

**IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA**

_____)	
LOS PADRES FORESTWATCH)	
)	
)	CIV # 22-3702
)	
Plaintiff,)	
)	COMPLAINT FOR
v.)	DECLARATORY AND
)	INJUNCTIVE RELIEF
U.S. FOREST SERVICE)	
)	
)	
)	
Defendant.)	
_____)	

INTRODUCTION

1. Defendant the United States Forest Service (“Forest Service” or “Agency”) has violated the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) by unlawfully failing to timely issue determinations in response to a written requests for records by Plaintiff, Los Padres ForestWatch (“ForestWatch”) pertaining to the proposed Ecological Restoration Project (“Project”), by failing to issue estimated dates of completion for the requests, by failing to conduct an adequate search for responsive records, by failing to timely respond, and by unlawfully withholding responsive records. This lawsuit requests an order declaring that Defendant has violated FOIA, enjoining the Forest Service from withholding responsive agency records, directing Defendant to issue final determinations and promptly produce all agency records improperly withheld, and providing other relief that circumstances warrant.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action, including the power “to enjoin [agencies] from withholding agency records and to order the production of any agency records improperly withheld from the complainant” pursuant to 5 U.S.C. § 552(a)(4)(B).

3. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty).

4. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

5. Venue is also appropriate under 28 U.S.C. § 1391 because Defendants are agencies of the United States with its National Offices located in Washington, D.C. and a substantial part of the events or omissions giving rise to these claims occurred in this judicial district.

6. This Court has statutory authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has statutory authority to grant injunctive relief pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations.

7. The Court retains all equitable powers to issue prospective relief to remedy agency practices, patterns, and/or policies that violate FOIA.

8. In addition to jurisdiction to compel agency FOIA compliance and to compel release of agency records withheld due to FOIA violations, this Court has statutory authority to refer this matter to the Special Counsel to investigate and make binding recommendations to remedy an agency’s conduct involving potentially arbitrary and capricious circumstances surrounding the withholding of agency records. 5 U.S.C. § 552(a)(4)(F).

9. This Court has statutory authority to award costs and attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).

10. “In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.” 5 U.S.C. § 552(a)(4)(G).

11. All claims made in this Complaint are ripe for judicial review and all FOIA violations and harms alleged in this Complaint can be remedied by an order of this Court.

PARTIES

12. Plaintiff LOS PADRES FORESTWATCH, founded in 2004, is a nonprofit membership organization headquartered in Santa Barbara, California, devoted to protecting wildlife, wilderness, and water, and promoting sustainable access, throughout the Los Padres National Forest and the Carrizo Plain National Monument through citizen education, community engagement, legal advocacy, and scientific collaboration. Plaintiff has more than 30,000 members and supporters in California and other states.

13. As part of its organizational mission, Plaintiff advocates for the protection and sustainable management of the Los Padres National Forest by reviewing and commenting on proposed projects to ensure consistency with scientific principles and environmental laws, monitoring forest conditions and activities to reduce or eliminate impacts to forest resources, consulting with scientists to ensure that land managers are relying on the best available science to make decisions, engaging members, supporters and the public about critical land management decisions and forest conditions, and educating the public regarding the importance of Los Padres National Forest lands in contributing to the economy, quality of life, and ecological integrity of central California’s communities. In addition, Los Padres ForestWatch organizes outings with

youth and families from underserved communities to spark an appreciation for the outdoors and inspire the next generation of environmental stewards.

14. Plaintiff and its members derive benefits from agency compliance with FOIA and from receipt of public records. Plaintiff regularly submits public records requests to obtain information about current and proposed activities on federal lands, including to ascertain benefits and detriments to public user groups, cumulative impacts on ecological communities, and conservation objectives of proposals. Plaintiff uses this information to educate the public regarding impacts on communities and ecosystems. This information is critical to meaningfully review and comment on proposals throughout the NEPA process.

15. In July 2022, the U.S. Forest Service announced the development of a proposal to clear vegetation and wildlife habitat across more than 235,000 acres (368 square miles) of Los Padres National Forest in Ventura, Santa Barbara, San Luis Obispo, Monterey, and southwestern Kern counties (the “Project”). The proposed Project directly impacts an area over eight times the size of the city of San Francisco and includes lands that are set aside for protection, such as botanical areas, critical biological zones, roadless areas, and critical habitat. The proposed Project represents the largest mechanical alteration of land in the history of Los Padres National Forest, and one of the largest projects proposed for any national forest in the country. The proposal includes the use of heavy industrial equipment to clear vegetation, which will impact all vegetation types, including conifer forests, hardwood forests, chaparral, and grasslands. The Project will result in extensive logging of trees of all sizes (a 24-inch diameter limit applies to only 20% of the project area), and the Forest Service has pledged to leave only “some” trees standing. The proposed timeframe is uncertain, and the Project may span decades. Plaintiff has

definite plans to submit additional FOIA requests to monitor this and other projects involving the Los Padres National Forest.

