

From: [Katherine Coffey](#)
To: [Cirullo, Megan - FS, MT](#)
Cc: [Martin, Jay - FS, VA](#); [Kyle, Kevin - FS, VA](#); [Kristin Davis](#)
Subject: FOIA REQUEST # 2024-FS-R8-03709-F -- RE: Acknowledgement of Dunlap Creek FOIA
Date: Tuesday, April 30, 2024 3:54:09 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[2024.04.30 Revised SELC Dunlap Creek FS FOIA Request.pdf](#)

Hi Meg,

Thanks for following up on this! We've made a few edits to our request based on your suggestions.

Although I think we've solved the issue for the purposes of this request, it would be helpful to schedule a call to discuss one aspect of the request. Specifically, we disagree with your interpretation of the law regarding language such as "all records" or "including but not limited to" in our request. Would you be open to chatting about that so we can understand your perspective better?

For record-keeping purposes on both of our ends, I'll send a similar email in response about our Archer Knob FOIA request.

Best,
Katherine

From: Cirullo, Megan - FS, MT <Megan.Cirullo@usda.gov>
Sent: Monday, April 22, 2024 6:55 PM
To: Katherine Coffey <kcoffey@selcva.org>
Cc: Martin, Jay - FS, VA <Jay.Martin2@usda.gov>; Kyle, Kevin - FS, VA <kevin.kyle@usda.gov>
Subject: Re: Acknowledgement of Dunlap Creek FOIA

Hello Katherine,

I hope this note finds you well. Just checking in to see if you had a chance to review the email I sent with suggestions about perfecting this FOIA request along with the one you submitted for the Archer Knob project. Please feel free to reach out if you have any questions or concerns, and I'll look forward to hearing from you.

Warm regards,
Meg Cirullo



Meg Cirullo
Public Affairs Staff Officer

Forest Service

George Washington and Jefferson National Forest

c: 406-548-1867
megan.cirullo@usda.gov

www.fs.fed.us



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From: Cirullo, Megan - FS, MT
Sent: Wednesday, April 10, 2024 2:15 PM
To: kcoffey@selcva.org <kcoffey@selcva.org>
Cc: Martin, Jay - FS, VA <Jay.Martin2@usda.gov>; Kyle, Kevin - FS, VA <kevin.kyle@usda.gov>
Subject: Acknowledgement of Dunlap Creek FOIA

Dear Katherine,

I hope this note finds you well. Thank you for your recent Freedom of Information Act (FOIA) request to the USDA Forest Service - Southern Region (R8). This email acknowledges receipt of your FOIA request dated April 01, 2024, which was received in the FS – George Washington and Jefferson National Forests office that same date. For the Dunlap Creek Project, you requested:

“All records and communications in the possession of the Forest Service relating to the Project. This request includes but is not limited to:

- a. Communications with any other federal or state agency related to the Project;*
- b. Authorizations for survey or other work on Forest Service lands in any way related to the Project;*
- c. Any data or reports related to field investigations or surveys associated with the Project;*
- d. Reports, summaries, tables, or other discussions of impacts associated with the Project on national forest lands;*
- e. Analyses, reports, or other records discussing alternatives to the Project as proposed; and*
- f. Records related to the Project’s compatibility or consistency with the George Washington National Forest’s land management plan;”*

Your request has been assigned to me as FOIA Coordinator for the George Washington and Jefferson National Forests.

We would point out that FOIA requests seeking "any and all documents," "any documents," "including, but not limited to," or "all documents" . . . are "impermissibly broad and do not comply with FOIA's requirement that the request for records 'reasonably describe[] such records.'" Exxon Mobil Corp. v. U.S. Dep't of Interior, No. 09-6732, 2010 WL 2653353 (E.D. La. June 29, 2010) (McNamara, J.). The FOIA requires agencies to conduct a "reasonable" search for requested records. (Campbell v. SSA, 446 F. App'x 477, 480 (3d Cir. June 3, 2011) (quoting Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

The FOIA specifies two requirements for a request for records to be considered a valid, "perfected" request: (1) It must "reasonably describe" the records requested and (2) it must be made in accordance with the agency's published FOIA regulations. After careful review of your FOIA request, the Forest Service has determined that your request does not identify the records which you are seeking with sufficient particularity to allow us to conduct a search. Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area to locate records without placing an unreasonable burden upon the agency. See 7 C.F.R. § 1.5(b). In order to process your request, you must provide the following information/clarification:

