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Attorneys for Plaintiff

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

BUFFALO FIELD CAMPAIGN,

Plaintiff,

vs.

**UNITED STATES DEPARTMENT OF
THE INTERIOR, NATIONAL PARK
SERVICE,**

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act

Plaintiff, 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.* It challenges the unlawful failure of the Defendant, the United States Department of the Interior, National Park Service (“Defendant,” or “Agency”), to abide by the statutory requirements of the FOIA.

2. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which Plaintiff 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 by: (1) failing to provide a final determination resolving Plaintiff’s FOIA Appeal within the time required by law; and (2) unlawfully withholding agency records from BFC and the public to which no valid disclosure exemption applies, including reasonably segregable, non-exempt portions of responsive records, in response to Plaintiff’s FOIA Request.

3. Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the requested material. Finally, Plaintiff seeks an Order from the Court directing Defendant to pay Plaintiff’s reasonable attorneys’ fees and

costs incurred in bringing this action.

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 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 habitat coordinator, Darrell Geist, resides and has his office in Missoula, Montana. Mr. Geist submitted the FOIA Request at the heart of this dispute on behalf of BFC, and will continue to play a major role obtaining, reviewing, and releasing information obtained from responsive records to shed light on ongoing government action. BFC conducts regular business activity in Missoula, and all year-end financial information is processed in Missoula, as reflected on BFC's annual reports to the State.
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).
9. Attorneys' fees and costs may be awarded by the Court to a substantially

prevailing plaintiff pursuant to 5 U.S.C. § 552(a)(4)(E).

PARTIES

10. 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 field offices in West Yellowstone, and Gardiner, Montana, where volunteers congregate and conduct daily field patrols to document government activities directed against wild buffalo. As BFC’s habitat coordinator, Mr. Geist regularly conducts business with and for BFC through his Missoula residence and office.

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 that 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 bison populations.

12. Defendant National Park Service is a division of the U.S. Department of the Interior, which itself is an agency of the executive branch of the United States government. The specific custodian of records at issue in this Complaint is the Office of Superintendent, Yellowstone National Park, which is part of the National Park Service.

13. Defendant is an “agency” as defined by 5 U.S.C. § 552(f)(1) and is therefore subject to the provisions of FOIA.

STATEMENT OF OPERATIVE FACTS

14. 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).

15. 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).

16. On June 20, 2018, Mr. Geist, in his capacity as BFC’s habitat coordinator, electronically submitted a FOIA Request (the “FOIA Request”) to Kerrie Evans,

Freedom of Information Act Coordinator for the National Park Service, Yellowstone National Park, Office of the Superintendent. A true and correct copy of the FOIA Request is attached as Attachment 1.

17. The FOIA Request sought disclosure of records concerning Yellowstone National Park's policy "surrounding the size of the bison population or herds in the Yellowstone ecosystem," excluding records previously produced. *Id.*

18. The FOIA Request also sought a fee waiver for all search and duplication fees associated with responding to the Request. *Id.*; *see also* 5 U.S.C. § 552(a)(4)(E)(iii). That fee waiver was ultimately granted by the Agency and is not in dispute in this Complaint.

19. On July 18, 2018, Kerrie Evans, the Yellowstone National Park FOIA Coordinator, provided a "notice of delay" in response to the FOIA Request. In that notice, Ms. Evans indicated that the FOIA Request had been accepted by the Agency and assigned control number NPS-2018-00887. The response further stated that "As yet, we have been unable to make a determination on your request."

20. On July 18, 2018, Kerrie Evans also provided a "partial response" to BFC's FOIA Request. In that partial response, Ms. Evans stated that the Agency has "been unable to make a determination on the remaining documents responsive to your request." Some records responsive to the Request were produced at that time.

21. On August 15, 2018, Mr. Geist wrote Ms. Evans to determine whether the

Agency would be releasing any further records responsive to the FOIA Request.

On August 16, 2018, Ms. Evans responded by indicating a final determination would be forthcoming in the near future.

22. On August 22, 2018, the Agency provided BFC with its “final response” to the FOIA Request. *See* Attachment 2. In that final response, the Agency provided, *inter alia*, 17 records responsive to the Request, totaling 149 pages, but redacted portions of the records due to the Agency’s application of Exemption b(5), 5 U.S.C. § 552(b)(5). These records are the subject of this Complaint.

23. On October 22, 2018, BFC timely appealed the Agency’s final determination to the Department of the Interior FOIA Appeals Office. *See* Attachment 3.

24. In its appeal, BFC sought review of the Agency’s redaction of specific records in response to the Request. In particular, BFC challenged that Exemption 5 could be properly applied to the responsive records because:

- a. The records are neither predecisional nor deliberative, but rather reflect the messaging the Agency used to explain decisions it already made pursuant to its Congressionally delegated duties;
- b. The records contained factual material that should be reasonably segregated from exempt portions of the records, especially with regards to the fully withheld Environmental Assessment on

Conservation and Management of Yellowstone Bison;

- c. In two instances, a withheld record appears to be drafts of a scientific article for the scientific journal *Policy Sciences*; and
- d. Another record withheld as deliberative was sent from a “trusted colleague inside the BLM” to Dan Wenk, then Superintendent of Yellowstone National Park.

25. In this Complaint, BFC challenges all withholdings made by the Agency concerning its FOIA Request as they pertain to Exemption 5 only.

26. BFC did not receive a response to its FOIA Appeal within the timeframe allowed by law, and has therefore constructively exhausted its administrative remedies.

27. In February, 2019, months after BFC filed its appeal, counsel for the Plaintiff contacted Charis Wilson, the Agency’s FOIA Officer. Counsel requested that Ms. Wilson determine whether the FOIA Appeal had been received and, if so, when a response would be forthcoming.

28. On March 4, 2019, counsel for the Plaintiff contacted Ms. Wilson by e-mail, asking for a status update on the appeal. Ms. Wilson responded that same day, indicating that she had reached out to the Agency’s FOIA appeal office and had not yet received a response.

29. Counsel for Plaintiff contacted Ms. Wilson again on March 14, 2019. Ms.

Wilson again responded that she had not “heard anything back” from the Agency’s FOIA appeal office.

30. On March 18, Ms. Wilson wrote to Plaintiff’s counsel indicating that the Department of the Interior’s Appeal Office received BFC’s appeal on October 22, 2018, and that it was assigned tracking number 2019-007. Ms. Wilson wrote:

“They have routed the appeal to us and notified us that they want to provide them with copies of the records that are the subject of the appeal by March 26.”

31. Having received no determination on its appeal, on May 30, 2019, counsel for BFC again wrote to Ms. Wilson. Counsel stated that “I am following up on this one last time before we head off to court. We haven't heard anything from the DOI appeals office since your March 18, 2019 e-mail below. Calls and e-mails have again gone unanswered. Can you please check back with the DOI FOIA appeals office for me to obtain the status of this appeal?”