16. The Forest Service does not plan to prepare a robust and thorough Environmental Impact Statement. Rather, the agency relied on out-of-state consultants to prepare a minimal study of the plan's impacts through an Environmental Assessment (EA), funded by Pacific Gas & Electric (PG&E), an investor-owned utility responsible for some of California's largest and deadliest wildfires. By the Forest Service's own estimate, the cost of this project will be approximately \$235,000,000.

17. More than one thousand sites of cultural and spiritual importance to Native Americans occur in proposed clearance areas, but tribal leaders were not consulted in the early stages of this project.

18. Plaintiff has been closely monitoring this proposed Project since it was first announced by the Forest Service. A 30-day comment period was initiated in late July, 2022, scheduled to expire on August 28, 2022. Due in part to significant public attention to this project, the comment period was extended until September 27, 2022.

19. Plaintiff submitted multiple FOIA requests, as further detailed below, via email, seeking access to agency records related to the Project. Plaintiff's FOIA requests sought expedited processing based on the organization's compelling need for the records, citing exigency due to impending comment deadlines and significant public interest in the Project. Plaintiff explained how a significant delay in production would result in injury because the requested information is vital to evaluating the legality of the proposed activities on federal land and the public will lose the opportunity to evaluate relevant information and comment on the process by the time the request is processed on a normal schedule. Without prompt access to the

responsive records, Plaintiff and the public cannot meaningfully comment on, and participate in, the National Environmental Policy Act processes related to the Project.

20. Plaintiff has requested, and has definite plans to continue to request, additional records related to the Project and similar records created or obtained by federal agencies. The Forest Service has repeatedly denied Plaintiff's right to promptly access similar agency records. Circumstances involving Defendants' withholding of agency records by delay and other FOIA violations include shielding the Forest Service activities from statutorily-required disclosures and outside scrutiny. The delayed FOIA responses required Plaintiff to submit comments on the EA without all responsive records related to the project's environmental impacts. Plaintiff suffered concrete, FOIA-cognizable injury as a result of the agency delaying FOIA responses until after comment periods close.

21. The circumstances around the Forest Service's denial of Plaintiff's FOIA right to promptly access records related to the Project is part of a potentially arbitrary or capricious policy, pattern and/or practice of denying the organization's legal right to promptly receive records to which it is entitled under FOIA. The actions and circumstances that unlawfully withhold agency records by denying Plaintiff's right of prompt FOIA access, and other FOIA injuries set out in this complaint, may be remedied by prospective equitable relief or by referral to the Special Counsel. 5 U.S.C. § 552(a)(4)(F).

22. Defendant U.S. FOREST SERVICE ("Forest Service") is a federal agency within the United States Department of Agriculture. Defendant is in possession and control of the records that Plaintiff seeks and so is subject to FOIA pursuant to 5 U.S.C. § 552(f). Defendant is responsible for fulfilling Plaintiff's FOIA requests to it.

23. The interests and organizational purposes of Plaintiff are directly and irreparably injured by Defendant's violations of law as described in this complaint.

24. Defendant's violations of law have denied Plaintiff the information to which it is entitled, thereby preventing Plaintiff from fulfilling its organizational mission and objectives, including from ensuring compliance with applicable statutes and regulations throughout the land exchange process, as well as meaningfully engaging its members, supporters, and the general public regarding the Project.

25. Defendant has further injured Plaintiff by the deprivation of government information to which Plaintiff is entitled by law. Withholding the agency records involving the Los Padres National Forest prevents Plaintiff from obtaining and disseminating information regarding Forest Service management activities and prevents Plaintiff from participating in statutory processes that rely on public disclosure and input to protect the Plaintiff's environmental and other interests in the National Forests.

STATUTORY FRAMEWORK

26. FOIA's fundamental purpose is to ensure governmental transparency by establishing the public's right to access federal agency records and imposing firm deadlines for releasing records in response to FOIA requests. 5 U.S.C. §§ 552(a)(3)(A), (6)(A).

27. Upon receipt of a request, FOIA requires agencies to issue a "determination" within 20 workdays, absent unusual circumstances, and to make requested records "promptly available" thereafter. 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(A)(i), (a)(6)(B).

28. Failure to provide a timely determination in response to a FOIA request is a violation of FOIA.

29. FOIA also requires agencies to provide “an estimated date on which the agency will complete action on the request” for requests that require “longer than ten days to process.” 5 U.S.C. § 552(a)(7).

