



May 18, 2010

SENT VIA CERTIFIED/RETURN RECEIPT MAIL AND ELECTRONIC MAIL

Office of the Secretary
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FREEDOM OF INFORMATION ACT REQUEST

The Center for Biological Diversity (“Center”) is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission and consistent with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I respectfully request the following information on behalf of the Center:

- All correspondence, emails, text messages, phone logs, faxes, and other mobile messaging, sent to/from Secretary of the Interior Ken Salazar related to the approval of any offshore oil and/or gas leasing; and
- Meeting notes of meetings attended by Secretary of the Interior Ken Salazar regarding offshore oil and/or gas leasing.

In the event that access to any of the requested records is denied, please note that FOIA provides that any “reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [FOIA].” 5 U.S.C. § 552(b). Please provide all non-exempt portions of the requested records that are reasonably segregable, describe the deleted material in detail, and specify the statutory basis for the denial, as well as your reasons for believing that the alleged statutory justification applies in each instance. Please separately state your reasons for not invoking your discretionary power to release the requested documents in the public interest.

This request is being sent to the Office of the Secretary of the Department of the Interior (“Department”) with the understanding that it will be forwarded to any and all other offices that contain the requested documents.

REQUEST FOR FEE-WAIVER

The Center requests that you waive all fees in connection with this matter. As shown below, the Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Interior's fee-waiver regulations at 43 C.F.R. § 2.19. See also Judicial Watch v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether the Center meets the fee-waiver criteria, it is imperative that the Department remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups such as the Center access to government documents without the payment of fees. Both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments to add the fee waiver provision is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. The waiver provision was added to FOIA “‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.” Better Gov't Ass'n v. Department of State, 780 F.2d 86, 94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass. 1984). As stated by one Senator, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). The Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” Id.

I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

A. The subject of the request concerns “the operations and activities of the government.”

The subject matter of this request relates to management of offshore oil and gas resources as well as the implementation of environmental laws and regulations, such as the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act. It is clear that management of offshore oil and gas resources, as well as implementation and execution of environmental laws, are specific and identifiable activities of the government, in this case the executive branch agency, the Department. See Judicial Watch, 326 F.3d at 1313 (stating that with regard to this factor, “‘reasonable specificity’ [is] all that FOIA requires.”).

B. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

The information requested will help provide the Center with crucial insight into the policies and decision-making processes of the Department as they relate to managing the environmental effects of offshore oil and gas extraction on fish, marine mammals, and other wildlife. These documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of the Department’s obligations as well as Department activities/operations regarding management of offshore oil and gas resources and the implementation of environmental laws and regulations. The information requested will contribute to an understanding of whether or not the Department is fulfilling its obligations, as well as what information the Department has in regard to oil and gas extraction activities’ effect on fish and wildlife, and what the Department is doing in regard to better manage offshore oil and gas extraction in light of that information. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314 (“the American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In McClellan Ecological Seepage Situation v. Carlucci, the court made clear that FOIA legislative history “suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.” 835 F.2d at 1286. In this instance, all the requested documents potentially provide new information about Department actions, especially regarding offshore oil and gas extraction activities and the effect on fish and wildlife. Moreover, the information will provide important oversight of Department activities by revealing what information the Department has about the effect of oil and gas extraction activities on fish and wildlife and what actions the Department is or is not taking in light of that information. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553, 560 (E.D. Pa. 2005) (“the CLS request would likely shed light on information that is new to the interested public”). Finally, this request will also shed light on whether the Department is appropriately implementing environmental laws and regulations.

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public understanding of the environmental effects of offshore oil and gas extraction on fish, marine mammals, and other wildlife, as well as of Department activities in regard to management of the effects of oil and gas extraction, will significantly increase as a result of disclosure because the requested information will reveal more about actions being taken regarding affected fish and wildlife. In other words, once the public is more aware of the Department’s actions, the public will a) have a better understanding of the status of the management of oil and gas extraction and affected fish and wildlife, and b) can better gauge

whether Department decisions and activities are appropriate or whether certain actions should be undertaken.

The documents are also certain to shed light on the Department's compliance with environmental and natural resource laws. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. Judicial Watch, 326 F.3d at 1315.

In addition, the Center plans to take the information it learns from the disclosed documents and educate the public about oil and gas extraction and affected fish and wildlife, such as about the impacts of various activities on marine mammals, and also educate the public about whether the Department's management and conservation strategies are appropriate in light of the known information. See Western Watersheds Project, 318 F.Supp.2d at 1040 ("In the letter denying the appeal, the FOIA Officer stated that WWP had failed to demonstrate . . . 'how the information would contribute to the understanding of the general public of the operations or activities of the government.' The Court, however . . . finds that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how . . . management strategies employed by the BLM may adversely affect the environment.").

The requested information will reveal in greater detail what the Department knows regarding oil and gas extraction activities and their effect on fish and wildlife, as well as the lawfulness of the Department's actions. There can be no dispute that disclosure of the requested documents may provide information that will significantly enhance the public's understanding of the Department's legal obligations and Department wildlife management in general. Even if the documents fail to reveal that certain actions need to be taken, this does not mean the documents do not serve the public interest. See Judicial Watch, 326 F.3d at 1314.

II. Obtaining the information is of no commercial interest to the Center.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

III. The Center has a recognized ability to disseminate this information broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been

substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public (e.g. the Center has several staff biologists and staff attorneys), (4) the Center possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species, biodiversity, and impacts on protected species.

Public oversight and enhanced understanding of Department duties is absolutely necessary. The Center's members' track record of active participation in oversight of governmental agency activities and their consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject.*" Carney v. U.S. Dept. of Justice, 19 F.3d 807, 815 (2d Cir. 1994)(emphasis added). The Center need not show how it intends to distribute the information, because "nothing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." Judicial Watch, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. Id.

The documents requested in this FOIA request will be used to determine the environmental effects of oil and gas extraction on fish and wildlife, and what actions the Department is or is not taking in light of that information. They will also be used to determine whether and how the Department is complying with and implementing its obligations under environmental laws. Concurrent with any action that the Center may take after obtaining the requested documents, the Center will publicize the reasons for the action and the underlying actions of Department and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of Department responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one, and has also many times publicized the status of species and the conservation measures being taken on their behalf through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner.

In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which are sent to nearly 255,000 people approximately once a week, and our web page, which is accessed nearly 1.5 million times each month. Information

concerning the effects of oil and gas extraction activities on fish and wildlife, as well as the Department's action in light of that information or the Department's compliance with environmental laws, will likely be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians 'publishes an online newsletter, which is e-mailed to more than 2,500 people' and stated that 'it intends to establish an interactive grazing web site' with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

CONCLUSION

I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee-waiver, and that you will immediately begin to search and copy the requested material. I urge you to act promptly on this request, because of the need for timely review of records to effectively participate in comment periods on impact statements and proposed permitting actions. Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and we may immediately file an administrative appeal.

For any of the requested records which are commonly used, and easily copied, electronic formats (e.g., Word, emails, PDFs), please provide the records to us in that electronic format to save time and reduce costs. Please send all materials to the address on the letterhead. If some records are available sooner than others, please forward those rather than waiting for a search for other records.

Thank you in advance for your prompt reply. Please call me at (415) 436-9682 ext. 305 or email me at jlopez@biologicaldiversity.org if you have any questions about the scope of this request or our qualification for a fee waiver.

Sincerely,

/s/Jaclyn Lopez
Jaclyn Lopez
Staff Attorney