32. On June 3, 2019, Ms. Wilson responded to Plaintiff’s counsel’s e-mail. She stated: “The last I heard from the appeals office they planned to issue a response ‘soon’. I contacted them last week after receiving your email and have not yet heard back from them.”

33. As of the date of this Complaint, BFC has not received any response to its FOIA Appeal, nor has it received any revised record production from Defendant.

34. To date, no further correspondences or communication have been received

by BFC from the Agency concerning BFC's FOIA Request.

35. To date, no "determination" has been provided to BFC concerning its FOIA Appeal, as that term is used in 5 U.S.C. § 552(a)(6)(A)(ii).

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

37. 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.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: APPEAL DETERMINATION DEADLINE VIOLATION

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

39. BFC has a statutory right to have Defendant process its FOIA requests in a manner which complies with the FOIA. Plaintiff's rights in this regard are violated by Defendant's unlawful delay in informing BFC of its final determination as to the FOIA Appeal beyond the twenty-day statutory deadline. 5 U.S.C. § 552(a)(6)(A)(ii).

40. To date, BFC has not received any communication from Defendant about whether the Agency will respond to its FOIA Appeal, its reasons for making that decision, and any right of BFC to seek judicial review.

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

42. 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.

43. Defendant's failure to make a determination on BFC's FOIA Appeal within the statutory timeframe has prejudiced Plaintiff's ability to timely obtain public records.

COUNT II

VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFUL WITHHOLDING OF NON-EXEMPT PUBLIC RECORDS

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

45. BFC has a statutory right to have Defendant process BFC's FOIA requests in a manner which complies with FOIA. BFC's rights in this regard are violated by Defendant's failure to promptly provide public, non-exempt records to BFC in response to the FOIA Request. 5 U.S.C. § 552(a)(3).

46. Defendant is unlawfully withholding public disclosure of information sought by BFC, information to which BFC is entitled and for which no valid disclosure

exemption applies, including the “deliberative process” exemption. 5 U.S.C. § 552(b)(5).

47. Defendant is also unlawfully withholding reasonably segregable, non-exempt portions of responsive records, contrary to 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

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

49. BFC’s organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA’s disclosure mandates.

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

REQUEST FOR RELIEF

WHEREFORE, BFC requests that this Court:

1. Declare Defendant’s failure to fully disclose the records requested by Plaintiff in the FOIA Request to be unlawful under the FOIA, 5 U.S.C. § 552(a)(3).
2. Order Defendant to promptly provide BFC with the records it has

unlawfully withheld under the “deliberative process” exemption, 5 U.S.C. § 552(b)(5).

3. Declare Defendant’s failure to make a timely final determination on Plaintiff’s FOIA Appeal to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i), (ii).

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

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

Filed this 10th Day of October, 2019.

/s/ Timothy Bechtold

Attorneys for Plaintiff

ATTACHMENT 1

From: Darrell Geist z@wildrockies.org
Subject: Freedom of Information Act request to the Superintendent
Date: June 20, 2018 at 2:59 PM
To: Evans, Kerrie kerrie_evans@nps.gov
Cc: Darrell Geist z@wildrockies.org, Ken Cole BFC Director director@buffalofieldcampaign.org



Superintendent
FOIA (J...18).pdf

Dear Kerrie Evans,

Please find attached Buffalo Field Campaign's Freedom of Information Act (June 20, 2018) request to the Superintendent, Office of the Superintendent, Yellowstone National Park.

Darrell Geist habitat coordinator
Buffalo Field Campaign
<z@wildrockies.org>
(406) 531-9284



BUFFALO
FIELD CAMPAIGN

FREEDOM OF INFORMATION ACT REQUEST

June 20, 2018

Superintendent
Office of the Superintendent
Yellowstone National Park
PO Box 168
Yellowstone National Park, WY 82190-0168
Phone: (307) 344-2002
Fax: (307) 344-2014
E-Mail: kerrie_evans@nps.gov

Dear Kerrie Evans,

Pursuant to the Freedom of Information Act 5 U.S.C. § 552 et. seq. and the U.S. Department of the Interior's regulations 43 C.F.R. §§ 2.1–2.290 (Jan. 19, 2017), Buffalo Field Campaign is filing a request for public information and records.

REQUESTED RECORDS

Buffalo Field Campaign requests all records from the Office of the Superintendent, Yellowstone National Park concerning the following subject matter:

1. The policy surrounding the size of the bison population or herds in the Yellowstone ecosystem.
 - a. Exclude the bison census or population size estimates produced by Yellowstone National Park.
 - b. Exclude Yellowstone National Park records available on ibmp.info.

The time period for the requested records is March 1, 2017 to June 20, 2018.

"Protecting the Last Wild Bison"

“Office of the Superintendent” refers to the Superintendent, Office of the Superintendent staff and personnel acting under the authority or on behalf of the Superintendent.

“All records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

Buffalo Field Campaign’s Freedom of Information Act request *is not meant* to exclude any other records that are reasonably related to the subject matter of our request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Buffalo Field Campaign is willing to receive records on a rolling basis.

RELEASE NON-EXEMPT REQUESTED RECORDS

As you know, the Freedom of Information Act provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed within the statutory time limit. 5 U.S.C. § 552(b).

Should you decide to invoke an exemption, Buffalo Field Campaign requests all non-exempt portions of the requested records and asks that you justify your decision by reference to specific exemptions allowed under the Freedom of Information Act. Please include sufficient information for Buffalo Field Campaign to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please provide a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

Buffalo Field Campaign reserves the right to appeal a decision by the agency to withhold any requested records.

FORMAT REQUESTED

Under the Freedom of Information Act, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted records. 5 U.S.C. § 552(a)(3)(B).

In responding to our Freedom of Information Act request, Buffalo Field Campaign requests the agency reduce costs and waste by providing the requested records in electronic format on a web site for downloading, or on a USB stick, or CD/DVD that can be mailed to the address below.

Please do not provide the records in a single or “batched” PDF file. Please do not provide files in portfolios and embedded files within PDF files as these documents are not “readily accessible.”

You may include an index.

RECORD DELIVERY

Buffalo Field Campaign appreciates your help in obtaining a determination of the requested records within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 5

C.F.R. § 1303.10(c). Failure to comply within the statutory timeframe may result in Buffalo Field Campaign taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may deliver the requested records to:

Darrell Geist
Buffalo Field Campaign
PO Box 957
West Yellowstone, MT 59758
z@wildrockies.org

If our Freedom of Information Act request is unclear, if the responsive records are voluminous, or if I can be of assistance in expediting our request for records, please contact me at (406) 531-9284 or z@wildrockies.org.