30. FOIA requires federal agencies to conduct a search reasonably calculated to uncover all relevant documents. An agency must consider leads and other positive indications identified during the search that suggest other records might be located outside the scope of its original search. Federal courts measure FOIA compliance by the information known at the completion of the agency search(es) and withholding determinations.

31. In limited circumstances, responsive records may be deemed exempt from FOIA’s broad disclosure mandate, so long as the information fits within nine categories of exemptions. 5 U.S.C. § 552(b). These exemptions are narrowly construed in light of FOIA’s dominant objective of disclosure.

32. Under FOIA, federal agencies bear the burden of proving that withholding of information in responsive agency records is proper. 5 U.S.C. § 552(a)(4)(B).

33. In 2016, Congress responded to concerns that agencies overuse these exemptions by imposing an additional, independent, and meaningful burden that now requires an agency showing of foreseeable harm that connects the information in withheld records to a harm recognized by the purposes of the specific exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I).

34. FOIA requires that agencies release reasonably segregable portions of requested records that are not lawfully exempt. 5 U.S.C. § 552(b)(9).

35. When an agency fails to respond to a FOIA request within the statutory timeframe, it has constructively denied the request. Requestors are then deemed to have exhausted any administrative remedies and may seek judicial relief. 5 U.S.C. § 552(a)(6)(C)(i).

A FOIA requester may seek injunctive and declaratory relief from the court for an agency's continued withholding of public records. 5 U.S.C. § 552(a)(4)(B).

36. If an agency determines that it will deny a FOIA request in whole or in part, the requester is entitled to administratively appeal the determination. 5 U.S.C. § 552(a)(6)(A)(ii).

37. The Forest Service does not have its own FOIA regulations. The Forest Service is subject to the United States Department of Agriculture regulations requiring among other things, that administrative appeals to be filed within 90 calendar days. 7 C.F.R. § 1.9.

38. FOIA requires agencies to make a determination with respect to an appeal within 20 working days after the receipt of the appeal. 5 U.S.C. § 552(a)(6)(A)(ii). On appeal, if the agency upholds the denial of the request for records in whole or in part, the agency "shall notify the person making such request of the provisions for judicial review of that determination." *Id.* If the agency fails to make a determination on the appeal within 20 days, all administrative remedies are deemed constructively exhausted, and a requestor may seek *de novo* judicial review of the agency's FOIA compliance. 5 U.S.C. 552(a)(6)(C)(i).

39. Pursuant to FOIA, this Court may assess attorney fees and litigation costs against Defendant if the Plaintiff prevails in this action. 5 U.S.C. § 552(a)(4)(E).

40. FOIA provides statutory authority to refer this matter to the Special Counsel to investigate and make binding recommendations to remedy an agency's conduct and policies based on potentially arbitrary and capricious circumstances surrounding the withholding of agency records. 5 U.S.C. § 552(a)(4)(F).

41. "In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member." 5 U.S.C. § 552(a)(4)(G).

42. In addition to the enumerated statutory remedies, the Court retains all inherent and equitable powers to remedy an agency's failure to comply with FOIA's mandate that, with some exceptions, "upon any request for records [agencies] shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

STATEMENT OF FACTS

2022-FS-R5-04994-F – August 1 FOIA Request

43. August 1, 2022, Plaintiff submitted its written FOIA Request to the Los Padres National Forest seeking:

All records pertaining to a contract with the consulting company DJ&A as it relates to the "Ecological Restoration Project" ("Project") on the Los Padres National Forest, including but not limited to any application and all attachments and supporting documents, grant agreement, award letter, and communications;

All records related to funding from PG&E for the Project including but not limited to any application and all attachments and supporting documents, grant agreement, award letter, and communications;

All other funding proposals related to the "Project;" and

All other records related to the "Ecological Restoration Project" on the Los Padres National Forest.

("August 1 FOIA Request"). Ex. 1.

44. The August 1, 2022 FOIA Request sought expedited processing of responsive records. Plaintiff explained that the request concerned a matter of significant public controversy associated with a discrete and immediate timeframe and significant delay in the release of requested records would result in injury to a recognized interest. The August 1, 2022 FOIA Request notified the Forest Service that Plaintiff needed the responsive records to provide comments within the 30-day comment period on the EA for the Project.

45. On August 15, 2022, Public Information Officer Andrew Madsen responded on behalf of the Forest Service and granted expedited processing of Plaintiff's August 1, 2022 FOIA Request. Mr. Madsen stated "[t]his means we will process this FOIA ahead of all other FOIAs in our queue. Currently the only other FOIA requests were submitted by your organization, so we will work on this FOIA ahead of your others." The response provided a tracking number of 2022-FS-R5-04994-F.

