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**FREEDOM OF INFORMATION ACT APPEAL  
FOR FREEDOM OF INFORMATION ACT REQUEST 2021-FS-R8-05717-F**

Randy Moore  
Chief, USDA Forest Service  
SM.FS.WOFOIA@usda.gov

**Re: Appeal of the Forest Service’s incomplete response to Freedom of Information Act Request [2021-FS-R8-05717-F] concerning records relating to Indiana bats in and near the Robert’s Gap Project area**

Dear Chief Moore:

The Buffalo River Watershed Alliance (“BRWA”) hereby appeals from the Forest Service’s incomplete and legally improper October 5, 2021 final response to BRWA’s August 13, 2021 FOIA Request. BRWA’s FOIA Request and the Forest Service’s incomplete and improper response are attached to this appeal as Attachments A and E. The Forest Service failed to conduct an adequate search for responsive records and improperly applied Exemption 5 to redact responsive information from the records that it released with its Final Response Letter. For the reasons set forth below, the Forest Service’s inadequate search and redaction of responsive records violate FOIA.

You have 20 working days to respond to this appeal. 5 U.S.C. § 522(a)(6)(A)(ii). BRWA seeks to have all the records that are responsive to its August 13, 2021 FOIA request in order to understand and evaluate the Forest Service’s response to the discovery of an Indiana bat maternity colony in the Robert’s Gap Project area.

**BACKGROUND**

Pursuant to FOIA, BRWA, on August 13, 2021, requested copies of records in the custody of the United States Forest Service. *See* Attachment A. BRWA requested:

[C]opies of specific records and/or reports relating to the discovery and analysis of an Indiana bat maternity colony in the Robert's Gap Project ("Project") area. BRWA request[ed] the following records:

1. Any documents, records, or reports, including a Supplemental Information Report ("SIR"), that evaluates, analyzes, or otherwise discusses the ecological importance and/or significance of the discovery of an Indiana bat maternity colony in the Project area relative to the overall impacts of the Project to the environment.
2. Any documents, studies, reports, or scientific literature relied upon to support or create any such document described above in request # 1.
3. According to the USFS' website on the Ozark-St. Francis National Forests, specific measures are being taken to protect maternity trees and new monitoring efforts are underway to identify other potential maternity colonies within or in proximity to Ozark-St. Francis National Forest. Please include any documents, records, or communications related to these specific efforts.

Please do not include any documents or records already included in response to BRWA's previous FOIA request dated August 4, 2021. The term "records" should be construed in the broadest possible interpretation of the term, including, but not limited to draft decision documents, draft and final reports, draft and final studies, data input for models used, meeting minutes, field observations, email communications, text messages, letters, faxes, photos, memos, and contracts, as well as any information recorded in an electronic format such as data files, emails, or digital photos. If such documents are available in electronic form, then BRWA requests that copies be provided on a CD. Otherwise, we wish to receive the copies in paper form.

Attachment A at 1-2.

On September 13, 2021, Earthrise Managing Attorney Tom Buchele received an email containing the Forest Service's initial response letter dated September 9, 2021 from Lori Wood, Ozark-St. Francis National Forest Supervisor, acknowledging receipt of the August 13, 2021 FOIA request. Attachments B and C. That letter assigned the FOIA request tracking number 2021-FS-R8-05717-F, and granted BRWA's request for a fee waiver. *Id.*

On September 21, 2021, Earthrise attorney Bridgett Buss sent an email to Terence Peck, Ozark-St. Francis National Forest Public Affairs Deputy Team Leader and FOIA Coordinator, notifying the Forest Service that BRWA and Earthrise "do not currently need to be provided with any .WAV or .ZC files responsive to this FOIA request" and asking that any such files gathered as responsive to request #5717-F be omitted from the production to BRWA and Earthrise. Attachment D. This notification was made after BRWA and Earthrise received approximately 45.85 GB of primarily raw bat monitoring data in the form of .WAV and .ZC files in response to their separate August 4, 2021 FOIA request regarding the Robert's Gap Project.