FEE WAIVER REQUESTED

Buffalo Field Campaign requests a fee waiver for all search and duplication fees under the Freedom of Information Act and its implementing regulations. 5 U.S.C. § 552(a)(4)(A); 43 C.F.R. § 2.45. A fee waiver and release of the information and records requested will benefit the people of the United States by fostering public understanding of government activities and encouraging public involvement in important policy and management issues of bison as a wildlife species in Yellowstone National Park, the state of Montana, and the public trust interests of American Indian tribes and the American people.

The language of the Freedom of Information Act clearly indicates the U.S. Congress intended fees not to be a barrier to private individuals or public interest organizations seeking access to government information and records. In addition, the legislative history of the Freedom of Information Act fee waiver language indicates the U.S. Congress intended a liberal interpretation of the phrase “primarily benefiting the public.” This suggests that all fees are to be waived whenever the release of information contributes to public debate on important public policy and management issues. This standard has been affirmed by the U.S. Court of Appeals for the District of Columbia in *Better Government Association v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986). In *Better Government*, the D.C. Circuit Court found that under the Freedom of Information Act, the U.S. Congress explicitly recognized the need for non-profit organizations to have free access to government

documents and those government agencies cannot impair this free access by charging duplication or search fees for Freedom of Information Act requests. *Better Government*, 780 F.2d at 89.

The Freedom of Information Act was designed to provide citizens a broad right to access government records. Its basic purpose is to “open agency action to the light of public scrutiny.” *U.S. Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989) (internal quotation and citation omitted). “The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny, and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*” *Freedom of Press*, 489 U.S. at 772-773 (internal quotation and citation omitted). In order to provide public access to this information, its fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Department of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Buffalo Field Campaign access to government records without the payment of fees. Indeed, the Freedom of Information Act’s fee waiver provision was intended by the U.S. Congress “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars and non-profit public interest groups.” *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

Buffalo Field Campaign Qualifies for a Fee Waiver

Under the Freedom of Information Act, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a)-(f).

A. The Subject Matter of our Freedom of Information Act Request Concerns the “Operations and Activities of the Government.”

The subject matter of our Freedom of Information Act request concerns the operations and activities of the Superintendent, and the Office of the Superintendent, in bison management in Yellowstone National Park and the state of Montana, the associated Interagency Bison Management Plan, and the legal and public trust responsibilities of the Superintendent.

Release of the requested records will provide Buffalo Field Campaign and the public with crucial insight into the Office of the Superintendent's role in managing American bison and the ecosystems upon which the native species depends, a subject of immense public interest for the past several decades. The subject is of broad public interest due to the substantial taxpayer moneys spent, the significance held for this remnant bison population by the public at large, and the public's interest in the execution of the U.S. government's trust and legal responsibilities.

It is clear that the role of the Superintendent and the Office of the Superintendent in managing bison held in the public trust is a specific and identifiable activity of the government, in this case the executive branch agency of the U.S. National Park Service. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("reasonable specificity" is all that is required). Thus, Buffalo Field Campaign meets this factor.

B. Disclosure of Requested Records is "Likely to Contribute" to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities. Release of the requested records will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow Buffalo Field Campaign to convey to the public information about the role of the Superintendent, and the Office of the Superintendent, in bison operations or activities, public trust management of National Parks and the ecosystems upon which bison depend for survival, and the legal and public trust interests of American Indian tribes and the American people.

Once records are available, Buffalo Field Campaign will review and analyze it and present it to the general public in a manner that will meaningfully

enhance the public's understanding of government operations or activities.

Release of the requested records is likely to contribute to an understanding of the operations and activities of the Superintendent, and the Office of the Superintendent, in managing public trust bison and National Parks, and the legal and public trust interests of American Indian tribes and the American people.

C. Disclosure of Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding Government Operations or Activities.

Release of the requested records will contribute to public understanding of how the Superintendent, Office of the Superintendent, National Park Service manage bison and Yellowstone National Park in light of their statutory duties under the Organic Act, a host of environmental and cultural resource laws, and the legal and public trust concerns held by American Indian tribes and the American people.

As explained herein, disclosing the records will contribute to public understanding of the role of the Superintendent in caretaking bison and Yellowstone National Park, and reasonably reach a broad audience of interested persons who can influence bison management, specifically in Yellowstone National Park and the state of Montana, through the associated Interagency Bison Management Plan.

Buffalo Field Campaign will use the information it obtains from the disclosed records to educate the public at large about how National Parks are being managed and how bison are being managed – operations or activities of government involving the U.S. National Park Service, the Superintendent, and the Office of the Superintendent.

Through Buffalo Field Campaign's synthesis and dissemination (by means discussed herein), disclosure of information contained in and gleaned from the requested records will contribute to the understanding of a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994)

(applying the term “public” to include a sufficient “breadth of benefit” beyond the requester’s own interests); *Community Legal Services. v. U.S. Department of Housing & Urban Development*, 405 F. Supp. 2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience . . . there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to evaluate the requested records, which concern how the Superintendent, Office of the Superintendent, National Park Service manage bison in light of their public trust and statutory duties under the Organic Act, and numerous environmental and cultural resource laws. To the best of our knowledge, none of the requested records are currently in the public domain, *e.g.*, the U.S. National Park Service’s FOIA Library (<https://www.nps.gov/aboutus/foia/foia-reading-room.htm>). *See Community Legal Services. v. HUD*, 405 F. Supp. 2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, the documents sought by the requestor “would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “Legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations”

Disclosure of requested records is not only “likely to contribute,” but is certain to contribute, to public understanding of the role of the Superintendent and the Office of the Superintendent, in executing their public trust duties and legal responsibilities concerning bison and National Parks.

The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions and public trust responsibilities. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the role of the Superintendent, and the Office of the Superintendent, and the legal and public trust duties concerning bison and National Parks.

D. Disclosure of Requested Records is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

Buffalo Field Campaign is requesting the disclosure of records to significantly enhance the public's understanding of the role of the Superintendent, and the Office of the Superintendent, and the legal and public trust duties carried out concerning bison and National Parks.

Disclosure of the requested records will enhance what is publicly known or readily available. Disclosure will significantly enhance the public's understanding because the requested records will help reveal more about the role of the Superintendent, and the Office of the Superintendent, and the legal and public trust duties carried out concerning bison and National Parks.

Disclosure of requested records to Buffalo Field Campaign is also certain to shed light on the role of the Superintendent, and the Office of the Superintendent, and the legal and public trust duties carried out concerning bison and National Parks.

