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Working to Protect and Restore Our Public Lands

FOIA Coordinator
Utah State Office
440 West 200 South, Suite 500
Salt Lake City, Utah 84101

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December 20, 2023

Re: FOIA Request

I. INTRODUCTION

Sage Steppe Wild has a grazing oversight program as part of its continuing efforts in the western United States to educate and involve the public in the sound management principles of public lands. Part of SSW's grazing program is designed to serve as a watchdog over federal agencies, including the BLM, to ensure sound decision-making and enforcement of laws designed to protect public lands.

As this request will be received on December 22nd, FOIA requires a completed response to be issued within 20 working days or by January 23rd.

I. A The 2016 Amendment and the Requirement regarding Foreseeable Harm

Due to the long-term abuse of FOIA by the executive branch, congress amended FOIA in 2016.

The DC Circuit Court provided a clear and detailed review of the amendment and its implications in their ruling in *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, No. 20-5091 (D.C. Cir. 2021). Given that it is critical for the agency to fully understand the amendment, we provide applicable sections of the ruling with emphasis added.

> Congress adopted the FOIA Improvement Act in part out of "concerns that some agencies [were] overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure." S.REP.NO. 4, 114th Cong., 1st Sess. 2 (2015); see also H.R.REP.NO. 391, 114th Cong., 2d Sess. 9 (2016) ("[T]here is concern that agencies are overusing these exemptions to protect records that should be releasable under the law."). Congress was particularly concerned with increasing agency overuse and abuse of Exemption 5 and the deliberative process privilege.

H.R.REP.NO.391, at 9–10 ("The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse."); see also S.REP.NO.4, at 3.

Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld." H.R. REP. NO. 391, at 9.2 Agencies cannot rely on "mere 'speculative or abstract fears,' or fear of embarrassment" to withhold information. S. REP. NO. 4, at 8. Nor may the government meet its burden with "generalized assertions[.]" *Machado Amadis*, 971 F.3d at 371.

In that way, the foreseeable harm requirement "impose[s] an independent and meaningful burden on agencies." *Center for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019) (citation omitted). While agencies may sometimes satisfy that burden on a category-by-category basis rather than a document-by-document basis—"that is, group together like records" and explain the harm that would result from release of each group—the basis and likelihood of that harm must be independently demonstrated for each category. *Rosenberg v. Department of Defense* (*Rosenberg I*), 342 F. Supp. 3d 62, 78 (D.D.C. 2018).

In the context of withholdings made under the deliberative process privilege, the foreseeability requirement means that agencies must concretely explain how disclosure "would"—not "could"—adversely impair internal deliberations. *Machado Amadis*, 971 F.3d at 371. A "perfunctory state[ment] that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information between senior leaders within and outside of the [agency]" will not suffice. *Rosenberg I*, 342 F. Supp. 3d at 79 (formatting modified); *see also Center for Investigative Reporting*, 436 F. Supp. 3d at 106 (rejecting "general explanations and boiler plate language" regarding foreseeable harm) (internal quotation marks and citation omitted). Instead, what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward. Naturally, this inquiry is context specific. *See Rosenberg v. Department of Defense* (*Rosenberg II*), 442 F. Supp. 3d 240, 259 (D.D.C. 2020); *Center for Investigative Reporting*, 436 F. Supp. 3d at 107; *Rosenberg I*, 342 F. Supp. 3d at 79.

The government broadly failed to "specifically focus[]" its foreseeable harm demonstration "on the information at issue in [the documents] under review," *Machado Amadis*, 971 F.3d at 371 (quotation marks omitted). Instead, it submitted a series of boilerplate and generic assertions that release of any deliberative material would necessarily chill internal discussions.

The FBI's primary declaration on foreseeable harm may generously be described as scanty. The FBI's broad assertion of foreseeable harm from release of the records under its control was contained in just two "umbrella paragraphs" that purported to sweepingly address "*all* of the deliberative information in the case." Gov't Br. 38. But the assertion of harm in those umbrella paragraphs is wholly generalized and

conclusory, just mouthing the generic rationale for the deliberative process privilege itself. *See* J.A. 248 ("Disclosure of [material containing or prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policies, proposals, conclusions, or recommendations] would have an inhibiting effect upon agency decisionmaking and the development of policy because it would chill full and frank discussions between agency personnel and decision makers regarding a decision. If agency personnel know that their preliminary impressions, opinions, evaluations, or comments would be released to the general public, they would be less candid and more circumspect in expressing their thoughts, which would impede the fulsome discussion of issues necessary to reach a well-reasoned decision.").