On October 5, 2021, the Forest Service provided its "final response" to the August 13, 2021 FOIA request in a letter dated October 4, 2021 from Kenderick Arney, Regional Forester.

Attachment E. That letter indicated that 100 pages were located during the search for responsive records, that 99 of these pages were being released in full, and that the remaining “1 page is being partially redacted in accordance with 5 U.S.C. § 552(b)(5).” *Id.* at 1. The letter stated that “a portion of a record that is [the] subject of your request contains communication of a deliberative and speculative in [sic] nature” that the Forest Service would withhold “pursuant to the deliberative process component” of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *Id.* at 2.

BRWA and Earthrise staff subsequently reviewed the 100 pages of responsive documents. During the course of this review, BRWA and Earthrise were unable to locate certain types of documents responsive to the three specific requests in the August 13, 2021 FOIA request. On November 18, 2021, on behalf of BRWA, Tom Buchele emailed Mr. Peck a list of the specific requests for which BRWA was unable to locate responsive documents. Attachment F at 2.<sup>1</sup> This email requested that the Forest Service either direct BRWA to the page number(s) in the responsive documents for the specific requests, or to provide BRWA with responsive documents if they were in fact missing from the FOIA response. *Id.* The email indicated that BWRA and Earthrise were unable to locate the following responsive documents:

Request #1) We were unable to find a supplemental information report.

Request #3) Outside of the Forest Plan, we were unable to find any records of measures to protect maternity roosts or new monitoring efforts to identify potential maternity colonies.

Attachment F at 2. On November 29, 2021, Mr. Peck responded, indicating that he had forwarded the email regarding missing documents “to the staff for action.” Attachment G. BRWA and Earthrise have not received any additional information or documents since that email. The October 4, 2021 letter from Kenderick Arney (Attachment E) indicated that any appeal to the FOIA response must be made in writing within 90 days from the date of that letter, and must be made to the Chief, USDA Forest Service. Thus, any appeal for 2021-FS-R8-05717-F would be due by January 2, 2022.

BRWA is thus appealing the adequacy of the action taken in response to its August 13, 2021 request. Specifically, the Forest Service failed to properly justify the reasons for redacting one of the responsive records, simply concluding that the redacted communication is “deliberative and speculative in nature.” *Id.* Moreover, the Forest Service produced a mere 100 pages of responsive records in total for the three categories of requested items. BRWA clearly requested a broad range of documents, records, reports, studies, scientific literature, and communications related to the ecological importance of Indiana bats, the significance of the discovery of an Indiana bat maternity colony in the Robert’s Gap Project area, the measures being taken by the Forest Service to protect maternity trees, and the Forest Service’s new monitoring efforts to identify other such trees in and near the Ozark-St. Francis National Forest. Based on the volume of its production alone, it is inconceivable that the Forest Service performed a “search reasonably

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<sup>1</sup> This was the same email in which Mr. Buchele identified a number of documents omitted from another FOIA request, 2021-FS-R8-05252-F. The items flagged as potentially omitted for this request, 2021-FS-R8-05717-F, are listed near the bottom of the of page 2 of Attachment F.

calculated to uncover all relevant documents.” *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal quotations omitted). However, as BRWA discusses in more detail below, other more specific problems with the Forest Service’s responses further highlight their legal inadequacy.

### THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). Former President Obama reinforced FOIA’s strong presumption of disclosure with regard to all FOIA decisions. *See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that “[i]n the face of doubt, openness prevails”). Former Attorney General Eric Holder issued FOIA guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. *Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies* (Mar. 19, 2009). In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. *Id.* Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *See id.* These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. *See* 5 U.S.C. § 552; *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980); *see also In re Dep’t of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993) (noting FOIA’s “policy of broad disclosure”). Consequently, any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” 5 U.S.C. § 552(c).

