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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

BUFFALO FIELD CAMPAIGN,

Plaintiff,

vs.

**UNITED STATES DEPARTMENT OF
AGRICULTURE, ANIMAL AND
PLANT HEALTH INSPECTION SERV-
ICE,**

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act
Administrative Procedure Act

Plaintiff, the Buffalo Field Campaign (“BFC” or “Plaintiff”), alleges as follows:

INTRODUCTION

1. This action is premised upon, and consequent to, violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.* It challenges the unlawful failure of the Defendant, the United States Department of Agriculture, Animal and Plant Health Inspection Service (“APHIS” or “Agency”), to abide by the statutory requirements of the FOIA and the APA.
2. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which it is entitled and for which no valid disclosure exemption applies or has been asserted. In particular, Defendant has violated, and remains in violation of, the statutory mandates imposed by FOIA and the APA by:
(1) failing to provide a final determination resolving a number of Plaintiff’s FOIA requests within the time required by law; **(2)** failing to properly invoke the “unusual circumstances” exception of FOIA; **(3)** maintaining an illegal pattern or practice of *(a)* failing to respond to FOIA requests in a timely manner; and *(b)* improperly invoking the “unusual circumstances” exception; and **(3)** failing to make available to the public a telephone line or Internet service that provides information about the status of a pending FOIA request under 5 U.S.C. § 552(a)(7)(B).

3. Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA and APA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the requested material. Plaintiff also seeks to enjoin Defendant from maintaining its illegal patterns or practices, as described above. Finally, Plaintiff seeks an Order from the Court directing APHIS to establish the required telephone or internet-based system designed to provide the public with a projected FOIA request completion date.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

4. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

5. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district. Plaintiff resides and has its principal place of business in the District of Montana.

6. This case is properly brought in the District of Montana, Missoula Division. BFC's Executive Director, Dan Brister, resides in Arlee, Montana. Mr. Brister has and will continue to have a major role in this dispute. Many of BFC's Board Members also reside in the Missoula area, including Tom Woodbury and Rebecca Smith. Furthermore, BFC conducts all of its financial accounting, grant writing, and fundraising from its offices in Arlee, Montana.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201.
8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff Buffalo Field Campaign (“BFC”) is a non-profit public interest organization founded in 1997 to stop the slaughter of Yellowstone’s wild bison, protect the natural habitat of wild free-roaming bison and other native wildlife, and to work with people of all Nations to honor the sacredness of the wild bison. BFC is supported by volunteers and participants around the world who value America’s native wildlife and the ecosystems upon which they depend, and enjoy the natural wonders of our National Parks and Forests. BFC has its field office in West Yellowstone, Montana, where volunteers congregate and conduct daily patrols into the field to document the harassment of wild buffalo. BFC has its financial headquarters in Arlee, Montana, where it conducts its financial planning, grant writing, and fundraising. BFC’s Executive Director and other staff conduct BFC’s business out of its Arlee office.

10. Much of BFC’s staff is located in Arlee, Moiese, Missoula, and West Yellowstone, Montana. BFC also has volunteers across Montana and the world. Through these staff, volunteers, and other supporters, BFC is a leader in advocating for viable, free-roaming populations of wild bison.

11. BFC, as an organization and on behalf of its members, is concerned with and actively involved with protecting the last remaining descendants of the native plains bison on this continent, and advocating such bison be allowed to occupy their original range. BFC actively seeks to document and publicize the plight of the bison, to end their slaughter by government agencies, and to secure long-term protection for viable populations of wild bison and year-round habitat. BFC actively engages the American public to honor cultural heritage by allowing wild bison to exist as an indigenous wildlife species and fulfill their inherent ecological role within their native range, and serve as the genetic wellspring for future, wild, free-ranging bison populations.

12. Defendant APHIS is a division of the U.S. Department of Agriculture, which itself is an agency of the executive branch of the United States government.

APHIS is tasked with protecting the health and welfare of plants and animals.