The release of information and records is for the public's benefit and in the public's interest and will be made available to the public at large through Buffalo Field Campaign's offices and our website, list-serve and network outlets. Information and records available to Buffalo Field Campaign are used in press conferences and releases, television and radio interviews, regional and national publications, local and national broadcast networks, in public meetings and before legislative bodies, is shared online through a variety of platforms that reaches the public nationwide and abroad, and shared with people traveling through Yellowstone National Park on an annual basis through our summer outreach programs. These and other Buffalo Field Campaign activities described herein significantly contribute to the public's understanding of government operations and activities.

Public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the Freedom of Information Act. Buffalo Field Campaign meets this factor as well.

Buffalo Field Campaign has a Demonstrated Ability to Disseminate the Requested Records Broadly

Buffalo Field Campaign is a non-profit organization that informs, educates, and engages the public regarding bison management issues, policies, and laws. Buffalo Field Campaign has been substantially involved in the activities of

numerous government agencies for over 20 years and consistently demonstrated its ability to disseminate information granted to it through the Freedom of Information Act.

In consistently granting Buffalo Field Campaign fee waivers, agencies have recognized: (1) the information requested by Buffalo Field Campaign contributes significantly to the public's understanding of the government's operations or activities; (2) the information enhances the public's understanding to a greater degree than currently exists; (3) Buffalo Field Campaign possesses the expertise to explain the requested information to the public; (4) Buffalo Field Campaign possesses the ability to disseminate the requested information to the general public; and (5) news outlets and reporters recognize and rely upon Buffalo Field Campaign as an on the ground, and expert source of information on bison, and the ecosystem they depend on for survival.

Buffalo Field Campaign's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities, as compared to the level of public understanding prior to disclosure, are well established.

Buffalo Field Campaign intends to use the records requested here similarly. Information and records obtained by Buffalo Field Campaign appear in news stories online and in print, radio and TV, including regular reporting in local, regional, national, and international outlets. Buffalo Field Campaign's extensive website reaches a broad level of people. Buffalo Field Campaign sends out weekly and biweekly updates and action alerts to a network of supporters throughout the United States. Buffalo Field Campaign sends and distributes an annual printed newsletter to more than 45,000 people. A diverse and broad group of people has joined Buffalo Field Campaign's social media platforms to regularly post news and take action items concerning bison.

Buffalo Field Campaign is also a source of news based on our capacity as an in the field organization providing information and news reports to people located throughout the United States, to broadcast networks and news media outlets in the United States and abroad, and to various local, regional, and international communities.

Buffalo Field Campaign intends to use any or all of these far-reaching public outlets to share with the public information obtained as a result of our Freedom of Information Act request.

Public oversight and enhanced understanding of the Office of the Superintendent's legal and public trust duties is a matter of public interest and an on-going concern.

In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons interested in the subject. *Carney v U.S. Department of Justice*, 19 F.3d 807 (2nd Cir. 1994). Buffalo Field Campaign need not show exactly how it intends to distribute the information, because "nothing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003). It is sufficient for Buffalo Field Campaign to show how it distributes information to the public generally. *Judicial Watch*, 326 F.3d at 1314.

Obtaining the Requested Records is of No Commercial Interest to Buffalo Field Campaign

Access to government records through Freedom of Information Act requests is essential to Buffalo Field Campaign's role in educating, informing, and engaging the general public. Founded in 1997, Buffalo Field Campaign is a 501(c)(3) nonprofit organization (EIN: 36 3964401) with supporters found throughout the United States who are dedicated to the protection of bison in the wild and the ecosystems upon which they depend for survival.

Buffalo Field Campaign has no commercial interest and will realize no commercial benefit from the release of the requested records.

For all of the foregoing reasons, Buffalo Field Campaign qualifies for a full fee waiver. We hope that the Office of the Superintendent will immediately grant our fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

All records and any related correspondence should be sent to my attention at the address below.

Thank you for your time and assistance.

Sincerely,

/s/

Darrell Geist
Buffalo Field Campaign
PO Box 957
West Yellowstone, MT 59758
z@wildrockies.org

ATTACHMENT 2



IN REPLY REFER TO:

United States Department of the Interior

NATIONAL PARK SERVICE

PO Box 168

Yellowstone National Park

Wyoming 82190

A7221(YELL)

VIA EMAIL – NO HARD COPY TO FOLLOW

August 22, 2018

Mr. Darrell Geist
Buffalo Field Campaign
P.O. Box 957
West Yellowstone, Montana 59758
z@wildrockies.org

Dear Mr. Geist:

This letter is the final response to your Freedom of Information Act (FOIA) request dated and received June 20, 2018, in which you requested “The policy surrounding the size of the bison population or herds in the Yellowstone ecosystem,” excluding documents previously produced by Yellowstone regarding bison census or population size estimates, and records available on ibmp.info. An initial response was sent to you on July 18, 2018.

Your request has been assigned FOIA control number NPS-2018-00887.

It is the policy of the National Park Service (NPS) to: (1) make records of the NPS available to the public to the greatest extent possible in keeping with the spirit of the FOIA; and (2) make documents requested under the FOIA available at the earliest possible date while, at the same time, protecting the rights of the individuals involved and the administrative processes surrounding such rights. For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Your request is being processed under the provisions of the Freedom of Information Act (5 United States Code 552); United States Department of the Interior (“Department”) implementing regulations found at 43 Code of Federal Regulations Part 2, Subparts A through E, beginning at 2.1; and the Privacy Act of 1974 (5 United States Code 552a). Please be advised that additional FOIA and/or Privacy Act guidance/regulations may also be found at either the Department’s web site, www.doi.gov/foia, or the United States Department of Justice web site, www.usdoj.gov.

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the

decisionmaker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public. The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency’s deliberative processes; expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions. The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Exemption 7 protects from disclosure “records or information compiled for law enforcement purposes” if the records fall within one or more of six specific bases for withholding set forth in subparts (a) through (f). 5 U.S.C. § 552(b)(7)(a)-(f). We are withholding 2 pages in part under Exemption 7 because they are protected under the following subpart. Exemption 7(E) protects law enforcement records if their release would disclose techniques and procedures for law enforcement investigation or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law. For the materials that have been withheld under 7(E), we have determined that they are techniques for law enforcement investigations or prosecutions; they are procedures for law enforcement investigations or prosecutions; and they are guidelines for law enforcement investigations or prosecutions whose release could reasonably be expected to risk circumvention of the law.