Congress recognized that in certain limited instances, records may be exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, “are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act.” *Missouri Coal. for Env’t Found. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1208 (8th Cir. 2008). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” *COMPTEL v. U.S. Federal Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request, 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *See King v. Dept. of Justice*, 830 F.2d 210, 219 (D.C.

Cir. 1987) (agency must provide); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency's disclosure of "who wrote the [document], to whom it was addressed, its date, and a brief description" was "patently inadequate" to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

## DISCUSSION

The Forest Service's response does not comply with FOIA because the Forest Service did not conduct an adequate search for responsive documents and because it improperly redacted a document responsive to BRWA's August 13, 2021 FOIA request.

### I. The Forest Service did not conduct an adequate search for responsive records.

Based on the Forest Service's failure to provide records that are responsive to BRWA's August 13, 2021 FOIA request, the Forest Service has failed to conduct an adequate search for responsive records.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

The federal agency has the burden to demonstrate that it conducted an adequate search for responsive documents. *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). "The standard of reasonableness [applied] to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Id.*; *see also Zemansky*, 767 F.2d at 571 (explaining that a search for documents pursuant to a FOIA request must be "reasonably calculated to uncover all relevant documents" (quoting *Weisberg*, 745 F.2d at 1485)). If the requester can "show circumstances indicating that further search procedures were available without the [agency] having to expend more than reasonable effort, then summary judgment [in favor of the agency] would be improper." *Miller*, 779 F.2d at 1385.

Here, the evidence suggests that the Forest Service failed to conduct an adequate search for responsive records. For example, as to request # 1, the Forest Service did not produce any documents, records, or reports evaluating, analyzing, or otherwise discussing the ecological importance and/or the significance of the discovery of an Indiana bat maternity colony in the Project area. The intra-agency email communications that were produced refer only generally to the maternity colony's discovery. Yet, as to request # 2, the Forest Service produced five studies on general Indiana bat roosting habitat preferences and needs, social behaviors, and summer distribution (totaling 50 pages, or half of the 100-page production). Presumably, the Forest Service's inclusion of these studies suggests that the agency relied on them in some fashion, but no evaluations, analyses, or discussions by the agency were produced. Finally, as to request # 3, the Forest Service failed to produce any documents, records, or communications related to the efforts the agency claims it is taking to protect and monitor maternity trees, other than a two-page press release announcing such protection and monitoring.

A search for documents pursuant to a FOIA request must be "reasonably calculated to uncover all relevant documents." *Zemansky*, 767 F.2d at 571 (quoting *Weisberg*, 745 F.2d at 1485). The Forest Service failed to explain its methodology for its search and review, including but not limited to: where searches were performed, the methodology of searches, and search terms. Accordingly, BRWA requests that the Forest Service in any response to this appeal fully explain its search terms, search methods, and locations of where searches took place.

## II. The Forest Service improperly redacted a document responsive to BRWA's request.

The Forest Service has failed to prove that it may lawfully redact responsive records under FOIA Exemption 5. Since the Forest Service has provided almost no detail as to why it redacted a portion of one of the responsive records, BRWA can only speculate as to how the Forest Service invoked Exemption 5.

First, as a threshold requirement, the Forest Service provided no evidence that the redacted record is an inter-agency or intra-agency memorandum or letter that would not be available to a party other than one involved in litigation with the agency. Second, the Forest Service failed to show that the redacted record is pre-decisional and deliberative. Thus, the Forest Service has not met its burden to prove that it may lawfully redact this record pursuant to Exemption 5.

### A. The Forest Service has not shown that it may redact responsive records under FOIA Exemption 5's threshold requirement.