APHIS is in possession and control of the records sought by BFC, and as such, it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).

STATEMENT OF OPERATIVE FACTS

13. The FOIA requires U.S. government agencies to promptly make public records available to any person if that person makes a request which (1) reasonably describes the records sought and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

14. The FOIA requires an agency to issue a final determination on any such information request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

15. The FOIA allows an agency to extend this determination deadline, however, by ten working days when “unusual circumstances” exist and when the agency so notifies a requester in writing. 5 U.S.C. § 552(a)(6)(B); *see also* 7 C.F.R. § 1.16(a) (U.S. Department of Agriculture regulations implementing “unusual circumstances” provision of FOIA). An agency is entitled to one ten-business day extension. *Id.* The written notice provided to the requester must specify the specific unusual circumstances justifying the extension and the date on which a final determination is expected to be dispatched. *Id.*

16. In some circumstances, the FOIA allows an agency to invoke an extension beyond ten days. To invoke a longer extension, the FOIA requires an agency to provide written notification to the requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an alternative time frame for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii). The agency must also make available to the requester its FOIA public liaison, who is tasked to resolve any dispute between the requester and the agency. *Id.*

17. U.S. Department of Agriculture regulations state that, even if an “unusual

circumstance” justifies a ten-day extension in responding to a FOIA request, the agency must still “acknowledge the request...in writing within the 20 working day time period” under the statute. 7 C.F.R. § 1.16(a).

18. The FOIA requires agencies like APHIS to “establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including (i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B). To date, APHIS has not set up such a system.

19. BFC has submitted a number of FOIA requests to APHIS, beginning on May 28, 2011. The operative facts pertaining to each FOIA request are as follows.

20. BFC has constructively exhausted all administrative remedies required by FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).

21. BFC has been required to expend costs and to obtain the services of a law firm, consisting of attorneys and legal assistants, to prosecute this action.

REQUEST ONE

22. On March 26, 2011, Yellowstone National Park released the following press statement:

Fifty-three yearling through four-year-old bison remain in the Corwin Springs facility as a part of a USDA Animal and Plant Health Inspection Service initiated research project to determine whether brucellosis positive

female bison can be prevented from shedding Brucella bacteria by treating them with a contraceptive vaccine.

The study requires a total of 80 to 100 bison, including some bison testing seronegative and some testing seropositive for brucellosis. At the end of the 7-year study, these bison will not be returned to the park. All bison that remain seronegative during the course of this study will be consigned to conservation programs or tribal restoration projects. Seropositive bison from this study may be consigned to slaughter at the conclusion of the research.

23. On May 28, 2011, BFC submitted a FOIA request to APHIS seeking access to records relating to APHIS' immunocontraceptive vaccination program ("Request One"). A true and correct copy of Request One is attached hereto as Attachment A. This request complied with all applicable Agency rules for making a FOIA request.

24. Had APHIS complied with the statutory time frame set forth in FOIA, its final determination on BFC's request would have been due on June 27, 2011.

25. Instead, APHIS responded to BFC's FOIA request by an e-mail dated July 5, 2011, over thirty days after BFC had submitted its request.

26. In its response, APHIS acknowledged that it had received Request One on May 31, 2011. It then purported to invoke the ten-day "unusual circumstances" extension under FOIA. In invoking the extension, APHIS acknowledged that it had received responsive records from the Veterinary Services program office, but claimed it needed additional time to review the records. APHIS indicated that the review would be complete by July 28, 2011.

27. If an agency invokes the “unusual circumstances” exception and specifies a determination date that would result in an extension for more than ten working days, it must offer the requester an opportunity to limit the scope of its request or to set up an alternative time frame for responding. It must also make its FOIA public liaison available to the requester. 5 U.S.C. § 552(a)(6)(B)(ii).

28. APHIS’ response to BFC specified a determination date of July 28, 2011, well beyond the standard ten day extension authorized by the FOIA. 5 U.S.C. § 552(a)(6)(B)(i).