1. Your request does not specify a date range for the search. We suggest a beginning date of November 1, 2023. District Ranger Kevin Kyle informed me the project didn't kick off until winter 2023/spring 2024, so my recommendation is a little backdated to capture the start of the project, though I'm open to whatever helps you.
2. Revise your request to remove the language that is non-compliant with the FOIA. We suggest the following language (suggested deletions in strikethrough and suggested additions highlighted):

*"~~All~~ **The following** records and communications in the possession of the Forest Service relating to the Project. ~~This request includes but is not limited to:~~*

- a. Communications with any other federal or state agency related to the Project;*
- b. Authorizations for survey or other work on Forest Service lands in any way related to the Project;*
- c. ~~Any~~ Data or reports related to field investigations or surveys associated with the Project;*
- d. Reports, summaries, tables, or other discussions of impacts associated with the Project on national forest lands;*
- e. Analyses, reports, or other records discussing alternatives to the Project as proposed; and*
- f. Records related to the Project's compatibility or consistency with the George Washington National Forest's land management plan;"*

Please advise whether our suggested revisions are acceptable or if you wish to propose your own. If we do not hear from you within 20 business days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

Provisions of the FOIA allow USDA to recover part of the cost of complying with your request. For purposes of fee assessment, you have been categorized as a "All Other" requester, pursuant to 7 CFR Appendix A to Subpart A of Part 1 Section 2(b)(4)(i). For your review and information, a copy of the USDA FOIA Fee Schedule is attached. However, if our processing costs are less than \$50.00, we will not bill you because the cost of collection would be greater than the fee collected. See, 43 C.F.R. § 2.37(g).

You have requested a fee waiver. Your fee waiver request is under consideration.

We are unable to provide the estimated time required to process your request until it is perfected.

You will receive a substantive response when your request is fulfilled, denied in part, or denied in full. If a request involves a voluminous amount of material, or searches in multiple locations, the Forest Service will often provide interim responses, releasing the records on a rolling basis instead of waiting until all processing is completed. Therefore, you may receive more than one substantive response.

Due to the increasing number of FOIA requests received by this office, and the resulting backlog of requests, we may encounter some delay in processing your request. Pursuant to USDA FOIA Regulations, Title 7 CFR §1.6(a), the Forest Service processes FOIA requests according to their order of receipt.

If you have questions about this request, please feel free to submit a query via email to megan.cirullo@usda.gov. In all correspondence, please reference your assigned case number: 2024-FS-R8-03709-F.

We appreciate your patience as we proceed with your request. Have a wonderful day!

Sincerely,
Meg C



Meg Cirullo
Public Affairs Staff Officer

Forest Service

George Washington and Jefferson National Forest

c: 406-548-1867
megan.cirullo@usda.gov

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April 30, 2024

Via Electronic Mail

Kevin Kyle, District Ranger
George Washington and Jefferson National Forests
422 Forestry Road
Hot Springs, VA 24445
kevin.kyle@usda.gov

Jay Martin, North Zone NEPA Planner
George Washington and Jefferson National Forests
401 Oakwood Drive
Harrisonburg, VA 22801
jay.martin2@usda.gov

**Re: Freedom of Information Act Request Regarding the Dunlap Creek Vegetation
Management Project**

Dear Kevin and Jay,

We are re-submitting this FOIA request based on feedback from Meg Cirullo. To make sure we are on the same page, we are simply trying to obtain the project file/Project Record that we routinely request and receive. We are seeking the underlying documentation produced when the Forest Service develops and analyzes impacts of projects like the Dunlap Creek project. These records inform documents like the Draft EA, which itself refers to these documents: “The Project Record provides a combined repository of information supporting these analyses and is filed in the James River District Office, 422 Forestry Road, Hot Springs, Virginia 24445.” That is a confined universe of documents that the District calls the Project Record. Compiling these documents should be—and generally is—a straightforward process.

Although we believe that the first request described the documents we are requesting—those in the project file for the Dunlap Creek project—we have modified the request to specifically identify the Project Record referenced in the Draft EA regarding resources identified in the Draft EA. In other words, we have “reasonably describe[s]” the records we are seeking “in such a way as to enable component personnel familiar with the subject of the request to locate them with reasonable effort”. 7 C.F.R. § 1.3(c)(1).