For its part, the Justice Department submitted the Waller declaration in an effort to justify the withholding of its draft Inspector General reports. But that document suffers from the same flaw. Its cookie-cutter formulations nowhere explain why actual harm would foreseeably result from release of the specific type of material at issue here. *See* J.A. 278 ("Release of this draft report would be harmful as the draft would also reveal the thought and decision-making processes of the [Office of the Inspector General] and may not reflect the agency's final decisions."), 279 (identical assertion). Indeed, that declaration contains a sweeping assertion that "requir[ing] disclosure of the withheld information would prevent the [Office of the Inspector General] from engaging in meaningful documented discussion about policy matters in the future, which could have a negative effect on agency decision-making, and would potentially confuse the public about the reasons for the [Office of the Inspector General]'s actions in this matter." J.A. 281. This is *precisely* the kind of boilerplate, unparticularized, and hypothesized assertion of harm that we said would be insufficient in *Machado Amadis*, 971 F.3d at 371.
We are, in fact, hard pressed to imagine how these assertions differ in any material way from the routine assertions of deliberative process privilege that pre-dated the FOIA Improvement Act.

It is apparent from the statutory text alone that the government's successful invocation of a FOIA exemption cannot justify its withholding of exempt material without a more particularized inquiry into what sort of foreseeable harm would result from the material's release. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). The detailed legislative history of the provision underscores the type of showing that Congress now requires of federal agencies.

Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation, No. 20-5091 (D.C. Cir. 2021)

This has echoes in other cases examining agency claims of foreseeable harm. From the DOJ website:

Exemption 5, "Foreseeable Harm" Requirement: The court relates that "CEQ has submitted various categories of documents for the court to review in camera." "The court has reviewed the records in their redacted and unredacted forms." The court finds that, "[u]pon review of each of the submitted records, the court concludes that CEQ has not adequately demonstrated it will suffer a reasonably foreseeable harm from the documents' unredacted production." The court finds that "the court's in camera review of the documents showed scant risk [of] either potential harm arising." "To justify its redactions, [defendant] cites a 'foreseeable

harm of chilling speech and stifling frank and open discussions' and a general 'risk of public confusion.'" "Simply put, having studied each unredacted document, the court cannot conclude that 'disclosure would harm an interest protected by an exemption.'" "As stated previously, the foreseeable harm requirement is subject to a 'heightened standard[;]'" "[t]hat is, the agency must 'articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.'" "Bearing this in mind, and having had the benefit of reviewing the unredacted documents in camera, the court finds Exemption 5 inapplicable to the records submitted for in camera review."

S. Env't L. Ctr. v. Council on Env't. Quality, No. 18-00113, 2020 WL 7331996 (W.D. Va. Dec. 14, 2020)

Shortly after the passage of the 2016 amendment, the Department of the Interior issued direction on the implementation of the Foreseeable Harm Standard. Given the importance of a rational approach to this standard and the step by step approach outlined, we provide it as an appendix in its entirety.

I. B FOIA Deadlines

As the Ninth Circuit has explained, "[t]he value of information is partly a function of time…. Congress gave agencies 20 days, not years, to decide whether to comply… and authorized agencies to give themselves extensions for 10 days for 'unusual circumstances.'" *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999) (emphasis original).

To decide whether to comply, the agency must "at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW*, 711 F.3d at 188.

Typically, FOIA requires an agency to make this determination within 20 days, but it allows 30 days or more for a determination in "unusual circumstances." 5 U.S.C. § 552(a)(6)(B).

Once an agency has determined to comply with a FOIA request, it must make the requested records "promptly available" to the requestor. *Id*. §§ 552(a)(3)(A), (a)(6)(C)(i).

"Promptly available" means "within days or a few weeks of a 'determination,' not months or years." *CREW*, 711 F.3d at 188. See also *Judicial Watch, Inc. v. United States Dep't of Homeland Sec*., 895 F.3d 770, 781 (D.C. Cir. 2018) (discussing Congress' intent in "promptly available").

The court in *CREW* held that agency processing systems, if they led to delays in making information "promptly available" constituted "improper withholding."

In *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983) the court held that an agency's "system" for dealing with requested documents constitutes "withholding" if it significantly "increase[s] the amount of time [the requester] must wait to obtain them.".