29. APHIS’ response did not offer BFC an opportunity to limit the scope of its request or to set up an alternative time frame for responding. Nor did APHIS make its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

30. By an e-mail dated August 4, 2011, APHIS requested a second extension under the FOIA’s “unusual circumstances” provision. This request came more than fifty days after BFC had submitted its FOIA request, and more than twenty days after APHIS’ first request for an “unusual circumstances” extension. APHIS indicated in the e-mail that it needed further additional time to review responsive records, even though those records had been in its possession since July. This time, APHIS said that the review would be complete by September 23, 2011, well outside the ten-days allowed by the statute. 5 U.S.C. § 552(a)(6)(B)(i). Again, APHIS failed to offer BFC an opportunity to limit the scope of its request or to set

up an alternative time frame for responding, both mandatory requirements under the statute. APHIS also failed to make its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

31. BFC respectfully denied APHIS' second request for an extension, as such an extension is not authorized by the FOIA or by U.S. Department of Agriculture regulations. 5 U.S.C. § 552(a)(6)(B); 7 C.F.R. § 1.16(a).

32. Having heard no response from APHIS since its August 4, 2011 request for another extension of time, BFC sent a letter to the Agency on October 20, 2011. That letter highlighted APHIS' numerous failures to abide by the FOIA and informed APHIS that BFC would file a civil complaint against it unless it provided all responsive documents by November 1, 2011. This would have given APHIS over five months to compile, review, and respond to BFC's FOIA request.

33. APHIS responded to BFC in a correspondence dated September 15, 2011, but received by BFC on November 17, 2011. According to the correspondence, APHIS had treated BFC's letter as an appeal, although it remains unclear whether any administrative appeals personnel ever reviewed BFC's letter. APHIS went on to state that it had received 54 pages of documents responsive to BFC's request, but was only providing BFC with 35 pages. According to the Defendant, because the remaining pages did not originate from within the Agency, it did not have "release authority" over them. APHIS did not provide any legal support for this con-

clusion. Those other documents allegedly originated with the National Park Service, and although APHIS had custodial control over them, it refused to produce them.

34. The documents that BFC did receive were highly suspect. In particular, the documents contained numerous references to other potentially responsive material that was not provided. As such, BFC contacted APHIS by phone on December 7, 2011. In that call, BFC requested that APHIS supplement its prior disclosure and provide all responsive documents in APHIS' custody regardless of their origination, as the FOIA requires. APHIS agreed to contact the program office that maintained the responsive documents and to ask them to provide a number of the specific documents. APHIS also agreed to contact the National Park Service with regard to the other 19 documents over which APHIS allegedly lacked "release authority." APHIS stated that it would ask the National Park Service to expedite its review of those 19 documents and to provide them to BFC as quickly as possible. In consideration for APHIS' action, BFC agreed to delay appealing APHIS' determination on Request One.

35. APHIS did not respond by December 17. Instead, on December 27 or 28, APHIS personnel called BFC representatives to inform them that new documents related to Request One had been found, but that production of those documents was being delayed due to internal review. APHIS stated that it would endeavor to

make the documents available to BFC in early January, 2012.

36. BFC contacted APHIS again by e-mail on January 9, January 18, and January 30, 2012. In these e-mails, BFC expressed its concern that APHIS had still not responded to FOIA Request One, which was received by the Agency on May 31, 2011. APHIS did not respond to these e-mails.

37. In early February, APHIS contacted BFC by phone. In that call, APHIS indicated that the responsive records were still being reviewed by Agency personnel and would be provided to BFC soon.

38. To date, APHIS has failed to provide the additional documents responsive to Request One over which it maintains custodial control. It has been approximately ten months since APHIS first received Request One.

