access to the requested information is crucial to WildEarth Guardians’ work safeguarding imperiled species, which, here, includes a species listed as threatened under the federal Endangered Species Act (“ESA”), and another species that was recently denied protection under the federal ESA. FWS’s failure to respond constrains WildEarth Guardians and the public’s ability to engage in agency decision-making processes on a fully informed basis. FWS has unlawfully withheld public disclosure of information sought by WildEarth Guardians.

WildEarth Guardians is entitled to receive the requested information. No valid disclosure exemption applies that would prohibit disclosure of the requested documents. FWS failed to comply with the statutory mandates and deadlines imposed by FOIA. Accordingly, WildEarth Guardians seeks declaratory relief establishing that FWS has violated FOIA. WildEarth Guardians also seeks injunctive relief directing FWS to promptly provide WildEarth Guardians with the requested information.

3. Given the time sensitive nature of this matter, WildEarth Guardians requests expedited consideration of this action pursuant to 28 U.S.C. § 1657(a).

4. If they prevail, WildEarth Guardians will seek an award of attorneys' fees, costs, and other expenses pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

II. JURISDICTION & VENUE

5. Jurisdiction is proper in this Court pursuant to 5 U.S.C § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et. seq.*

6. This action reflects an actual, present, and justiciable controversy between the Plaintiff and the Defendant. Plaintiff's interests will be adversely affected and irreparably injured if Defendant continues to violate FOIA as alleged herein.

7. The requested relief is authorized by 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. § 552(a)(4)(B).

8. The requested relief would redress the actual, concrete injuries to Plaintiff caused by the Defendant's failure to comply with duties mandated by FOIA, and its associated regulations.

9. The challenged agency action is final and subject to judicial review pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

10. Plaintiff filed a FOIA request on August 13, 2014 to which Defendant's have failed to respond, and therefore Plaintiff has exhausted any and all available and required remedies.

11. Plaintiff filed a second and unrelated FOIA request on September 12, 2014 to which Defendant's have failed to respond, and therefore Plaintiff has exhausted any and all available and required remedies.

12. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the District of Columbia. Additionally, WildEarth Guardians has members that work and/or reside within this judicial district. Assignment is proper in this district and division for the same reasons.

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

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

III. PARTIES

15. Plaintiff WILDEARTH GUARDIANS is a non-profit organization headquartered in Santa Fe, New Mexico. WildEarth Guardians is dedicated to protecting and restoring the West's wild places, rivers, and wildlife, including Canada lynx and wolverine. WildEarth Guardians has more than 65,000 members and supporters and maintains offices in New Mexico, Colorado, Montana, Arizona, Utah, Oregon, Wyoming, and California. WildEarth Guardians brings this action on its own behalf and on behalf of its adversely affected members. WildEarth

Guardians and its members are injured and adversely affected by FWS's failure to make a determination on its FOIA requests. WildEarth Guardians and its members are injured and adversely affected by FWS's failure to release the requested documents.

16. The relief sought by WildEarth Guardians would redress the injuries suffered by WildEarth Guardians and its members, as well as provide valuable and necessary information that will allow WildEarth Guardians, its members, and the general public, to engage in the FWS decision-making process on a fully-informed basis. The requested relief would require Defendant to respond to WildEarth Guardians' FOIA requests and promptly release the requested information.

17. The relief sought by WildEarth Guardians would redress these injuries.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a federal agency within the U.S. Department of the Interior. FWS is responsible for promptly responding to all FOIA requests, including the underlying requests at issue here. In this capacity, FWS is responsible for implementing and complying with federal law, including the federal laws implicated by this action. FWS has failed to respond or otherwise communicate with WildEarth Guardians regarding its FOIA requests.

IV. STATUTORY BACKGROUND

19. FOIA requires that an agency of the federal government, "upon any request ... shall make the records promptly available." 5 U.S.C. § 552(a)(3)(A).

20. Each agency, upon any request for records, "shall determine within 20 [working days] after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons

therefor.” 5 U.S.C. § 552(a)(6)(A)(i).

21. In “unusual circumstances,” an agency may extend the time period by which it must make a determination on a FOIA request by no more than ten working days. 5 U.S.C. § 552(a)(6)(B)(i). An agency must notify a requester in writing that it is taking such an extension of time before the twenty working day time limit for a determination on a FOIA request expires. 43 C.F.R. § 2.19(a). Such written notification must provide the requester with the date by which the agency expects to make a determination on the FOIA request. 5 U.S.C. § 552(a)(6)(B)(i). Such written notification must also provide the requester with the date by which the agency expects to complete the processing of the FOIA request. 43 C.F.R. § 2.19(a)(2).