Twenty (20) documents totaling 108 pages have been released in their entirety:

1. March 19, 2017 – email from Dan Wenk to Sue Masica, Subject: Secretary’s visit (3 pp.)
2. March 20, 2017 – email from Michael Reynolds to Sue Masica, Subject: Re: Secretary’s visit (3 pp.)
3. March 21, 2017 – email from Herbert Frost to Sue Masica, Subject: Re: Secretary’s visit (3 pp.)
4. March 27, 2017 – email from Herbert Frost to Dan Wenk, Sue Masica, Subject: FwdL YELL Bison briefing update: due today at 4:00 EDT (3 pp.)
5. March 27, 2017 – email from Dan Wenk to Sue Masica, Subject: Re: YELL Bison briefing update: due today at 4:00 EDT (3 pp.)
6. September 8, 2017 – email from Dan Wenk to Sue Masica, Subject: Background Bison Brief (3 pp.)
7. September 8, 2017 – email from Sue Masica to Todd Willens, Subject: Yellowstone Bison (4 pp.)
8. March 12, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Fwd: YELL_BisonManagement_3-12-18_FINAL.docx (3 pp.)
9. March 13, 2018 – email from Dave Mihalic to Dan Wenk, Subject: Re: YELL_BisonManagement_3-12-18_FINAL.docx (3 pp.)
10. March 13, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Re: YELL_BisonManagement_3-12-18_FINAL.docx (2 pp.)
11. May 11, 2018 – email from Dan Wenk to Dave Mihalic, Subject: BisonSlides_IBMP_WinterOps_NPS_4-25.pptx (8 pp.)
12. May 14, 2018 – email from Dan Wenk to Susan Combs, Subject: Bison Briefs (6 pp.)
13. May 16, 2018 – email from Dan Wenk to Dave Mihalic, Subject: fuhlendorf et al 2012.pdf (14 pp.)
14. May 17, 2018 – email from Dan Wenk to Dave Mihalic, Subject: BisonAbundanceIBMP_May2018.docx (3 pp.)
15. June 6, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Fwd: PJ’s request-description of agreement with Washington Lee Univ (33 pp.)

16. June 7, 2018 – email from Dave Mihalic to Dan Wenk, Subject: Re: PJ's request-description of agreement with Washington Lee Univ (3 pp.)
17. June 7, 2018 – email from Randal Bowman to Dave Mihalic, Subject: Re: PJ's request-description of agreement with Washington Lee Univ (3 pp.)
18. June 11, 2018 – email from Dave Mihalic to Dan Wenk, Subject: Bison Brief (3 pp.)
19. June 11, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Re: Bison (1 page)
20. June 12, 2018 – email from Dave Mihalic to Dan Wenk, Subject: Re: Bison Brief (4 pp.)

Seventeen (17) documents totaling 149 pages have been released with redactions made under Exemption (b)5 Draft Deliberative Privilege as cited above:

1. March 8, 2017 – email from P.J. White to Dan Wenk, Subject: Bison briefing statements for the Secretary of the Interior (6 pp.)
2. March 14, 2017 – email from Sue Masica to Dan Wenk, Subject: Bison overview BP (4 pp.)
3. May 24, 2017 – email from P.J. White to Dan Wenk, Patrick Kenney, Jennifer Carpenter, Pete Webster, Subject: (Subject Line Withheld under Exemption (b)5 Draft Deliberative Privilege) (18 pp.)
4. June 22, 2017 – email from Dan Wenk to Bert Frost, Sue Masica, Subject: Fwd: Bison briefs (4 pp.)
5. January 25, 2018 – email from Tim Reid to P.J. White, Jennifer Carpenter, Rick Wallen, Pete Webster, Jody Lyle, Subject: Strategic Mtg-save the date (5 pp.)
6. March 14, 2018 – email from P.J. White to Rick Wallen, Chris Geremia, Subject: Bison science and governance manuscript (14 pp.)
7. March 23, 2018 – email from Tim Reid to Jody Lyle, Subject: Re: information about bison numbers (3 pp.)
8. April 6, 2018 – email from P.J. White to Dan Wenk, Jennifer Carpenter, Tim Reid, Pete Webster, Patrick Kenney, Subject: Recommendations for Bison Conservation and Management (4 pp.)
9. April 17, 2018 – email from P.J. White to Dan Wenk, Jennifer Carpenter, Tim Reid, Pete Webster, Patrick Kenney, Rick Wallen, Subject: Bison strategy meeting on Thursday (3 pp.)
10. April 20, 2018 – email from P.J. White to Dan Wenk, Jennifer Carpenter, Tim Reid, Pete Webster, Rick Wallen, Chris Geremia, Ray McPadden, Subject: Environmental Assessment: Conservation and Management of Yellowstone Bison (59 pp.)
11. April 20, 2018 – email from Tim Reid to Dan Wenk, Jennifer Carpenter, P.J. White, Rick Wallen, Chris Geremia, Subject: IBMP PPT (8 pp.)
12. May 16, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Bison habitat (2 pp.)
13. May 16, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Re: Sorry to ask... (4 pp.)
14. May 16, 2018 – email from Dan Wenk to Jennifer Carpenter, P.J. White, Tim Reid, Subject: Fwd: Sorry to ask... (2 pp.)
15. May 17, 2018 – email from P.J. White to Dan Wenk, Jennifer Carpenter, Tim Reid, Rick Wallen, Chris Geremia, Pete Webster, Patrick Kenney, Subject: Briefs on Bison Grazing and Abundance (7 pp.)
16. May 17, 2018 – email from Dan Wenk to Dave Mihalic, Subject: Re: Sorry to ask... (3 pp.)
17. May 17, 2018 – email from Dave Mihalic to Dan Wenk, Subject: Re: Sorry to ask... (3 pp.)

Two (2) documents totaling 7 pages have been released with redactions made under Exemption (b)7e as cited above:

1. April 10, 2018 – Yellowstone Bison Update (3 pp.)
2. April 10, 2018 – email from Tim Reid to Dave Mihalic, Subject: YELL Bison Update (4 pp.)

The National Park Service consulted with Kate Williams-Shuck, Attorney, Office of the Solicitor, Rocky Mountain Region, United States Department of the Interior, Denver, Colorado, in connection with this FOIA response.

In accordance with Department regulations found at 43 C.F.R. 2.24(d), the following individuals are responsible for the partial denial of your request:

- Sue Masica, Director, Intermountain Region, National Park Service, Denver, Colorado
- Charis Wilson, Freedom of Information Act Officer, National Park Service, Denver, Colorado

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this letter. Appeals arriving or delivered after 5:00 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the National Park Service's response is in error. You must also include with your appeal copies of all correspondence between you and Yellowstone National Park concerning your FOIA request, including your original FOIA request and the Bureau's response. Failure to include with your appeal all correspondence between you and the Bureau will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 20240

Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
(OGIS) 8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

Fee waivers are determined on a case-by-case basis. All fees have been waived. This letter completes Yellowstone National Park's response to you for this request. If you have questions concerning this FOIA response, please contact me at (307) 344-2002.

Sincerely,

A handwritten signature in cursive script that reads "Kerrie Evans". The signature is written in black ink and is positioned below the word "Sincerely,".