39. APHIS has failed to make a final determination on BFC's appeal within the twenty-day time period allowed by the statute. 5 U.S.C. § 552(a)(6)(A)(ii). This failure means that BFC has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

REQUEST TWO

40. On October 12, 2011, BFC submitted another FOIA request to APHIS ("Request Two"). A true and correct copy of that request is attached hereto as Attachment B. This request complied with all applicable Agency rules for making a FOIA request.

41. APHIS responded to this request on November 16, 2011, past the twenty-day determination deadline. 5 U.S.C. § 552(a)(6)(A)(i). APHIS provided only partial records in response to Request Two.

REQUEST THREE

42. On October 20, 2011, BFC submitted another FOIA request to APHIS (“Request Three”). This request complied with all applicable Agency rules for making a FOIA request.

43. APHIS responded to this request on December 5, 2011, past the twenty-day determination deadline. 5 U.S.C. § 552(a)(6)(A)(i). A true and correct copy of APHIS’ response is attached hereto as Attachment C.

REQUEST FOUR

44. On November 2, 2011, BFC submitted another FOIA request to APHIS (“Request Four”). A true and correct copy of that request is attached hereto as Attachment D. This request complied with all applicable Agency rules for making a FOIA request. On November 4, 2011, APHIS sent an e-mail to BFC acknowledging that it had received Request Four on November 2, 2011. That e-mail contained an image of BFC’s request with a stamp that stated “Dec 2 – 2011 Date Due Out.”

45. APHIS was statutorily obligated to inform BFC by December 2, 2011, of its final determination on Request Four. 5 U.S.C. § 552(a)(6)(A)(i). APHIS failed to do so.

46. On November 28, 2011, BFC sent a correspondence to APHIS pertaining to Request Four. In that correspondence, BFC reminded APHIS that its response to Request Four was due on December 2, 2011.

47. APHIS responded to BFC by a letter dated December 7, 2011, past the twenty-day determination deadline. In that letter, APHIS purported to invoke the ten-day “unusual circumstances” extension under the FOIA to search for and collect records from field facilities. 5 U.S.C. § 552(a)(6)(B); *see also* 7 C.F.R. § 1.16(a) (U.S. Department of Agriculture regulations implementing “unusual circumstances” provision of FOIA). APHIS then purported to invoke *another* ten-day “unusual circumstances” extension to “review the records.” In total, APHIS stated that its collection and review process would be completed by February 24, 2012, well beyond the twenty-day determination deadline and single ten-day extension authorized by the FOIA. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(B)(i).

48. APHIS’ response did not offer BFC an opportunity to limit the scope of its request or to set up an alternative time frame for responding. Nor did APHIS make its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

49. APHIS’ response also failed to include the Agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of BFC to appeal to the head of the agency. As such, APHIS did not

issue a final determination on Request Four. This failure means that BFC has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

50. BFC responded to APHIS' letter on December 30, 2011. In its letter, BFC explained that APHIS' actions were improper under the statute. BFC also stated that APHIS' repeated failures to abide by the statute suggest that APHIS had developed a "pattern or practice of intentionally ignoring the timing requirements" of the FOIA.

51. To date, APHIS has failed to provide any records in response to Request Four nor responded to BFC's December 30, 2011 letter.

REQUEST FIVE

52. On January 6, 2012, BFC submitted another FOIA request to APHIS ("Request Five"). A true and correct copy of that request is attached hereto as Attachment E. This request complied with all applicable Agency rules for making a FOIA request.

53. APHIS responded to BFC's request in a letter dated February 23, 2011, but received by BFC on February 29, 2012. This response came well beyond the twenty-days allowed by the FOIA.

54. In its letter, APHIS first stated that it had received Request Five on January 6, 2012. Next, the Agency again purported to invoke the ten-day "unusual circumstances" extension under the FOIA to "search for and collect" potentially respon-

sive documents. 5 U.S.C. § 552(a)(6)(B); *see also* 7 C.F.R. § 1.16(a) (U.S. Department of Agriculture regulations implementing “unusual circumstances” provision of FOIA). Once that process was complete, APHIS stated that it would then review the records. In total, APHIS estimated that the process to collect and review the records would be complete by May 23, 2012, months after BFC submitted its original request and well beyond the ten-days allowed by the statute. 5 U.S.C. § 552(a)(6)(B)(i).