We disagree with Ms. Cirullo’s assertion that “FOIA requests seeking ‘any and all documents,’ ‘any documents,’ ‘including, but not limited to,’ or ‘all documents’ . . . are ‘impermissibly broad and do not comply with FOIA’s requirement that the request for records ‘reasonably describe[] such records.’” The case cited for this proposition comes out of the Eastern District of Louisiana. *See Exxon Mobil Corp. v. U.S. Dep’t of the Interior*, No. CIV.A.09-6732, 2010 WL 2653353 (E.D. La. June 29, 2010). The court in that case, however, did not hold that

all FOIA requests using those terms are improper. Rather it held that *absent other language reasonably describing what they are requesting*, ExxonMobil's use of those terms was too broad. *Id.* at *8 (emphasis added). Indeed, federal courts have not uniformly ruled all FOIA requests seeking "any and all documents," "any documents," "including but not limited to," or "all documents" to be "impermissibly broad." *See, e.g., LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (finding that a requestor may "reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" in a request for "all documents pertaining to" a particular criminal case). Rather, "whether a particular FOIA request 'reasonably describes' the records sought is a highly context-specific inquiry." *Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 278 (D.D.C. 2012), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020).

Here, we are specifically seeking the project file/Project Record for a specific discretionary action by the Forest Service, not "all records relating to an immensely broad topic" that would prevent an official familiar with the subject from locating responsive records. *Gun Owners of America, Inc. v. Federal Bureau of Investigation*, 594 F.Supp.3d 37, 48 (D.C. Cir. 2022); *LaCedra*, 317 F.3d at 348.

Please note that we are requesting communications also because the Draft EA explicitly relies on such communications. *See, e.g.,* Appendix C, Soil and Water Resources Report at p. 15-written communications with Kyle, K.; Draft EA at 71-78- communications with Baker, E.; Harrold, C.; Howard, J.

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and 7 C.F.R. Part 1, Subpart A, the Southern Environmental Law Center ("SELN") requests access to the following documents or other public records regarding the Dunlap Creek Vegetation Management Project ("Project"), excluding any records which are already publicly available on the Forest Service web pages:

1. All records and communications beginning on September 1, 2023 that comprise the Dunlap Creek Vegetation Management Project Record identified on page 12 of the Draft Environmental Assessment. This request includes but is not limited to:
 - a. Communications with any other federal or state agency related to the Project.
 - b. Authorizations for survey or other work on Forest Service lands in any way related to the Project;
 - c. Any reports, analyses, data, summaries, tables, or field investigations associated with the Project and its impacts on resources on national forest lands as identified in the Draft EA, which include:
 - i. Forest communities (referred to on pages 13-18 of Draft EA);
 - ii. Old growth (referred to on pages 18-20 of Draft EA);
 - iii. Non-native invasive species (referred to on pages 20-25 of the Draft EA);
 - iv. Successional forests and associated management indicator and demand species (referred to on pages 26-35 of Draft EA)
 - v. Threatened, endangered, sensitive, and locally rare species (referred to on pages 35-39 of Draft EA);

- vi. Fisheries and aquatic habitat (referred to on pages 39-48 of Draft EA);
- vii. Geology (referred to on pages 48-52 of Draft EA);
- viii. Soils and hydrology (referred to on pages 52-63 and Appx. C of Draft EA);
- ix. Visual and scenic resources (referred to on pages 63-66 of Draft EA);
- x. Recreation (referred to on pages 66-67 of Draft EA);
- xi. Access and roadways (referred to on pages 67-69 of Draft EA); and
- xii. Climate impacts (referred to in Appendix C of Draft EA).
- d. Analyses, reports, or other records discussing alternatives to the Project as proposed; and
- e. Records related to the Project's compatibility or consistency with the George Washington National Forest's land management plan.

This request for documents or other records includes, but is not limited to, all reports, studies, correspondence, memoranda, e-mails, analyses, meeting notes or other notes of any kind, drafts and working papers, and every other document, recorded communication, or record of any kind (including records which exist electronically). In addition, we request access to each version of a record or document, whether it is a draft, has been electronically deleted, has attachments, bears annotations, etc. Please include records up to the date that the agency commences its search for responsive records. To reduce costs and expedite delivery, we request that information be delivered electronically, by a file-sharing service, removable storage, or email, to the extent possible. Upon request, SELC will provide a file-sharing link for easy transfer of the requested documents.

If the Forest Service takes the position that any of the above-described public records are not open to public inspection under the FOIA, please explain the basis for your position and identify any statute, rule of law, or other authority upon which you rely. Please note that claims of exemption under 5 U.S.C. § 552(b)(5) must not only qualify for the exemption technically; they must also be accompanied by a determination that withholding the records is necessary to accomplish the purpose of that exemption. 5 U.S.C. § 552(a)(8)(i).