22. The requester is “deemed to have exhausted his administrative remedies with respect to such a request if the agency fails to comply with the applicable time limit provisions.” 5 U.S.C. § 552(a)(6)(C)(i).

23. Requesters may seek immediate judicial review if the agency fails to make an initial substantive determination on a request within 20 working days.

V. STATEMENT OF FACTS

24. On August 13, 2014, WildEarth Guardians submitted a FOIA request to FWS seeking certain documents related to the FWS’ August 13, 2014 decision to not list the wolverine as threatened under the federal ESA (hereinafter “wolverine FOIA request”).

25. On August 14, 2014, FWS acknowledged that it received the wolverine FOIA request. FWS assigned WildEarth Guardians’ wolverine FOIA request tracking number: FWS-2014-01228.

26. The wolverine FOIA request had a response deadline of September 12, 2014. FWS failed to make a determination on whether to comply with WildEarth Guardians' wolverine FOIA request by September 12, 2014. FWS failed to request an extension of time to respond to WildEarth Guardians' wolverine FOIA request by September 12, 2014. FWS failed to respond to WildEarth Guardians' wolverine FOIA request in any way, beyond acknowledging receipt, by September 12, 2014. FWS failed to provide the requested documents to WildEarth Guardians by September 12, 2014.

27. On September 12, 2014, counsel for WildEarth Guardians sent FWS a letter via email and United States Postal Service (USPS) certified mail, return receipt requested, to remind the agency of the September 12, 2014 response deadline, to offer assistance to facilitate a prompt response to WildEarth Guardians' wolverine FOIA request, and to request the agency's prompt release of the requested documents.

28. On September 16, 2014, counsel for WildEarth Guardians received an email from FWS' FOIA officer, Melissa Allen, acknowledging receipt of the September 12, 2014 letter. This email informed counsel for WildEarth Guardians that: "You've touched upon a very important point that I will be addressing Service-wide as I assemble a new team here/update FWS FOIA policies: determinations in a timely manner." This email also stated that WildEarth Guardians' wolverine FOIA request was being processed by FWS' Region 6 office.

29. On September 16, 2014, counsel for WildEarth Guardians received an acknowledgement letter from Antoinette Urioste, a FWS employee in the Region 6 FOIA office. This letter assigned a new tracking number to WildEarth Guardians' wolverine FOIA request:

FWS-2014-01264. This letter also stated that FWS was taking a “10-workday extension under 43 C.F.R. § 2.19.”

30. On September 26, 2014, counsel for WildEarth Guardians sent FWS a second letter via email and USPS certified mail, return receipt requested, informing the agency of its statutory obligations under FOIA and, in particular, its mandate to make a determination within 20 working days of receipt of the FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). WildEarth Guardians counsel also informed FWS that under the ten-workday extension that it had taken, a determination on WildEarth Guardians’ FOIA request would have been due on September 26, 2014. WildEarth Guardians’ counsel offered to provide any assistance or additional information to facilitate a prompt response. WildEarth Guardians’ counsel informed FWS that it expected a reply by October 2, 2014, and that WildEarth Guardians would pursue legal action to compel compliance with the statutory time limits of FOIA if no response was received. FWS did not respond to the September 26, 2014 letter.

31. To date, FWS has not made a determination on WildEarth Guardians’ wolverine FOIA request. To date, FWS has not responded to WildEarth Guardians’ wolverine FOIA request.

32. On September 12, 2014, WildEarth Guardians submitted a FOIA request to FWS seeking certain documents related to the FWS’ September 12, 2014 decision to revise the critical habitat designation for the Canada lynx (hereinafter “lynx FOIA request”). The Canada lynx is a species listed as threatened under the federal ESA.

33. On September 15, 2014, FWS acknowledged it received the lynx FOIA request. FWS assigned WildEarth Guardians’ lynx FOIA request tracking number: FWS-2014-01350.

34. The lynx FOIA request had a response deadline of October 14, 2014. FWS failed to make a determination on whether to comply with WildEarth Guardians' lynx FOIA request by October 14, 2014. FWS failed to request an extension of time to respond to WildEarth Guardians' lynx FOIA request by October 14, 2014. FWS failed to respond to WildEarth Guardians' lynx FOIA request in any way, beyond acknowledging receipt, by October 14, 2014. FWS failed to provide the requested documents to WildEarth Guardians by October 14, 2014.