Kerrie Evans
Freedom of Information Act Officer

Enclosures

ATTACHMENT 3

Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence Street
Eugene, OR 97401
Ph: 541-344-3505 Fax: 541-344-3516

October 22, 2018

FREEDOM OF INFORMATION ACT APPEAL

VIA E-MAIL TO: FOIA.appeals@sol.doi.gov

DOI FOIA/Privacy Act Appeals Office
ATTN: FOIA/PRIVACY ACT APPEALS OFFICE
Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 20240

Re: Buffalo Field Campaign Freedom of Information Act request (June 20, 2018)
FOIA control number NPS-2018-00887

Dear FOIA Appeals Officer:

This document constitutes Buffalo Field Campaign's appeal of records and information withheld by Yellowstone National Park Superintendent's office in response to our Freedom of Information Act (FOIA) request NPS-2018-00887.

Specifically, Buffalo Field Campaign appeals the National Park Service's unlawful use of Exemption (b)(5), the FOIA's deliberative privilege exemption, to redact 17 documents totaling 149 pages.

A copy of all correspondence and responses generated in our FOIA request are included in our appeal.

Attorney Daniel Snyder, Law Offices of Charles M. Tebbutt, P.C., Eugene, Oregon is handling Buffalo Field Campaign's appeal. Mr. Snyder may be reached at: dan@tebbuttlaw.com, or by phone at 541-344-3505.

BACKGROUND

On June 20, 2018 Buffalo Field Campaign requested all records from the Office of the Superintendent, Yellowstone National Park concerning the following subject matter:

1. The policy surrounding the size of the bison population or herds in the Yellowstone ecosystem.
 - a. Exclude the bison census or population size estimates produced by Yellowstone National Park.
 - b. Exclude Yellowstone National Park records available on ibmp.info.

The time period for the requested records is March 1, 2017 to June 20, 2018.

“Office of the Superintendent” refers to the Superintendent, Office of the Superintendent staff and personnel acting under the authority or on behalf of the Superintendent.

“All records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

On July 18, 2018, the National Park Service provided a non-determination letter to Buffalo Field Campaign’s habitat coordinator who acknowledged receipt of the notice of delay. On the same day, the National Park Service provided a partial response releasing 9 documents totaling 33 pages.

On August 15, 2018, Buffalo Field Campaign’s habitat coordinator emailed the Superintendent’s office requesting the National Park Service comply with the FOIA and make a final determination on the remainder of the request. On August 16, 2018, the National Park Service responded that the agency intended to send the remaining portion of its response in the near future.

On August 22, 2018, the National Park Service released 20 documents totaling 108 pages in their entirety, applied a (b)(5) draft deliberative privilege claim to 17 documents totaling 149 pages, and applied a (b)(7) law enforcement privilege claim to 2 documents totaling 7 pages.

I. THE FREEDOM OF INFORMATION ACT IS DESIGNED TO REQUIRE DISCLOSURE OF AGENCY RECORDS.

The purpose of the FOIA “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted). The U.S. Congress designed the FOIA to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Accordingly, the FOIA requires that federal government agencies disclose to the public any requested documents. 5 U.S.C. § 552(a). As the Supreme Court has declared: “FOIA is often explained as a means for citizens to know what ‘their Government is up to.’” *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that “[t]his phrase should not be dismissed as a convenient formalism.” *Id.* at 171-72. Rather, “[i]t defines a structural necessity in a real democracy.” *Id.* at 172. “As a general rule, if the information is subject to disclosure, it belongs to all.” *Id.*

The National Park Service may avoid disclosure only if it proves that the requested documents fall within one of the nine enumerated exemptions to the general disclosure requirement. 5 U.S.C. § 552(b)(1)–(9). Thus, the FOIA establishes a statutory right of access by any person to federal agency records. Consistent with encouraging disclosure, the exemptions under § 552(b) are discretionary, not mandatory. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). “Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency’s obligation to disclose; it does not foreclose disclosure.” *Id.* at 292.

The FOIA’s exemptions are to be construed “as narrowly as consistent with efficient Government operation.” *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89 (1973) (citing Senate and House Reports on exemption 5). This includes the deliberative process exemption: “It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (citation omitted). “[W]hen material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Inf. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (citation omitted). “To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.” *Coastal States Gas Corp.*, 617 F.2d at 866.

The FOIA is to be broadly construed in favor of disclosure.

FOIA generally provides that the public has a right of access, enforceable in court, to federal agency records. *See Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 941 (10th Cir. 1990). FOIA is to be

broadly construed in favor of disclosure, and its exemptions are to be narrowly construed. *Id.* The federal agency resisting disclosure bears the burden of justifying nondisclosure. *Id.*

Audubon Society v. U.S. Forest Service, 104 F.3d 1201, 1203 (10th Cir. 1997).

Given the public disclosure policy favored in the FOIA, federal courts have consistently refused to allow agencies to meet their burden of proving the requested documents fall within one of the FOIA's exemptions by making conclusory and generalized allegations of confidentiality. "We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases." *Coastal States*, 617 F.2d at 861. *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) ("agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts."). "We remind the agencies, once again, that the burden is on them to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct." *Coastal States*, 617 F.2d at 861. *Anderson v. Dep't of Health & Human Services*, 907 F.2d 936, 941 (10th Cir. 1990) ("The district court must determine whether all of the requested materials fall within an exemption to the FOIA and may not simply conclude that an entire file or body of information is protected without consideration of the component parts.") (citation omitted).

II. THE NATIONAL PARK SERVICE DID NOT PROVIDE THE NECESSARY PROOF AND DETAILED SPECIFICITY FOR WITHHOLDING RECORDS AND INFORMATION FROM THE PUBLIC UNDER THE "DELIBERATIVE PROCESS" CLAIM.

The National Park Service's response letter (Aug. 22, 2018) does not provide the necessary detail, particular justification, and proof for withholding records and information from the public under the "deliberative process" exemption.

Courts employ a two-part test to examine an agency's withholding deliberative information under Exemption 5: (1) the document must be either inter-agency or intra-agency; and (2) the document must be both predecisional and part of the agency's deliberative or decisionmaking process. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Factors to consider in determining whether a document falls within the deliberative process privilege include whether the document (1) "is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency"; (2) "is recommendatory in nature or is a draft of what will become a final document"; and (3) "weigh[s] the pros and cons of agency adoption of one viewpoint or another"; however, even if the document was predecisional at the time it was prepared, it is not exempt from disclosure if it has been "adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The exemption applies only to federal government agencies:

[T]he communication must be “inter-agency or intra-agency.” 5 U.S.C. § 552(b)(5). Statutory definitions underscore the apparent plainness of this text. With exceptions not relevant here, “agency” means “each authority of the Government of the United States,” § 551(1), and “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ..., or any independent regulatory agency,” § 552(f).

Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 9 (2001). “If a document is neither inter- nor intra-agency, then an agency may not withhold it, regardless of whether or not it reflects the deliberative process of the agency, attorney work product, or is an attorney-client communication. See *Klamath*, 532 U.S. at 12, 121 S.Ct. 1060.” *Center for Biological Diversity v. Office of the U.S. Trade Rep.*, 450 Fed. Appx. 605, 608 (9th Cir. 2011).

If the record is found to be inter- or intra-agency, it must also satisfy the “deliberative process” prong of the exemption. The Ninth Circuit explained the “deliberative process” privilege in *National Wildlife Federation v. U.S. Forest Service*, stating that to qualify for Exemption 5, the document must be “both (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and (2) ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are formulated.’” 861 F.2d 1114, 1117 (9th Cir. 1988) (citation omitted). The policy for protecting such records “is to enhance ‘the quality of agency decisions’ . . . by protecting open and frank discussion.” *Klamath*, 532 U.S. at 9 (citation omitted).

Two prerequisites are required to properly apply the deliberative process privilege:

In deciding whether a document should be protected by the privilege we look to whether the document is “predecisional”—whether it was generated *before* the adoption of an agency policy—and whether the document is “deliberative”—whether it reflects the give-and-take of the consultative process.

Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987)(citations omitted). “Accordingly, to approve exemption of a document as predecisional, a court must be able ‘to pinpoint an agency decision or policy to which the document contributed.’ *Paisley*, 712 F.2d at 698.”

Documents that contain technical discussions by agency staff are not considered “deliberative” of policy determinations. Such records are “primarily reportorial and expository, not deliberative.” *In re Franklin Nat. Bank Securities Litigation*, 478 F. Supp. 577, 585 (E.D. N.Y. 1979). See also *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163

(W.D. Wash. 1986) (“expert interpretations of facts” are not deliberative); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (documents which are “simply straightforward explanations of agency regulations in specific factual situations” are not deliberative, but are “more akin to a ‘resource’ opinion about the applicability of *existing policy* to a certain state of facts.”) (emphasis added).

“[F]actual material that does not reveal the deliberative process is not protected by this exemption.” *National Wildlife*, 861 F.2d at 1117 (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)). “[D]ocuments containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure,” as would factual materials “to the extent that they reveal the mental processes of decisionmakers.” *Id.* at 1119 (citation omitted). However, “‘memoranda consisting *only* of compiled factual material or *purely* factual material contained in deliberative memoranda and severable from its context would generally be available’ for inspection by the public.” *Id.* at 1118 (citations omitted).

“Under the deliberative process privilege, factual information generally must be disclosed.” *Petroleum Inf. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). “[T]he privilege applies only to the ‘opinion’ or ‘recommendatory’ portion of the report, not to factual information which is contained in the document.” *Coastal States*, 617 F.2d at 867. “The exemption does not protect ‘purely factual material appearing in ... documents in a form that is severable without compromising the private remainder of the documents.’” *Playboy Enterprises, Inc. v. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (citing *EPA v. Mink*, 410 U.S. at 91).

Thus, any report, or portion thereof, that does not qualify for the privilege must be disclosed.

Here, Buffalo Field Campaign takes exception with the National Park Service’s use of the deliberative process exemption. In particular, as to the “Briefing Statements”:

- The National Park Service did not “narrowly” interpret or construe its privilege to withhold records and information from the public. Instead, from the redacted records, it appears the Park Services used a broad brush in deciding what to redact.
- The National Park Service did not point to any specific or particular agency decision or policy that is “predecisional” for each record and information withheld. From our review of the materials, there does not appear to be any particular discussions between subordinate and supervisor discussing the formation of agency policy or law.
- The National Park Service did not identify the role each withheld and redacted Briefing Statement had in any deliberative process underway or in the formulation of policy it has not already adopted. Bison management policies as

presented and summarized in the Briefing Statements withheld by the agency have been in place since 2000.

- Briefing Statements do not meet the criteria of being predecisional (‘antecedent to the adoption of agency policy’) *and* deliberative (“meaning it must actually be related to the process by which policies are formulated”). *National Wildlife* 861 F.2d at 1117. Instead, they are reportorial, in that they are merely a presentation of facts regarding an existing agency decision or policy.
- Briefing Statements are akin to memoranda, factual material or reports compiled by the National Park Service to explain the basis for its policy to the public.
- The National Park Service has not demonstrated that any of the Briefing Statements withheld fall within “the frank exchange of ideas on legal or policy matters” that permit the (b)(5) exemption.
- The National Park Service has also not demonstrated that any of the Briefing Statements withheld are part of the “give-and-take of the consultative process” or that any of the Briefing Statements contain “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States*, 617 F.2d at 866.
- The National Park Service withheld Briefing Statements in their entirety that the agency released on the ibmp.info web site covering the same bison management topics. For example:

Adaptive Management Criteria in the federal and state IBMP Records of Decision (Aug. 28, 2008) available at <http://ibmp.info/Library/20080828/Briefing%20-%20YNP%20ROD.pdf>.

Bison Monitoring and Surveillance Plan (Aug. 28, 2008) available at <http://ibmp.info/Library/20080828/Briefing%20-%20YNP%20Bison%20Surveillance1.pdf>.

Bison Population Status (Aug. 7, 2008) available at http://ibmp.info/Library/20080806/Briefing%20-%20YNP2_Bison%20Populations.pdf.

Genetics Assessment of Effective Population Size (Dec. 8, 2010) available at http://ibmp.info/Library/20101207/Genetics%20report_8%20Dec%202010.pdf.

Interagency Bison Management Plan update - 2007/2008 (Aug. 6, 2008) available at <http://ibmp.info/Library/20080806/Briefing%20-%20YNP1.pdf>.

Transfer of Surplus Bison under the IBMP (Aug. 11, 2009) available at http://ibmp.info/Library/20090811/IBMP_TransferSurplusBison_Brief.pdf

- Indeed, the Briefing Statements the National Park Service withheld appear to be updated with new information on bison management policies long in place i.e., surplus/quarantine, monitoring, population size, adaptive management strategy, among them. It is difficult to understand how these can be both “predecisional” and “deliberative” when they discuss decisions and deliberations that have already been concluded.

Accordingly, Buffalo Field Campaign requests that the Briefing Statements be released in their entirety.

Additionally, Buffalo Field Campaign takes issue with the Park Service’s withholding of a manuscript submitted for the journal *Policy Sciences* (pages 95–112 and 125–138). The redactions should be removed, because the manuscript is not the formulation of agency policy or law, is not deliberative, and is not predecisional. In particular:

- A manuscript prepared for publication is science – an expert’s interpretation of facts.
- A manuscript prepared for publication in a journal is not deliberative. While the National Park Service may withhold opinions solicited in support of drafting its publication, it cannot withhold the manuscript submitted for publication under exemption (b)(5).