55. APHIS’ response did not offer BFC an opportunity to limit the scope of its request or to set up an alternative time frame for responding. Nor did APHIS make its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

56. APHIS’ response also failed to include the Agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of BFC to appeal to the head of the agency. As such, APHIS did not issue a final determination on Request Five. This failure means that BFC has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

57. To date, APHIS has failed to provide any documents responsive to Request Five.

REQUEST SIX

58. On January 12, 2012, BFC submitted another FOIA request to APHIS (“Request Six”). A true and correct copy of that request is attached hereto as Attach-

ment F. This request complied with all applicable Agency rules for making a FOIA request.

59. APHIS did not respond to this request within the twenty-day deadline. Instead, on February 17, 2012, APHIS sent a message to BFC stating that it had received the request on January 12, but gave no explanation for its delay.

60. On February 22, 2012, APHIS sent another correspondence to BFC about Request Six. In that correspondence, APHIS purported to invoke the ten-day “unusual circumstances” extension under the FOIA to “search for, collect, and appropriately examine” potentially responsive documents. 5 U.S.C. § 552(a)(6)(B); *see also* 7 C.F.R. § 1.16(a) (U.S. Department of Agriculture regulations implementing “unusual circumstances” provision of FOIA). APHIS stated that this process would be completed by March 5, 2012. Once that process was complete, APHIS stated that it would then review the records, which would take even more time. APHIS did not state an expected determination date, but in any event it would necessarily be more than ten days. 5 U.S.C. § 552(a)(6)(B)(i).

61. APHIS’ response did not offer BFC an opportunity to limit the scope of its request or to set up an alternative time frame for responding. Nor did APHIS make its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

62. APHIS’ response also did not specify the date on which a determination was expected to be dispatched. 5 U.S.C. § 552(a)(6)(B)(i) (to properly invoke the “un-

usual circumstances” exception, agency must provide written notice to the requester which, among other things, specifies “the date on which a determination is expected to be dispatched”).

63. APHIS’ response also failed to include the Agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of BFC to appeal to the head of the agency. As such, APHIS did not issue a final determination on Request Six. This failure means that BFC has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

64. On March 5, 2012, APHIS sent another correspondence to BFC regarding Request Six. In its correspondence, APHIS again purported to invoke another ten-day “unusual circumstances” extension under the FOIA to “search for, collect, and appropriately examine” potentially responsive documents. 5 U.S.C. § 552(a)-(6)(B); *see also* 7 C.F.R. § 1.16(a) (U.S. Department of Agriculture regulations implementing “unusual circumstances” provision of FOIA). APHIS stated that this process would now be completed by March 16, 2012. Once that process was complete, APHIS again stated that it would then review the records, which would take even more time. APHIS did not state an expected determination date, but in any event it would necessarily be more than ten days. 5 U.S.C. § 552(a)(6)(B)(i).

65. APHIS’ response did not offer BFC an opportunity to limit the scope of its request or to set up an alternative time frame for responding. Nor did APHIS make

its FOIA public liaison available to BFC. 5 U.S.C. § 552(a)(6)(B)(ii).

66. APHIS' response also did not specify the date on which a determination was expected to be dispatched. 5 U.S.C. § 552(a)(6)(B)(i) (to properly invoke the "unusual circumstances" exception, agency must provide written notice to the requester which, among other things, specifies "the date on which a determination is expected to be dispatched").