35. On October 16, 2014, counsel for WildEarth Guardians sent FWS a letter via email and United States Postal Service (USPS) certified mail, return receipt requested, to remind the agency of the October 14, 2014 response deadline, to offer assistance to facilitate a prompt response to WildEarth Guardians' lynx FOIA request, and to request the agency's prompt release of the requested documents.

36. On October 20, 2014, counsel for WildEarth Guardians received an email from a FOIA Coordinator for FWS, Pam Mozina, acknowledging receipt of the October 16, 2014 letter. This email informed counsel for WildEarth Guardians that Ms. Mozina was "[s]orry for the delay in responding to [WildEarth Guardians'] FOIA request dated September 12, 2014" and that Ms. Mozina would contact counsel for WildEarth Guardians "as soon as [Ms. Mozina could] find out the status of [WildEarth Guardians'] request." No additional correspondence was received from FWS.

37. To date, FWS has not made a determination on WildEarth Guardians' lynx FOIA request. To date, FWS has not responded to WildEarth Guardians' lynx FOIA request. To date, FWS has not provided written notice to WildEarth Guardians that it is seeking a ten-workday

extension to make a determination on WildEarth Guardians' lynx FOIA request due to unusual circumstances pursuant to 5 U.S.C. § 552(a)(6)(B)(i).

38. The information sought by WildEarth Guardians through both the wolverine and lynx FOIA requests is time-sensitive in nature and relates to FWS decisions related to the wolverine and the Canada lynx.

39. WILDEARTH GUARDIANS has exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C).

40. Plaintiff has been required to expend costs and to obtain the services of a law firm consisting of attorneys, law clerks, and legal assistants, to prosecute this action.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Violation of FOIA (Constructive Denial / Failure to Make a Determination)

COUNT I

41. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

42. The Defendant has failed to respond to Plaintiff's wolverine FOIA request within the statutorily prescribed 20 working-day time period. 5 U.S.C. § 552(a)(6)(A)(i).

43. Plaintiff has a statutory right to have the Department process its FOIA request in a manner that complies with FOIA.

44. FOIA establishes that an agency's failure to comply with the Act's deadlines shall constitute a constructive denial of the request and that the requester's administrative remedies shall be deemed exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

45. Defendant has violated Plaintiff's rights under FOIA by unlawfully failing to make a determination on whether to comply with Plaintiff's FOIA request, respond to Plaintiff's FOIA request, or by providing documents and information responsive to Plaintiff's FOIA request.

46. Plaintiff's organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA's disclosure provisions, as it has in this case. Plaintiff's members will be adversely affected if Defendant is allowed to continue violating FOIA's disclosure provisions, as it has in this case.

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

48. Plaintiff has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552 (a)(6)(A), (a)(6)(C).

49. Plaintiff is entitled to reasonable costs of litigation, including attorney's fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II

50. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

51. The Defendant has failed to respond to Plaintiff's lynx FOIA request within the statutorily prescribed 20 working-day time period. 5 U.S.C. § 552(a)(6)(A)(i).

52. Plaintiff has a statutory right to have the Department process its FOIA request in a manner that complies with FOIA.

53. FOIA establishes that an agency's failure to comply with the Act's deadlines shall constitute a constructive denial of the request and that the requester's administrative remedies shall be deemed exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

54. Defendant has violated Plaintiff's rights under FOIA by unlawfully failing to make a determination on whether to comply with Plaintiff's FOIA request, respond to Plaintiff's FOIA request, or by providing documents and information responsive to Plaintiff's FOIA request.

55. Plaintiff's organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA's disclosure provisions, as it has in this case. Plaintiff's members will be adversely affected if Defendant is allowed to continue violating FOIA's disclosure provisions, as it has in this case.

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

57. Plaintiff has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552 (a)(6)(A), (a)(6)(C).

58. Plaintiff is entitled to reasonable costs of litigation, including attorney's fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

VII. RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare Defendant's failure to make a determination on whether to comply with Plaintiff's FOIA requests to be unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i);

B. Declare Defendant's failure to produce the documents requested by Plaintiff to be unlawful under FOIA, 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i);

C. Issue an injunction requiring the Defendant to make a determination on whether to comply with Plaintiff's FOIA requests and provide Plaintiff's with all responsive records sought through its FOIA request, 5 U.S.C. § 552(a)(4)(B);

D. Retain jurisdiction over this action to ensure the timely processing of Plaintiff's FOIA request and that no responsive agency records are wrongfully withheld;

E. Award Plaintiff its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E), and 28 U.S.C. § 2412; and

F. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 31st day of October 2014,

/s/ Sarah McMillan
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