The National Park Service also withheld a record and information submitted by the Bureau of Land Management to the Superintendent (pages 222–223). The BLM official is not a subordinate to the Superintendent of Yellowstone National Park. The agency did not demonstrate how a document shared with the Superintendent bound the National Park Service to any policy or decision. As such, those pages should be released in full.

The National Park Service also withheld an Environmental Assessment on the Conservation and Management of Yellowstone bison (pages 153–211). The National Park Service did not “narrowly” identify or construe its exemption privilege to segregate factual material and expert science presented in the environmental assessment. The National Park Service is well aware of the intense public interest in bison management policy. The public wants to know “what their government is up to.” *U.S. Dept of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 773 (1989). “Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.” *Id.* As such, the Environmental Assessment

should be released. At minimum, factual material and science contained in the Environmental Assessment should be released.

The National Park Service entirely withheld factual material and science in several Briefing Statements, none of which are identified as drafts:

- Bison Management: Long term Strategy (pages 84–85)
- Quarantine Program for Yellowstone Bison (page 87)
- Bison Grazing Effects on Northern Grasslands (page 88)
- Bison Issues (Population, Quarantine, Removal/Winter Operations) (pages 91–93)
- Long-Term Bison Management Strategy, including Quarantine (pages 121–123)

On one hand, the National Park Service entirely withheld a Briefing Statement on Bison Abundance under the Interagency Bison Management Plan (pages 236–237). And on the other hand, the Park Service released a document with the same date and title as the document it withheld (pages 234–235). This is highly confusing when attempting to ascertain how the redacted document actually constitutes a deliberative process, given the content provided in the fully released document.

The National Park Service also withheld Talking Points in a Briefing Statement on a Quarantine Program for Yellowstone bison (page 115). Talking points explain or elucidate a policy. Quarantining bison is an adopted policy of the National Park Service extending in practice to 2006, and originally proposed in 2000. The Talking Points should be released.

The National Park Service has a track record of publishing and updating Briefing Statements to share with the public facts and information about its bison management policies. For example, the web site ibmp.info contains National Park Service Briefing Statements and periodic updates to those Briefing Statements as new facts become available to the agency.

The National Park Service’s Briefing Statements are an important way for the public, including Buffalo Field Campaign, to obtain factual information and updates on how the agency is carrying out its bison management policies that have been in place for two decades.

The National Park Service has not met its burden to withhold records and information from Buffalo Field Campaign. It did not “narrowly” identify and construe its privilege to exempt records from disclosure to the public. Instead, the agency broadly construed and applied a standard that arbitrarily kept from the public information it needs to know what “their Government is up to.”

The National Park Service's Conclusory Statements Do Not Justify Nondisclosure

As noted above, the federal courts have repeatedly held that “conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases.” *Coastal States*, 617 F.2d at 861. *See also Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) (“agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.”). Unsupported or conclusory justifications for nondisclosure “are unacceptable and cannot support an agency’s decision to withhold requested documents.” *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citation omitted).

FOIA imposes on agencies the burden of establishing that information is exempt from release. 5 U.S.C. § 552(a)(4)(B). In order to meet their burden, courts have uniformly required agencies to compile a so-called “Vaughn Index” that identifies each document withheld and the statutory exemption claimed for each document, and sets forth “a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.” *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (citation omitted). *See also Animal Legal Defense Fund v. Dep’t of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (the government “must establish ‘what deliberative process is involved, and the role played by the documents in issue in the course of that process.’” (citation omitted); *King v. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (“specificity imposes on the agency the burden of demonstrating applicability of the exemptions invoked *as to each document or segment withheld* . . . and sets forth the exemption claimed and why that exemption is relevant.”) (emphasis in the original).

The National Park Service’s blanket claim for withholding records and information does not adequately state the particulars. While the agency identifies and explains the (b)(5) privilege, it does not “set[] forth a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.” *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). Merely reciting the statutory language of exemption 5 evades the “particular” explanation or a statement of reasons for withholding a “particular” record or information sought under the FOIA.

III. EVEN IF PORTIONS OF THE WITHHELD DOCUMENTS ARE EXEMPTED FROM DISCLOSURE, THE NATIONAL PARK SERVICE FAILED TO PROVIDE “REASONABLY SEGREGABLE PORTIONS” OF THE RECORDS AND INFORMATION TO THE PUBLIC.

Even if the National Park Service could prove that the records and information it withheld are exempt from release under the FOIA, only those specific portions of the records(s) that are legally exempt can be withheld. In this case, the National Park Service improperly withheld entire documents, instead of releasing “reasonably segregable portions” not fully protected from disclosure by exemption 5. 5 U.S.C. § 552(b).

“[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” *Arieff v. U.S. Dep’t of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983). “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 942 (10th Cir. 1990) (citation omitted).

Here, the National Park Service failed to describe the “mix of privileged and non-privileged information and explain[] why it would not be possible to simply redact the privileged materials.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (citation omitted). Indeed, from our review, there are readily segregable portions of records that are purely factual. The Environmental Assessment is perhaps the most obvious example.

In addition, as shown above, “[f]actual material that does not reveal the deliberative process is not protected by this exemption.” *National Wildlife*, 861 F.2d at 1117 (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)). “[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.” *EPA v. Mink*, 410 U.S. 73, 87–88 (1973) (footnote omitted).

The National Park Service withheld the title of an Issue, and the entire Briefing Statement on the undisclosed issue (pages 238–239). We believe it is a Briefing Statement on bison grazing. The National Park Service is studying bison grazing on the northern range with respect to managing the population size. See Geremia et al. *Bison Effects on Yellowstone Grasslands* (Update for 2015–16) available at: http://ibmp.info/Library/20161201/2_ChrisGermania_ProgressReport2016bestVersion.

The National Park Service must, at minimum, release factual information and science contained in the Briefing Statements on bison grazing (pages 88, 233, 238–239).

The National Park Service failed to release such portions, or adequately justify at all why it has not done so. Any records or information that can be reasonably segregable portions should be released.

RELIEF SOUGHT

Based on the above, Buffalo Field Campaign requests that the National Park Service immediately release the requested records, and reasonably segregable, non-exempt portions thereof, that were improperly withheld. We ask for your final determination within 20 working days pursuant to the FOIA. It would be useful as we evaluate the need to seek judicial review of this matter if you were to provide us with a projected date-certain by which we could expect a determination of our appeal as required by the FOIA.

We reserve the right to seek immediate judicial review if this appeal is not satisfactorily resolved and the requested documents produced in the FOIA-mandated time deadlines.

Dated this 22nd Day of October, 2018.

/s/ Darrell Geist
Habitat Coordinator
Buffalo Field Campaign

/s/ Daniel C. Snyder
OSB# 105127
Law Offices of Charles M. Tebbutt, P.C.