46. On August 19, 2022, Plaintiff emailed the Forest Service, stating

Thank you, Mr. Madsen, for granting Los Padres ForestWatch's request for expedited processing. Given that the statutory deadline has passed (8/15), and the immediacy of the proposed action to which this FOIA Request relates, we were wondering whether the USFS would be willing to release some documents immediately and provide a rolling production as others become available? If that is not possible, would you kindly provide an estimated date of completion?

47. Plaintiff did not receive a response to its August 19 email inquiry.

48. On August 30, 2022, Plaintiff again emailed the Forest Service to inquire as to the status of expedited processing of the August 1, 2022 FOIA Request, stating

I am writing to inquire as to the status of this FOIA request. Would you kindly provide an estimated date of completion? As you know, ForestWatch is eager to receive the records given the impending comment deadline. I understand that this deadline has been extended, but ForestWatch requires the responsive records to meaningfully participate in the notice and comment process. Given that expedited processing was granted, we hope that records will be produced in the near future.

49. On September 8, 2022, the Forest Service responded providing a link to 18 records and stating that the link contained "all responsive records."

50. The September 8, 2022 release did not contain all responsive records. The Forest Service did not provide a determination letter, including appeal rights, along with this release.

The release did not conform with FOIA requirements.

51. The September 8, 2022, release was hastily made on the same day, within hours after Plaintiff posted a statement on social media calling attention to the Forest Service's lack of response to its FOIA request for records related to the Project. Forest Service personnel regularly monitor Plaintiff's social media posts. The purpose of the Forest Service's September 8, 2022 release was to rebut Plaintiff's social media statement.

52. On September 15, 2022, Plaintiff emailed the Forest Service to alert the agency to responsive records missing from the release, stating

After careful review, we have identified certain responsive records that were not produced but are within the purview of the request. These include:
Records related to a contract with DJ&A to prepare the environmental documentation for this project, including by way of example, an agreement that describes the deliverables and payment terms;

Pursuant to the PG&E grant award, the Forest Service is to provide PG&E with "quarterly progress status updates," but no such reports were produced in response to the FOIA request. In addition, the grant agreement requires "documentation of funds used by March 31 of each year," but the production did not include any documentation of funds; and

The FOIA request also included a general request for "all other records" pertaining to the Ecological Restoration Project. The records produced relate primarily to scoping. However, the grant was received in 2020, and this project has been on the agency's program of work for two years, so additional records must exist outside of scoping that relate to the project itself.

ForestWatch would like to assist in any way we can with regard to ensuring that the full scope of records is produced as expeditiously as possible. We would strongly prefer to avoid the burden that an administrative appeal would place on your agency as well as our organization. Would you be willing to produce the additional records described above? We would greatly appreciate a response confirming whether you'll provide these additional records by the end of the day tomorrow (9/15). As you know, the organization's opportunity to submit comments ends on September 27, 2022, and time is of the essence.

53. The Forest Service did not respond to Plaintiff's email inquiry.

54. On September 15, 2022, Plaintiff, through Jeff Kuyper, Executive Director, emailed the Forest Supervisor for the Los Padres National Forest, Chris Stubbs. The email

reminded the agency that the request for expedited processing was approved more than four weeks prior and notified the agency that Plaintiff was still awaiting a full response and several records were obviously still being withheld. Mr. Stubbs responded the same day, confirming that expedited processing had not been completed.

I can confirm that the contract is under review at our Washington Office. We can't provide the contract until that review is complete. Regarding the quarterly reports, my understanding is none have been generated yet. My staff officer, Susan Shaw, is out on leave. We will confirm this with her when she returns. As far as additional records, we believe we have been responsive. Can you be more specific about what you are seeking?

55. Plaintiff responded the same day asking for a timeframe by when it would receive the contract and stating

Can you clarify the purpose of the [Washington Office] review – is it related to an exemption, or something else? We are surprised that this review was not mentioned in Andrew's email to us, which made it sound like all responsive records were provided.

As for our request for "all other records" pertaining to ERP, it is difficult to be more specific without knowing what records your agency has generated in the two years since you received the PG&E grant award. We would suspect that a significant amount of records have been generated on this project since 2020 or before. We would expect to see records like emails, communications between the Forest Service and the contractor, a project initiation letter, a scoping/interested parties list, references cited in the project description, power points or presentations given to external groups, criteria used to establish proposed fuel breaks and treatment units, the GIS data used for maps 2 and 3 in the proposed action, communications with external agencies and the public, and other information pertaining to the project that has been in development for the last two years. These examples are not a clarification of our request, but rather just a sampling of the types of records that we expect would fall under a request for "all other records" pertaining to ERP.

