

April 30, 2024

Via Electronic Mail

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Re: Freedom of Information Act Request Regarding the Archer Knob Project

Dear Mary 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 Archer Knob project. These records inform documents like the Draft EA, which itself refers to these documents: “The Project Record is available for public inspection at the North River Ranger District Office in Harrisonburg, VA.” 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 Archer Knob 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.,* Draft EA at 79-80 - written and personal communications with Caldwell, P.; Francis, D.; and 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 (“SELC”) requests access to the following documents or other public records regarding the Archer Knob Project (“Project”):

1. Current shapefiles for the Project;
2. All records and communications beginning on October 1, 2021 that comprise the Archer Knob Project Record identified on page 15 of the Draft Environmental Assessment, including but not limited to:
 - a. Any records of coordination with the U.S. Fish and Wildlife Service or other agencies and organizations (referred to on page 78 of the Draft EA);
 - b. Records related to water quality assessments and proposed stream crossings, including any permits required under the Clean Water Act;
 - c. Records related to proposed ground disturbance in Potential Wilderness Areas;
 - d. 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 17-21 of Draft EA);
 - ii. Old growth, including tally sheets, maps, and other information (referred to on pages 21-22 of Draft EA);
 - iii. Non-native invasive species (referred to on pages 22-23 of the Draft EA);
 - iv. Herbicide use (referred to on pages 24-28 of the Draft EA);
 - v. Loss of oak in future stands (referred to on pages 28-29 of the Draft EA);
 - vi. Terrestrial wildlife resources, including threatened, endangered, sensitive, and locally rare species, rare communities and rare species in special

- biological areas, and management indicator species (referred to on pages 30-47 of Draft EA);
- vii. Fisheries and aquatic habitat, including federally threatened and regional foresters sensitive aquatic species, aquatic management indicator species, bioindicators, water quality, and stream classification and riparian corridors (referred to on pages 47-56 of Draft EA);
- viii. Physical environment, including soils and watersheds, geology, soil quality, and water quality (referred to on pages 56-66 of the Draft EA);
- ix. Social environment, including recreation, visual and scenic resources, climate change and carbon storage, Virginia Mountain Treasures, Roads and access, (referred to on pages 66-77 of the Draft EA);
- 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.

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

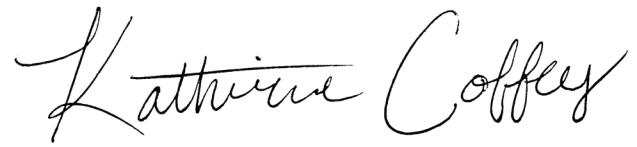
a federal government agency, and the requested records concern a Forest Service “activity”: the Archer Knob Project. As to the second factor, our requests seek information that would increase public understanding of a forest management project on Forest Service lands. The Archer Knob Project is highly 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 Archer Knob 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 Archer Knob 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 script is fluid and cursive, with the first name and last name clearly distinguishable.

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