67. APHIS' response also failed to include the Agency's determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of BFC to appeal to the head of the agency. As such, APHIS did not issue a final determination on Request Six. This failure means that BFC has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

68. To date, APHIS has failed to provide any documents responsive to Request Six.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: DETERMINATION DEADLINE VIOLATION

69. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

70. BFC has a statutory right to have APHIS process its FOIA requests in a manner which complies with the FOIA. Plaintiff's rights in this regard were vio-

lated when APHIS unlawfully delayed informing BFC of its final determination as to Requests One, Two, Three, Four, Five, and Six beyond the twenty-day determination deadline imposed by the FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i), (B); *see also* 7 C.F.R. § 1.16(a) (where agency invokes “unusual circumstances” extension, it must still respond within FOIA’s twenty-day timeframe). Plaintiff’s rights in this regard were also violated when APHIS unlawfully delayed informing BFC of its final determination on BFC’s appeal of Request One beyond the twenty-day appeals timeframe. 5 U.S.C. § 552(a)(6)(A)(ii).

71. Based on the nature of Plaintiff’s organizational activities, Plaintiff will continue to employ FOIA’s provisions in information requests to APHIS in the foreseeable future. These activities will be adversely affected if APHIS is allowed to continue violating FOIA’s response deadlines.

72. Unless enjoined and made subject to a declaration of Plaintiff’s legal rights by this Court, Defendant will continue to violate the rights of Plaintiff to receive public records under the FOIA.

73. APHIS’ failure to make a final determination on BFC’s FOIA requests within the statutory timeframe has prejudiced Plaintiff’s ability to timely obtain public records.

COUNT II

VIOLATION OF THE FREEDOM OF INFORMATION ACT: FAILURE TO PROPERLY INVOKE UNUSUAL CIRCUMSTANCES EX-

CEPTION

74. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

75. BFC has a statutory right to have APHIS process its FOIA requests in a manner which complies with FOIA. Plaintiff's rights in this regard were violated when APHIS failed to properly invoke FOIA's "unusual circumstances" exception.

76. APHIS purported to invoke the "unusual circumstances" exception in response to Requests One, Four, Five, and Six. In each of these instances, APHIS indicated a determination date that exceeded the automatic ten-day extension authorized by the FOIA.

77. When an agency specifies a determination date that would result in an extension beyond the ten working days allowed by the "unusual circumstances" exception, it must provide written notification to the requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an alternative time frame for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii). The agency shall also make available to the requester its FOIA Public Liaison, who is tasked in resolving any dispute between the requester and the agency. *Id.*

78. At no time did APHIS provide BFC with an opportunity to limit the scope

of its request so that it may be processed within FOIA's time limits or an opportunity to arrange an alternative time frame for processing its request. 5 U.S.C. § 552(a)(6)(B)(ii).

79. At no time did APHIS make available to BFC its FOIA Public Liaison, who is tasked in resolving any dispute between the requester and the agency. *Id.*

80. APHIS also improperly attempted to invoke a second ten-day "unusual circumstances" extension with regard to Requests One, Four, and Six, which is not authorized under the FOIA.

81. APHIS also failed to specify the date on which a determination was expected to be dispatch with regard to Request Six. 5 U.S.C. § 552(a)(6)(B)(i).

82. These failures and unlawful actions have prejudiced BFC's ability to timely obtain public records, as it was not afforded its statutorily-mandated opportunity to limit the scope of its request, propose an alternative timeframe for production, or to speak with APHIS' FOIA public liaison officer.

83. Based on the nature of Plaintiff's organizational activities, Plaintiff will continue to employ FOIA's provisions in information requests to APHIS in the foreseeable future. These activities will be adversely affected if APHIS is allowed to continue to illegally invoke the "unusual circumstances" exception.

84. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant will continue to violate the rights of Plaintiff to receive

public records under the FOIA.

COUNT III

VIOLATION OF THE FREEDOM OF INFORMATION ACT FAILURE TO PROVIDE NON-EXEMPT PUBLIC RECORDS

85. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

86. BFC has a statutory right to have APHIS process its FOIA requests in a manner which complies with FOIA. Plaintiff's rights in this regard were violated when APHIS failed to promptly provide public, non-exempt records to BFC. 5 U.S.C. § 552(a)(3).