Once we get these issues resolved, we would appreciate a final determination letter from Andrew stating the final disposition of all requested records, the application of any exemptions, and any appeal procedures to follow should that be necessary.

Thanks again for working with us to ensure the disclosure of important public records. We remain hopeful that we can receive any outstanding requested records prior to the close of the comment period on September 27.

56. On September 22, 2022, Plaintiff received a letter from the Forest Service stating that (a) it had produced all responsive records related to the first three parts of the August 1, 2022 FOIA Request; (b) the fourth part of the request, seeking all other records related to the Project, was not “sufficiently described” for the agency to conduct a search; and (c) “[a] portion of the responsive records pertaining to contracts and contracting requires further review and has been referred to the U.S. Forest Service Washington Office for final release determination. These records are being processed under tracking number 2022-FS-WO-05506-F.” The September 22, 2022 letter confirmed that expedited processing of the August 1, 2022 FOIA request was not yet complete.

57. The September 22, 2022 letter omitted any information regarding the scope of the search, which is a condition precedent to a final determination. The letter stated that a “final release determination” was forthcoming.

58. As of the date of the filing of this complaint, Plaintiff has not received any additional responsive records.

2022-FS-WO-05506-F – Treatment of September 16, 2022 Referral of Records for Washington Office Review as a New FOIA Request

59. On September 22, 2022, Bryant Baker, ForestWatch’s Director of Conservation and Research, received an email from the Washington Office of the U.S. Forest Service acknowledging receipt of a September 16, 2022 “referral of records” responsive to Plaintiff’s August 1, 2022 FOIA Request and stating a brief description of the records to be “[d]ocuments referred to USFS WO for processing pertaining to FOIA#2022-FS-R5-04994-F.”

60. The September 22, 2022 Acknowledgement Letter stated that the Forest Service had assigned a tracking number of 2022-FS-WO-05506-F.

61. The September 22, 2022 Acknowledgement Letter did not reference the Forest Service's grant of expedited processing for the records referred to its office.

62. On September 29, 2022, Plaintiff emailed the Washington Office of the Forest Service, via Fanny Ogbonna, stating

Thank you for confirming that you will process this FOIA request and that it was referred to your office on September 16, 2022. The original FOIA request was submitted by Los Padres ForestWatch on August 1, 2022. The Los Padres National Forest granted our request for expedited processing, so the deadline for the provision of all responsive records passed on August 15, 2022. The comment deadline for this project is today, and Forest Watch does not have all responsive records for this request. Can you please provide an estimated date of completion for this request? Finally, all communications related to this request should be sent to this email address – foia@lpfw.org

63. Plaintiff did not receive a response to its September 29, 2022, inquiry as to the status of its FOIA request.

64. The Forest Service used the referral to unlawfully create a new FOIA request and avoid FOIA deadlines. The circumstances involving the assignment of a new tracking number are arbitrary and capricious.

65. As of the date of the filing of this complaint, Plaintiff has not received any responsive records from the Washington Office.

2022-FS-R5-05750-F Request for Specific Project Records

66. On September 29, 2022, Plaintiff sent a second written FOIA Request to the Los Padres National Forest that sought agency records related to the Project, including:

Letter from PG&E dated February 4, 2020 regarding the USFS Fuels Reduction Grant Program;

Minutes or other notes from the Forest Service's "Meet & Greet" meeting regarding the Los Padres National Forest Ecological Restoration Project on Friday, November 5, 2021;

All invoices and other communications between the Forest Service and DJ&A and/or other contractors for the Ecological Restoration Project;

The project initiation letter for the Ecological Restoration Project;

A scoping and/or interested parties list for the Ecological Restoration Project including the names and contact information for those notified about the scoping process for the Ecological Restoration Project;

Copies of the complete references cited in the project description for the Ecological Restoration Project;

Power points or presentations given to external groups regarding the Ecological Restoration Project or "forest health" treatments generally;

Methodology that the Forest Service and/or its contractors used to identify specific treatment area and fuelbreak boundaries in the Ecological Restoration Project;

GIS data used for maps 2 and 3 in the proposed action for the Ecological Restoration Project;

Communications with external agencies and the public regarding the Ecological Restoration Project;

Any quarterly status updates submitted to PG&E as required by the Collection Agreement ("The U.S. Forest Service shall...provide PG& with quarterly project status updates..."); and

All documentation of funds used pursuant to the Collection Agreement ("The U.S. Forest Service shall...provide documentation of funds used by March 31 of each year.").