Returning to *CREW*, the court held that:

> The statute requires that, within the relevant time period, an agency must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.
>
> All of those statutory provisions together reinforce the conclusion that a "determination" under Section 552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. Rather, in order to make a "determination" and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the "determination" is adverse.
>
> As to actual production, FOIA requires that the agency make the records "promptly available," which depending on the circumstances typically would mean within days or a few weeks of a "determination," not months or years. 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i).
>
> To summarize: An agency usually has 20 working days to make a "determination" with adequate specificity, such that any withholding can be appealed administratively. 5 U.S.C. § 552(a)(6)(A)(i). An agency can extend that 20–working–day timeline to 30 working days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents. Id. § 552(a)(6)(B). Beyond those 30 working days, an agency may still need more time to respond to a particularly burdensome request. If so, the administrative exhaustion requirement will not apply. But in such exceptional circumstances, the agency may continue to process the request, and the court (if suit has been filed) will supervise the agency's ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request. Id. § 552(a)(6)(C).
>
> *Citizens for Responsibility and Ethics in Washington v. Federal..., 711 F.3d 180 (2013)*

I. C Department of Justice Direction

On March 15th, 2022 the Attorney General issued a memorandum all executive branch heads regarding implementation of FOIA. At A. 2:

> Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are

> strongly encouraged to make discretionary disclosures of information where appropriate. (emphasis added)

The memo continued:

> In determining whether to defend an agency's nondisclosure decision, the Justice Department will apply the presumption of openness described above. The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with these guidelines.
>
> As the Act makes clear, however, the "burden is on the agency to sustain" a decision to withhold records under those exemptions. Id. § 552(a)(4)(B). Nor may agencies withhold information based merely on speculative or abstract fears or fears of embarrassment.

The DOJ recently issued more details on the memo titled OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard

On March 19th, 2009 Attorney General Eric Holder issued a memorandum to all federal agencies regarding the implementation of FOIA. This memorandum rescinds Attorney General Ashcroft's FOIA Memorandum of October 12, 2001 and restores the presumption of disclosure. The memo quotes President Obama "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." The President also stated that "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Further, it clearly defines the intent of FOIA and agency's duties in fulfilling this intent:

"First, an agency should not withhold information simply because it may do so legally"

"An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."

The Attorney General also stated that the Department of Justice "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Attorney General Holder continued that "I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government… Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed."

On December 16th, 2005, an Executive Order was issued clarifying agency's role under FOIA:

"FOIA requestors are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately.....

agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation."

In addition, Congress recently passed an amendment to FOIA. The statute now states:

Congress finds that--

(1) the Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that--

(A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;

(B) such consent is not meaningful unless it is informed consent; and

(C) as Justice Black noted in his concurring opinion in Barr v. Matteo (360 U.S. 564 (1959)), `The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.'; (emphasis added)

(2) the American people firmly believe that our system of government must itself be governed by a presumption of openness; (emphasis added)

(3) the Freedom of Information Act establishes a `strong presumption in favor of disclosure' as noted by the United States Supreme Court in United States Department of State v. Ray (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act; (emphasis added)

(4) `disclosure, not secrecy, is the dominant objective of the Act,' as noted by the United States Supreme Court in Department of Air Force v. Rose (425 U.S. 352 (1976)); (emphasis added)

(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the `need to know' but upon the fundamental `right to know'. (emphasis added)

The new amendment of the statute reiterates the clear and undeniable intent of the legislation and the mass of case law surround this statute, that there is a "strong presumption in favor of disclosure" and that "disclosure, not secrecy, is the dominant

objective of the Act" and that the intent of FOIA is that there is a "fundamental 'right to know'" for the American public. As such we sincerely hope that the agency does not withhold information just because one of the exemptions may be able to be applied, but follows the intent of this statute favoring disclosure and by fulfilling the public's right to know the activities of its government.

Recently, the Department of the Interior provided guidance to all employees regarding FOIA duties:

- Requests for records under the FOIA shall be treated liberally, with a presumption of disclosure and access where release is not prohibited by law.
- In conjunction with the DOI policy, the BLM will only withhold information when we reasonably foresee that the release could harm an interest protected by a FOIA exemption (e.g., in cases of National Security, personal privacy, law enforcement, attorney client-privileged information, statute, etc.). Program offices must provide "foreseeable harm statements" to deny access to records that are "sensitive and proper" for protection from release to FOIA requesters (See Attachment 2) .
- All employees must work collaboratively with FOIA coordinators to fulfill their roles in processing requests so that replies are handled promptly within the statutory timeframes mandated by law.
- Program offices should proactively review records and projects in anticipation of requests to identify information that can be posted online to reduce FOIA requests.