87. APHIS is unlawfully withholding public disclosure of information sought by BFC, information to which they are entitled and for which no valid disclosure exemption applies.

88. Based on the nature of BFC's organizational activities, it will undoubtedly continue to employ FOIA's provisions in information requests to APHIS in the foreseeable future.

89. BFC's organizational activities will be adversely affected if APHIS is allowed to continue violating FOIA's response deadlines as it has in this case.

90. Unless enjoined and made subject to a declaration of BFC's legal rights by this Court, APHIS will continue to violate the rights of BFC to receive public records under the FOIA.

COUNT IV

VIOLATION OF THE FREEDOM OF INFORMATION ACT: PATTERN OR PRACTICE OF FAILING TO TIMELY RESPOND TO FOIA REQUESTS

91. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

92. BFC has a statutory right to have APHIS process its FOIA requests in a manner which complies with FOIA. Plaintiff's rights in this regard are, have been, and will continue to be violated by APHIS' pattern or practice of unlawfully failing to timely respond to FOIA requests. This pattern or practice is exemplified by APHIS' failure to timely respond to Requests One, Two, Three, Four, Five, and Six. In each of these instances, APHIS did not provide a final determination on BFC's FOIA requests within the twenty-day deadline allowed by the statute.

93. Based on the nature of Plaintiff's organizational activities, Plaintiff will continue to employ FOIA's provisions in information requests to APHIS in the foreseeable future. These activities will be adversely affected if APHIS is allowed to continue its pattern or practice of failing to timely respond to FOIA requests.

94. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant will continue to violate the rights of Plaintiff and others by maintaining its illegal pattern or practice of unlawfully delaying responses to FOIA requests.

COUNT V

VIOLATION OF THE FREEDOM OF INFORMATION ACT: PATTERN OR PRACTICE OF UNLAWFULLY INVOKING THE “UN- USUAL CIRCUMSTANCES” EXCEPTION

95. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

96. BFC has a statutory right to have APHIS process its FOIA requests in a manner which complies with FOIA. Plaintiff's rights in this regard are, have been, and will continue to be violated by APHIS' pattern or practice of unlawfully invoking the “unusual circumstances” exception.

97. In particular, APHIS' actions demonstrate that it has maintained an illegal pattern or practice of improperly invoking the “unusual circumstances” exception to grant it additional response time well beyond the single, ten-day extension authorized by the statute.

98. Where an agency specifies a determination date that would result in an extension beyond the ten working days allowed by the “unusual circumstances” exception, it must provide written notification to the requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an alternative time frame for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii). The agency shall also make available to the requester its FOIA

Public Liaison, who is tasked in resolving any dispute between the requester and the agency. *Id.*

99. Here, APHIS invoked extensions in Requests One, Four, Five, and Six that were beyond the ten working days allowed by the statute. At no time, however, did APHIS offer BFC an opportunity to limit its request or arrange an alternative time frame for processing the request. Nor did APHIS make its FOIA Public Liaison available to Plaintiff.

100. APHIS also improperly attempted to invoke a second ten-day “unusual circumstances” extension with regard to Requests One, Four, and Six, which is not authorized under the FOIA.

101. APHIS also failed to specify the date on which a determination was expected to be dispatch with regard to Request Six. 5 U.S.C. § 552(a)(6)(B)(i).

102. Based on the nature of Plaintiff’s organizational activities, Plaintiff will continue to employ FOIA’s provisions in information requests to APHIS in the foreseeable future. These activities will be adversely affected if APHIS is allowed to continue its pattern or practice of failing to properly invoke the “unusual circumstances” exception.

103. Unless enjoined and made subject to a declaration of Plaintiff’s legal rights by this Court, Defendant will continue to violate the rights of Plaintiff and others by maintaining its illegal practice or pattern of failing to properly invoke the “un-

usual circumstances” exception.