67. The September 29, 2022 request sought records within the purview of the August 1, 2022 but that the agency had failed to produce. At the time of submission, Plaintiff stated that it was submitting this follow up request to ensure that the agency provided all responsive records related to the Project.

68. On September 30, 2022, Plaintiff received an acknowledgment from the Pacific Southwest Regional Office of the Forest Service, assigning a tracking number of 2022-FS-R5-05750-F and stating, in pertinent part

Please note that we do not conduct searches for "any and all" records. Courts have recognized that the legislative history of the 1974 FOIA amendments indicate that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort." Since your request is worded using the language "any and all," "all" or "any," searches will be conducted by an employee or employees within the Region that are familiar with the specific subject matter of your request.

The Forest Service's statement conflicts with FOIA's plain language, as amended since 1974, and as interpreted by the federal courts.

69. The September 30, 2022 response also notified Plaintiff that "a portion of [Plaintiff's] request will need to be processed by the USDA Forest Service Washington Office (WO)" and indicated that a separate response from the Washington Office would be transmitted. The acknowledgment letter did not provide a determination of Plaintiff's request for expedited processing.

70. On October 5, 2022, Plaintiff sent an email to the Regional Office requesting a determination on Plaintiff's request for expedited processing and stating

Finally, in your response below you indicate that your office will not respond to requests that use the language "any and all" and cite the 1974 legislative amendments in support of that proposition. However, the FOIA request at issue "reasonably described" the records sought by Los Padres ForestWatch, which more than fulfills ForestWatch's statutory obligation. See 5 U.S.C. § 552(a)(3). Further, your email does not provide a sufficient legal basis to assert that Los Padres ForestWatch cannot, as a rule, request "all records" related to a specific project. Simply because a request is voluminous, does not mean that such request is not reasonably defined. Requests may be broad, as long as they are well-defined. The fact that a request seeks "any and all" records related to a specific subject does not per se render that request vague or overbroad. In fact, courts have upheld requests similar to ForestWatch's with this exact language. See, e.g., *Pinson v. U.S. Dep't of Justice*, 70 F. Supp. 3d 111, 121–22 (D.D.C. 2014) (finding that the

request for “any and all information” with requester’s name was not unduly broad). The requirement that a requestor reasonably describe the records it seeks was intended to require that a request “be sufficient [to enable] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974). See also S. Rep. No. 93-854, 93d Cong., 2d Sess. 10 (1974) (“[T]he identification standard should not be used to obstruct public access to agency records.”); *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).” Further, I note that you have not asserted that the request is unreasonably burdensome or that the searches would impede your agency’s ability to conduct its regular course of business. Here, Los Padres ForestWatch more than reasonably described the records it seeks. Where the words “any” and “all” are used in the request language, they are tied to requests for a discrete set of records. Please confirm that you will not truncate the scope of search on this basis.

71. The Forest Service did not respond to Plaintiff’s October 5, 2022 email, nor did it provide a determination on the request for expedited processing.

72. On October 26, 2022, Plaintiff received an email from the Regional Office stating that FOIA Request 2022-FS-R5-05750-F required an additional ten days to process on the basis that Plaintiff’s request generated “voluminous” records. The Forest Service requested that Plaintiff agree to omit personally identifiable information from produced records and Plaintiff agreed to such omission.

73. On November 9, 2022, the Forest Service, through Chris Stubbs, provided an interim release of responsive records to Plaintiff. The letter accompanying such release stated that the Forest Service had located 3,276 pages of responsive records and was releasing 3,276 pages of responsive records exclusive of personally identifiable information.

74. The November 9, 2022 letter also stated that a portion of the records required further review by the Regional Office and had been referred to that office for “final release determination.”

75. The November 9, 2022 letter further stated

An additional portion of the responsive records pertaining to contracts and contracting requires review by the U.S. Department of Agriculture's Forest Service Washington Office (WO) and has been referred to that office for final release determination. You will be contacted by the WO FOIA staff. They will provide you with contact and follow-up information concerning these records.

76. As of the filing of this Complaint, the Forest Service has not provided the remainder of the responsive records it had located.

77. On November 15, 2022, Plaintiff received an email from the Washington Office stating that “[p]ortions of responsive records pertaining to contracts were referred to the USFS WO FOIA office for review and release determinations.”

78. The November 15, 2022 email assigned a tracking number of 2023-FS-WO-00659-F to Plaintiff's FOIA Request. The email did not acknowledge Plaintiff's request for expedited processing or provide a determination on such request. The email advised Plaintiff that “the WO FOIA Service Center has a backlog of pending FOIA requests and appeals” and informed Plaintiff that the request would be processed in the order it was received. The email did not contain an estimated date of completion or any other information regarding the agency's processing of the FOIA request. Referral to the Washington Office involves potentially arbitrary and capricious circumstances involving delay that constitutes unlawful withholding of agency records.