In WO-IM-2009-203, the BLM required of its staff that:

- Requests for records under the FOIA shall be treated liberally, with a presumption of disclosure and access where release is not prohibited by law.
- In conjunction with the DOI policy, the BLM will only withhold information when we reasonably foresee that the release could harm an interest protected by a FOIA exemption (e.g., in cases of National Security, personal privacy, law enforcement, attorney client-privileged information, statute, etc.). Program offices must provide "foreseeable harm statements" to deny access to records that are "sensitive and proper" for protection from release to FOIA requesters (See Attachment 2) .
- All employees must work collaboratively with FOIA coordinators to fulfill their roles in processing requests so that replies are handled promptly within the statutory timeframes mandated by law.
- Program offices should proactively review records and projects in anticipation of requests to identify information that can be posted online to reduce FOIA requests.

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> agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation."

II. SCOPE OF REQUEST

In order to assist our grazing management program on lands administered by the BLM and to be able to monitor the grazing program on BLM lands, SSW requests the following documents from the BLM pursuant to the Freedom of Information Act:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §522 et seq., Sage Steppe Wild hereby request the following documents:

1) All field notes, conversation records, emails, photographs, monitoring data, field sheets, meeting notes and other documents related to permit administration, resource and range management from 3/17/2023 to the date this request is fulfilled
2) All stubble height, willow usage, range condition, actual use reports or other field monitoring sheets, observations or data from 3/17/2023 to the date this request is fulfilled
3) All documentation of lack of permit compliance, including but not limited to, cattle in trespass or violation of the AMP, improper salting, excessive utilization or others from 3/17/2023 to the date this request is fulfilled whether permit action was taken or not
4) All field notes, photographs, emails, meeting notes, conversation records, data, data sheets, GIS, analyses, or other documents regarding evaluations, determinations or appropriate actions of Rangeland Health Standards and compliance with 43 CFR 4180 between 3/17/2023 and the date this request is fulfilled
5) All documents, meeting notes, emails, conversation records or other documents related to range NEPA analysis, CX, DNA or permit renewals (including obviously the 3 Creek project) between 3/17/2023 and the date this request is fulfilled

For all allotments within the Salt Lake Field office

NOTE:

1) Please leave records in their **original** format. **Do not** convert photos, emails, spreadsheets or other common file formats into PDF.
2) For any files in PDF, **do not** use Portfolio format
3) Please **provide separate folders** for each of the enumerated categories
4) **Do not** provide rolling releases. Provide all records in a single release
5) Records include all information such as emails, txt messages, database entries, information accessed through a web browser, etc

III. PURPOSE OF REQUEST

Sage Steppe Wild, a non-profit conservation organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. SSW has supporter across the western US. SSW is active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values of western watersheds. To do so, SSW actively participates in agency decision-making concerning Forest Service, BLM and NPS lands throughout the West, and

the Forest Service and BLM's management of livestock grazing in Idaho, Nevada, Utah California and Wyoming.

SSW is effective at increasing public awareness of environmental matters, such as protection of the diverse and valuable sage steppe ecosystem, through public education and outreach, participation in administrative processes, litigation and other enforcement of federal environmental laws.

Disclosure of the information we have requested will significantly contribute to the public's understanding of federal agency activities with respect to the environmental impacts associated with grazing. Information gathered from this request may be disseminated to the public through one or more of the above activities as well as our website, www.Wild-Sage.org, supporter alerts and press releases. SSW also represents its supporters in advocating improvements in state and federal statutes, regulations, and procedures concerning the protection of natural ecosystems and biodiversity.

V. WITHHOLDING OF DOCUMENTS:

If you believe any portion of this request is exempt from disclosure under FOIA please provide a detailed description of each withheld document and the legal basis for withholding such document.

VI. FEE WAIVER REQUEST:

The following describes how and why Sage Steppe Wild (SSW) meet the six factors defined by the U.S. Department of Interior entitling requestors to a fee waiver for the provision of public documents under the Freedom of Information Act. SSW is a non-profit organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. SSW has supporters across the west. SSW is active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values of western watersheds. To do so, SSW actively participates in agency decision-making concerning Forest Service, BLM and NPS lands throughout the West, and the agencies management of livestock grazing in Idaho, Nevada, Utah, California and Wyoming.

SSW is effective at increasing public awareness of environmental matters, such as protection of the diverse and valuable sagebrush-steppe ecosystem, through public education and outreach, participation in administrative processes, litigation and other enforcement of federal environmental laws. The following details SSW and our use and dissemination of the requested information demonstrate their eligibility for a fee waiver.

Factor 1: *Do the requested records concern "the operations or activities of the government"?*

Yes. Our request is for public documents relating to the BLM. Such management is "operations or activities of the government".