A threshold requirement for records to qualify for the protections of Exemption 5 is that the records must be inter- or intra-agency records. 5 U.S.C. § 552(b)(5). While it is true that in order to withhold records under Exemption 5 the records must first meet the requirement that they are "inter-agency or intra-agency memorandums or letters," this threshold requirement does not end the inquiry, as the records must also "not be available by law to a party other than an agency in litigation with the agency." *Id.* Moreover, the Supreme Court has held that the standard to be employed in determining if the records fall under the inter-agency or intra-agency threshold requirement is whether the documents would "routinely be disclosed" in civil litigation. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). Furthermore, to satisfy Exemption 5's

threshold requirement that a record must be an inter- or intra-agency to qualify for Exemption 5, the agency must show that it has not shared the withheld records with third parties, including state agencies. See *People for Am. Way Found. v. U.S. Dep't of Educ.*, 516 F. Supp. 2d 28, 36 (D.D.C. 2007) (citing 5 U.S.C. § 551(1)) (for the purpose of FOIA, “it is clear” that “an ‘agency’ must be a federal entity”).

Here, it is not apparent how the Forest Service is using Exemption 5 to redact a portion of the requested records. The Forest Service redacted a portion of one record by broadly invoking Exemption 5 without providing any justification. The Forest Service failed to provide a “relatively detailed justification, specifically identifying the reasons” for withholding information by redacting the record. *King*, 830 F.2d at 219. In its Response Letter, the Forest Service merely provided BRWA with the number of pages being partially redacted (1). See Attachment E at 1-2. Due to the Forest Service’s lack of justification, BRWA is unable to tell how the redacted record qualifies for the privilege of Exemption 5. Thus, the Forest Service failed to show that it could meet Exemption 5’s threshold requirement.

B. The Forest Service has failed to show that the records are predecisional and deliberative.

Even if the Forest Service could prove that it met Exemption 5’s threshold requirement (which it has not done), the Forest Service failed to show that the redacted record was predecisional and deliberative. An agency’s invocation of Exemption 5’s deliberative process privilege “must be construed as narrowly as is consistent with efficient government operation.” *Army Times Pub. Co. v. Dep’t of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). The deliberative process privilege allows a federal agency to redact responsive records only where the records contain material that is both “predecisional” and “deliberative.” 5 U.S.C. § 552(b)(5).

For a record to be “predecisional,” it must reflect the give-and-take of a consultative process before the agency took final action. See *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). An agency must be able to point to a specific agency decision to which an allegedly exempt record pertains. See *Senate of P.R. v. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). Even draft documents are not universally exempt from disclosure. See *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982).

In addition to being “predecisional,” records must be “deliberative” to qualify for the privilege. Portions of a record are “deliberative” only when they involve opinions or are recommendatory in nature. See U.S. Department of Justice Guide to the Freedom of Information Act, Exemption 5, at 27 (August 26, 2019), <http://www.justice.gov/oip/doj-guide-freedom-information-act-0> (hereinafter “DOJ Guide”) (website last visited December 3, 2021). The D.C. Circuit Court of Appeals has held that records qualify as deliberative only if they “reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981). The key factor is the “role, if any, that the document plays in the process of agency deliberations.” *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal citations omitted).

Orders, decisions, interpretations, or guidelines which have precedential weight are not deliberative, and are therefore not protected. *Scheffler v. U.S.*, 702 F.2d 233 (D.C. Cir. 1983). Moreover, factual information generally does not fall under the privilege because facts do not reveal agency process that would expose agency deliberations to any purported “chilling effect.” DOJ Guide at 27-28 (factual information is not deliberative); *see also Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (explaining that Exemption 5 “has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports”).

Simply providing conclusory statements of privilege or policy justifications for redacting information is wholly inadequate for an agency to overcome FOIA’s strong disclosure presumption and to redact information from records under the narrowly construed deliberative process privilege. *See Founding Church of Scientology*, 610 F.2d at 837; *see also COMPTTEL*, 910 F. Supp. at 111 (“conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases”); *see also Senate of P.R.*, 823 F.2d at 585 (an assertion of privilege is “conclusory” when “no factual support is provided for an essential element of the claimed privilege”) (emphasis in original).