79. As of the date of the filing of this Complaint, the Forest Service has not made a final determination and has not provided any additional responsive records, including through the Regional Office or the Washington Office.

80. Plaintiff has exhausted administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

81. The relief requested in this lawsuit is required to compel Defendant to promptly provide access to all records responsive to Plaintiff's FOIA requests 2022-FS-R5-04994-F and 2022-FS-WO-05506-F and FS-R5-05750-F

82. Plaintiff has been required to expend costs and obtain the services of attorneys to initiate legal action.

FIRST CLAIM FOR RELIEF
Failure to Timely Gather Records and Make Withholding Determinations

83. Plaintiff realleges and incorporates by reference all allegations in all paragraphs of this Complaint.

84. Plaintiff properly submitted written requests for agency records within the possession, custody, and control of Defendant.

85. Defendant determined that FOIA Request 2022-FS-R5-04994-F satisfied FOIA's expedited processing provisions. 5 U.S.C. § 552(a)(6)(E).

86. Defendant violated FOIA and unlawfully withheld agency records by failing to gather and make a determination regarding the requested agency records within the statutory period. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A)(i), and (a)(6)(A)(ii).

87. The statutory deadline for the Forest Service to make an expedited determination on FOIA Request 2022-FS-R5-04994-F passed on August 15, 2022 and the request was required to be processed as soon as practicable. 5 U.S.C. § 552(a)(6)(E); 7 C.F.R. § 1.6(e).

88. Referral of agency records responsive to FOIA Request 2022-FS-R5-04994-F for review by the Washington Office was treated as if it were a new FOIA Request and assigned tracking number 2022-FS-WO-05506-F. There is no lawful basis for a referral to create a new FOIA Request. Even if the referral had created a new deadline, which it did not, the deadline for the Forest Service to respond to the arbitrarily designated FOIA Request 2022-FS-WO-05506-F

passed on November 15, 2022. The Forest Service did not exclude the Washington Office from the decision to grant expedited processing and comply with statutory and regulatory requirements.

89. The Forest Service has no lawful basis under FOIA for its delay in making a determination on FOIA Request 2022-FS-R5-04994-F and 2022-FS-WO-05506-F, and the agency has provided no lawful basis to withhold or redact the records Plaintiff requested.

90. The statutory deadline for the Forest Service to respond to FOIA Request 2022-FS-R5-05750-F passed on November 15, 2022.

91. The Forest Service failed to fully respond regarding the portion of records for FOIA Request 2022-FS-R5-05750-F that were referred to the Regional Office.

92. Referral of agency records responsive to FOIA Request 2022-FS-R5-05750-F for review by the Washington Office was treated as if it were a new FOIA Request and assigned tracking number 2023-FS-WO-00659-F. There is no lawful basis for a referral to create a new FOIA Request. The Forest Service did not exclude the Washington Office from the decision to grant expedited processing and comply with statutory and regulatory requirements related to expedited processing.

93. The Forest Service has provided no lawful basis to withhold or redact the records Plaintiff requested with regard to 2022-FS-R5-05750-F and 2023-FS-WO-00659-F.

SECOND CLAIM FOR RELIEF
Failure to Conduct an Adequate Search

94. Plaintiff realleges and incorporates by reference all allegations in all paragraphs of this Complaint.

95. Defendant Forest Service is an “agency” subject to FOIA (5 U.S.C. § 552(a)), and therefore must make reasonable efforts to search for requested records upon a written request. 5 U.S.C. § 552(f)(1).

96. The Forest Service did not design nor conduct a reasonable search that would identify all agency records responsive to FOIA requests 2022-FS-R5-04994-F, 2022-FS-WO-05506-F, 2022-FS-R5-05750-F and 2023-FS-WO-00659-F.

97. The Forest Service’s determination letter for FOIA Request 2022-FS-R5-04994-F did not contain any information regarding the search the agency conducted.

98. Upon information and belief, responsive agency records have been withheld due to an unlawfully narrow search for all FOIA requests that are subject of this litigation, and the agency’s explicit refusal to search for responsive records related to the fourth part of FOIA Request 2022-FS-R5-04994-F and its refusal to search for responsive records related to the parts of FOIA Request 2022-FS-R5-05750-F containing the word “any” or “all.” 5 U.S.C. §§ 552(a)(3)(B)-(C).

99. Defendant continues to violate FOIA by failing to conduct and document a lawful search for responsive records, which is a condition precedent to a lawful determination.