COUNT VI

VIOLATION OF THE FREEDOM OF INFORMATION ACT: FAILURE TO ESTABLISH INTERNET / PHONE SYSTEM

104. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

105. Plaintiff has a statutory right to have Defendant process its FOIA requests in a manner which complies with FOIA. Plaintiff’s rights in this regard were violated when the Defendant failed to provide BFC with access to “a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including – (i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request” as required by the Act. 5 U.S.C. § 552(a)(7)(B).

106. Based on the nature of Plaintiff’s organizational activities, Plaintiff will undoubtedly continue to employ FOIA’s provisions in information requests to Defendant in the foreseeable future.

107. Plaintiff’s organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA’s response deadlines as it has in this case.

108. Unless enjoined and made subject to a declaration of Plaintiff’s legal rights by this Court, Defendant will continue to violate the rights of Plaintiff to receive

public records under the FOIA.

COUNT VII

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURES ACT

109. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

110. APHIS has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA by failing to (1) issue a timely final determination on BFC's information requests; (2) improperly invoking the "unusual circumstances" exception; and (3) provide the public with access to "a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including – (i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request." 5 U.S.C. § 552(a)(7)(B).

111. APHIS has unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to issue timely final determinations on BFC's information requests and to produce non-exempt records.

112. APHIS has also unlawfully withheld agency action by failing to provide the public with access to "a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned

tracking number, including – (i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B).

113. BFC has been adversely affected and aggrieved by APHIS’ failure to comply with the mandates of FOIA. APHIS’ failure and refusal to issue timely final determinations on BFC’s information requests has injured Plaintiff’s interests in public oversight of governmental operations and constitute a violation of Defendant’s statutory duties under the APA.

114. BFC has suffered a legal wrong as a result of APHIS’ failure to comply with the mandates of FOIA. APHIS’ failure and refusal to issue timely final determinations on BFC’s information requests has injured Plaintiff’s interests in public oversight of governmental operations and constitute a violation of Defendant’s statutory duties under the APA.

115. APHIS’ failure and refusal to issue timely final determinations on BFC’s information requests and to properly invoke the “unusual circumstances” extension constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

116. APHIS’ failure to provide BFC and the public with access to a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number constitutes agency

action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

117. Alternatively, APHIS' failure and refusal to issue timely final determinations on BFC's information requests and to properly invoke the "unusual circumstances" extension is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

118. Alternatively, APHIS' failure to provide BFC and the public with access to a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

119. BFC is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702, 706.

120. BFC is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

REQUEST FOR RELIEF

WHEREFORE, BFC pray that this Court:

1. Order APHIS to promptly provide BFC all of the information sought in this action and to immediately disclose the requested documents.

2. Declare APHIS' failure to make timely determinations on Plaintiff's information requests and appeal to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i), (ii), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2).

3. Declare APHIS' failure to properly invoke the "unusual circumstances" exception to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(B)(i), (ii), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2).

4. Declare APHIS' failure to disclose the information requested by Plaintiff to be unlawful under the FOIA, 5 U.S.C. § 552(a)(3), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2).

5. Declare APHIS' pattern or practice of failing to timely respond to FOIA requests unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A).

6. Issue appropriate injunctive relief to prohibit Defendant from con-

tinuing its pattern or practice of failing to timely respond to FOIA requests.

7. Declare APHIS' pattern or practice of failing to properly invoke the "unusual circumstances" extension to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(B).

8. Issue appropriate injunctive relief to prohibit Defendant from continuing its pattern or practice of failing to properly invoke the "unusual circumstances" exception.

9. Declare Defendant's failure to provide access to a telephone or Internet-based tracking system to be unlawful under the FOIA, 5 U.S.C. § 552(a)(7), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2).

10. Issue appropriate injunctive relief to require Defendant to provide access to a telephone or Internet-based tracking system for FOIA requests. 5 U.S.C. § 552(a)(7).

11. Award BFC its reasonable attorneys' and expert witness fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.

12. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 9th Day of March, 2012.

/s/ John Meyer

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