In addition, *even if* the withheld document is deliberative, an assertion which BRWA reserves the right to challenge, under the 2016 FOIA Amendments, 5 U.S.C. § 552(a)(8)(A), the Forest Service is required to identify foreseeable harm resulting from the release of purportedly deliberative documents. Another district court has explained the specific, new burdens that the 2016 FOIA Amendments impose on agencies:

[T]he foreseeable-harm requirement “impose[s] an independent and meaningful burden on agencies.” *NRDC v. EPA*, No. 17-CV-5928 (JMF), 2019 U.S. Dist. LEXIS 124353, 2019 WL 3338266, at \*1 (S.D.N.Y. July 25, 2019); *see also, e.g., Judicial Watch I*, 375 F. Supp. 3d at 100 (describing the new foreseeable-harm requirement as a “heightened standard”). Indeed, as the foregoing legislative history illustrates, the text, history, and purpose of the FOIA Improvement Act confirm that the foreseeable-harm requirement was intended to restrict agencies’ discretion in withholding documents under FOIA. *See Stone v. INS*, 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).

*Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019). Here, the Forest Service has not identified or explained any foreseeable harm resulting from the release of the one page of allegedly deliberative material, and has therefore failed to carry its burden.

The Forest Service may not withhold factual, scientific information that is not part of a policy-oriented process and therefore is not “deliberative” and does not qualify for the deliberative process privilege. *See Soucie*, 448 F.2d at 1077. Here, the Forest Service provided no detail or justification as to why it may redact a portion of a record. *See* Attachment E. This is wholly inadequate to show that the Forest Service may, despite FOIA’s strong disclosure mandate, lawfully redact any records under the narrowly construed deliberative process privilege.

*Founding Church of Scientology*, 610 F.2d at 830; *see also COMPTEL*, 910 F. Supp. 2d at 119; *Senate of P.R.*, 823 F.2d at 585.

The Forest Service failed to provide a relatively detailed justification for redacting a portion of the record. *King*, 830 F.2d. at 219. Simply alleging that the redacted portion of the record is “deliberative and speculative” is insufficient. Even if the document *was* deliberative, the Forest Service has failed to carry its burden of establishing that release of the document posed foreseeable harm to protected interests. Thus, the Forest Service must promptly release the portion of the record improperly redacted under the deliberative process privilege.

#### CONCLUSION

As described above, the Forest Service violated FOIA by failing to provide BRWA with the requested records related to the Forest Service’s response to the discovery of an Indiana bat maternity colony in the Robert’s Gap Project area. Accordingly, the Forest Service must conduct an adequate search for responsive records and produce all responsive records in a timely manner. The Forest Service must also produce the improperly redacted portion of the responsive record. In so doing, the Forest Service must provide an estimated date of completion of its release of the records. 5 U.S.C. § 552(a)(7)(B).

As noted above, the Forest Service has 20 working days to respond to this appeal. 5 U.S.C. § 522(a)(6)(A)(ii). We look forward to the Forest Service’s prompt attention to this matter in accordance with FOIA’s disclosure mandate and federal policies. Please do not hesitate to contact me with any questions regarding this appeal.

Sincerely,

s/Tom Buchele

Tom Buchele

Earthrise Law Center

*Counsel for the Buffalo River Watershed Alliance*

## **ATTACHMENT LIST:**

- Attachment A: BRWA's 8/13/21 FOIA request
- Attachment B: Forest Service (Peck) 9/13/21 email transmitting initial response letter
- Attachment C: Forest Service (Wood) 9/9/21 initial response letter
- Attachment D: Buss-Peck 9/21/21 email narrowing scope of request
- Attachment E: Forest Service (Arney) 10/5/21 final response letter
- Attachment F: Buchele 11/18/21 email regarding omitted documents
- Attachment G: Peck 11/29/21 email regarding omitted documents