FOIA requires a responding agency to make a determination on any request within twenty (20) working days of receipt. *See* 5 U.S.C. § 552(a)(6)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. 5 U.S.C. § 552(b). The Forest Service "shall withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by" a statutory exemption. 5 U.S.C. § 552(a)(8)(A)(i).

SELC requests that any fees associated with this request be waived because disclosure of information in the requested records would be in the public interest. The FOIA provides that "[d]ocuments *shall* be furnished without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii)

(emphasis added); *see also* 7 C.F.R. § 1.12(p) (fees should be waived because this disclosure is in the public interest and SELC has no “commercial interest” in the disclosure). Congress’ stated main purpose in amending the FOIA in 1986 was “to remove any roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under FOIA.” 132 Cong. Rec. S16,496 (Oct. 15, 1986) (statement of Sen. Leahy). Congress intended the amendment to the FOIA’s public interest provision “to be liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 853 F.2d 1282, 1284 (9th Cir. 1987) (both quoting 132 Cong. Rec. S14,298 (Sept. 20, 1986) (statement of Sen. Leahy)).

Fee waiver is appropriate in this case because disclosure of this information “is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 7 C.F.R. § 1.12(p)(1)(i). The regulations identify four factors to be considered under this public interest requirement:

- (i) The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.
- (ii) Disclosure of the requested records must be meaningfully informative about government operations or activities to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public’s understanding.
- (iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the requester’s individual understanding. A requester’s expertise in the subject area as well as his or her ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media, as defined in appendix A of this subpart, will satisfy this consideration.
- (iv) The public’s understanding of the subject in question must be enhanced by the disclosure to a significant degree. However, components will not make value judgments about whether the information at issue is “important” enough to be made public.

7 C.F.R. § 1.12(p)(3).

The first regulatory factor for fee waiver is clearly met, as the above requests are directly related to “identifiable operations or activities of the Federal government.” The Forest Service is a federal government agency, and the requested records concern a Forest Service “activity”: the Dunlap Creek Vegetation Management Project. As to the second factor, our requests seek information that would increase public understanding of a forest management project on Forest

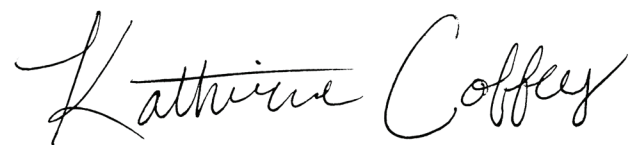
Service lands. The Dunlap Creek Vegetation Management Project is highly significant to the public, and we are not seeking records that are already in the public domain. As a result, the requested information will lead to greater public understanding of the operations of the federal government. The third factor is also met, as the requested disclosure would benefit not only SELC, but also our partner groups, our collective members and constituents, and the public at large. As a nonprofit environmental protection organization, a large part of our work consists of keeping citizens informed about government activities, like management of public lands, that affect natural resources and public health. We disclose information through our website, newsletters, by speaking at events, through the press, and through numerous other channels. Thus, we are not seeking this information solely for any "individual understanding," and we have significant experience conveying information to the public. Finally, there is no doubt that this disclosure would enhance public understanding of the Dunlap Creek Vegetation Management Project, and how the Forest Service reaches decisions about management projects on national forest lands. This disclosure would be "significant," in part, because there is little publicly available information on this issue at this stage of project assessment.

In addition to the demonstrated public interest in the information sought here, SELC has no commercial interest in the disclosures. 7 C.F.R. § 1.12(p)(4). SELC is a nonprofit organization with a public interest mission and, by definition, no commercial interests. SELC seeks the disclosure solely in the public interest of obtaining information about activities and operations of the Forest Service related to the Dunlap Creek Vegetation Management Project. Although SELC is a legal organization, SELC does not profit, or otherwise have a commercial interest, in litigation. SELC does not charge its clients for attorney time or enter into contingency agreements. Further, the abstract possibility of some future litigation does not create a commercial interest, since any such possibility is not itself a commercial interest. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1287 n.4 (9th Cir. 1987).

Should SELC's request for reduced or waived fees be denied, SELC is prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves its right to appeal a fee waiver or reduction denial.

If you have any questions, please do not hesitate to contact me. I am happy to work with you to clarify the scope of our request and to facilitate the production of the requested public records. Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Katherine Coffey". The signature is written in a cursive, flowing style with a large initial 'K'.

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cc: Meg Cirullo (via email- megan.cirullo@usda.gov)