100. On information and belief, responsive agency records have been withheld due to an unlawfully narrow search. 5 U.S.C. §§ 552(a)(3)(B)-(C).

THIRD CLAIM FOR RELIEF
Unlawful Withholding of Agency Records Responsive to FOIA Requests

101. Plaintiff realleges and incorporates by reference all allegations in all paragraphs of this Complaint.

102. The Forest Service improperly and unlawfully withheld records responsive to FOIA requests 2022-FS-R5-04994-F, 2022-FS-WO-05506-F, 2022-FS-R5-05750-F and 2023-FS-WO-00659-F.

103. Defendant has not adequately communicated to Plaintiff the scope of the documents it intends to produce and withhold in response to the FOIA Request or reasons for withholding responsive records and has not disclosed to Plaintiff all records responsive to the FOIA Request.

104. The Forest referred a portion of the records responsive to FOIA Request 2022-FS-R5-04994-F to the Washington Office and improperly and unlawfully classified this as a “new” FOIA request. When it made such referral, the agency failed to consider the Forest Service’s prior grant of expedited processing for the portion of responsive records it referred to the Washington Office.

105. The Forest Service referred a portion of records responsive to FOIA Request 2022-FS-R5-05750-F and improperly and unlawfully classified this as a “new” FOIA request and failed to consider the Forest Service’s prior grant of expedited processing for the original FOIA request and for the portion of responsive records it referred to the Washington Office.

106. The portion of records for 2022-FS-R5-05750-F that were referred to the Regional Office have not been provided to Plaintiff, nor has the Forest Service provided any information regarding their withholding of such responsive records.

107. A privilege log was not provided with the agency’s withholding determinations for responsive records the agency failed to produce. On information and belief based on agency practices, the Forest Service did not prepare or maintain a privilege log or *Vaughn* index when making its withholding determinations.

108. Defendant violated FOIA by illegally withholding agency records that are responsive to the FOIA Requests, but which Defendant has not demonstrated are subject to any FOIA withholding provision. 5 U.S.C. § 552(b). FOIA's enumerated Exemptions provide the exclusive basis for an agency to withhold agency records.

109. Plaintiff has a statutory right to the records it seeks, and there is no legal basis for Defendant to assert that FOIA Exemptions 5 and 6 apply to the withheld records. See 5 U.S.C. § 552(b).

110. Defendant continues to violate FOIA and unlawfully withhold records by not making responsive records promptly available to Plaintiff. 5 U.S.C. § 552(a).

111. Defendant continues to violate FOIA by failing to release segregable nonexempt portions of agency records. 5 U.S.C. § 552(a)(8)(A), (b).

112. Plaintiff is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA, for the Office of the Secretary's violation of FOIA. 5 U.S.C. § 552(a)(4)(E).

113. At such time as appropriate, Plaintiff anticipates requesting entry of judicial findings confirming that the circumstances raise questions as to the arbitrary and capricious conduct of agency personnel in processing these FOIA Requests and referral to Special Counsel for further investigation and remedy of the arbitrary and capricious conduct. 5 U.S.C. § 552(a)(4)(F).

REQUEST FOR RELIEF

FOR THESE REASONS, the Plaintiff respectfully requests that this Court enter judgment providing the following relief:

a. Enter Findings and Declare that Defendants violated FOIA by unlawfully withholding agency records responsive to Plaintiff's FOIA Request;

- b. Enter Findings and Declare that Defendant violated its duty to comply with FOIA's statutory deadlines for resolving Plaintiff's FOIA Request;
- c. Direct by injunction that Defendant provide Plaintiff with a lawful determination on its FOIA Request by a date certain;
- d. Direct by order that Defendant conduct a lawful search for responsive records;
- e. Direct by order the Defendant provide proof that a lawful search was conducted with a cutoff date set as the date of such order;
- f. Direct by injunction that Defendants promptly provide all agency records responsive to Plaintiff's FOIA Request, and related written requests, that are not subject to withholding pursuant to one of the nine recognized FOIA exemptions;
- g. Direct by order that Defendants provide Plaintiff with a detailed statement justifying each withholding of an agency record, or portions thereof, in accordance with the indexing requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);
- h. Direct by order that Defendants provide Plaintiff with all responsive agency records in the form and format specific in the request, by a date certain within twenty working days of any such order;
- i. Grant Plaintiff's cost of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E);
- j. Enter a finding that Defendants' conduct involves circumstances that raise questions of whether the agency has unlawfully, arbitrarily, and/or capriciously withheld agency records, and refer the matter for administrative investigation and remedy (5 U.S.C. § 552(a)(4)(F)); and,

- k. Provide such other statutory or equitable relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED December 12, 2022.

/s/Maya Kane

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