Factor 2: *What is the informative value of the information to be disclosed? Explain in detail why the information requested is "likely to contribute" to the understanding of government operations or activities. For this factor, the requester bears the burden of identifying "with reasonable specificity" the public interest served.*

Documents requested in this FOIA request are essential to our mission to protect the land and water of the Interior West and to educate their supporters and the general public to enable and empower them to advocate for this protection. The information requested enables SSW to inform and educate the public on the management of livestock grazing and natural resources protection on the BLM lands - which are public lands, owned by the taxpayers. Moreover, SSW utilizes this type of information to meaningfully participate in the NEPA process for public land grazing issues and so that it can observe management of the public lands to prevent abuses. There is not doubt, therefore, that the requested information, read and digested by SSW staff, will contribute to the public understanding of these issues.

Factor 3: *Please identify why disclosure of the documents would contribute to the understanding of the subject by the public, as opposed to an individual's understanding of the requester or by a narrow segment of interested persons. This factor concerns whether disclosure of the information will contribute to an understanding by "a reasonably broad audience of persons interested in the subject," and requires the requester to have the ability to disseminate the information to the public.*

The third criteria, "to public understanding" was covered above. "Likely to contribute" is met through our intended purpose in obtaining the information and our means of public dissemination. "Public understanding" is met as well. Public land grazing issues, allotment management plans, permit renewals, the interplay and role of NEPA and enforcement criteria are complex matters, as you well know. Accordingly, educating the public concerning these matters will undoubtedly add to the public understanding.

BLM's planning and decision-making processes are supposed to be public processes in which information is readily available and comprehensible to the public at large. Unfortunately, in many instances, such documents as the ones requested here are long, tedious to read, and difficult to understand. Also, in many instances, they are not provided to the general public. Accordingly, organizations like SSW compiles this information into a more readily understandable form for the general public, as well as for our supporters.

As one of only a few organizations specifically dedicated to the preservation and protection of the lands and waters of the sage steppe ecosystem, SSW is critically important source of information for both our supporters and the general public who have an interest in the health and management of our public lands.

Factor 4: *How will the disclosure of the documents contribute "significantly" to public understanding? For example, will disclosure contribute to public understanding of government operations or activities? The public benefit should be "identified with reasonable specificity." To warrant a waiver, the public's understanding of the subject matter must increase as compared to the level of public understanding existing prior to the release of the documents.*

Fourth, the contribution to the public will be significant. The comparable BLM regulation clearly states that the "significant" test is met when the information "clearly supports public oversight of Department operations, and the effect of policy and regulations on public health and safety, or otherwise confirms or clarifies data on past or present operations of the Department." 43 C.F.R. § 2.21(a)(2)(iii). There is no doubt that the information requested is significant in the effectiveness of our ongoing public lands management oversight program.

Factors 5 and 6: *Does the requester have a commercial interest that would be furthered by the requested documents, and what is the magnitude of that interest? What is the requester's primary interest in disclosure? Is the magnitude of the identified commercial interest of the requester sufficiently large when compared with the public interest in disclosure? Is disclosure "primarily in the commercial interest of the requester?"*

A commercial interest is one that furthers a commercial, trade, or profit interest. SSW does not have any commercial interest in obtaining this information and requested fee waiver. Rather, SSW is a not-for-profit group that strives to protect the natural resources of the West. Nowhere in SSW's mission statement, by-laws, or charter, does the organization state a profit-motive goal. Thus, with no commercial interest, SSW clearly cannot have a commercial interest that "is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester,'" as stated in the sixth factor.

Additional Information Concerning Fee Waiver: Legal Background.

In 1986, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

> Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information, which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ....

132 Cong. Rec. S14298 (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Government Association v. Department of State, 708 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to such groups, which rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions

> The fee 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.

Id. at 93-94 (emphasis added).

Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public-interest fee waivers are 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). "'[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.'" Ettlinger v. FBI, 596 F.Supp. 867, 873 (D. Mass. 1984) (quoting legislative history). An agency may not refuse a fee waiver when "'there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.'" Id. at 874, quoting Fitzgibbon v. Central Intelligence Agency, Civil No. 76-700 (D.D.C. Jan. 10, 1977). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." Id., citing 5 U.S.C. § 552(a)(4)(B).

In light of these principles, it is clear that SSW as a non-profit group interested in oversight of agency management of livestock grazing and resource protection on BLM's public lands, are entitled to a fee waiver for the specific documents requested.

Accordingly, SSW asserts that a fee waiver is proper as we comply with the six factors. If you have any further questions or if you require more information, please contact me at the address provided. If the BLM should deny our fee waiver, please notify us immediately of the costs for these documents so we can proceed from there. Thank you in advance for your prompt reply.

Sincerely yours,

Jonathan B Ratner
Director

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.
[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.
[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis