

C A M P A I G N F O R ACCOUNTABILITY

June 17, 2019

By Fax: 202-219-3856

Gail Ennis
Acting Inspector General
U.S. Department of the Interior
1849 C Street NW - Mail Stop 4428
Washington, D.C. 20240

Re: Request for Investigation into Whether the Interior Department's FOIA Awareness Process is Lawful

Dear Ms. Ennis:

On behalf of the undersigned groups, Campaign for Accountability respectfully requests that you open an investigation into the Department of the Interior's Awareness Process governing responses to Freedom of Information Act ("FOIA") requests. Recent news reports and correspondence with agency officials indicate political appointees at the Department of the Interior are interfering with the FOIA process and causing violations of FOIA's requirements.

The Department's Awareness Policy

On May 24, 2018, the Department of the Interior ("DOI") adopted an "Awareness Process for Freedom of Information Act Productions."¹ The process requires career FOIA staff to notify politically appointed officials if their names or email addresses appear in documents that have been designated to be released in response to a FOIA request.² The memo creating the process states that DOI is interested in "formalizing" an existing "case-by-case" ad-hoc policy to "ensure it is consistent and effective."³ DOI released an updated policy on February 28, 2019, with additional details.⁴

The Awareness Process amends DOI's standard FOIA process. The DOI's FOIA manual, which does not mention the Awareness Process, provides that the "Action Office" within each Bureau is responsible for "[c]onducting a reasonable search and ensuring that any records found responsive to the request are reviewed consistently with FOIA and DOI's FOIA regulations."⁵

¹ Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries, et. al., May 24, 2018, available at https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_final.pdf.

² *Id.*

³ *Id.*

⁴ Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries, et. al., Feb. 28, 2019, available at https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf.

⁵ Department of the Interior, Department Manual, Chapter 15: Freedom of Information Act Policy Responsibilities, and Procedures, Aug. 5, 2016, § 15.5(H)(4), available at

The Awareness Process, though, requires Action Offices to adopt another level of review by informing political appointees if they are mentioned in documents designated to be released in response to a FOIA request. Specifically, the Awareness Process memo states that FOIA personnel must search responsive records for the names and email addresses of:

- a. Current Department employees who are Presidentially Appointed, Senate Confirmed (PAS), Non-Career Senior Executive (NCSE), and/or Schedule C employees; and/or
- b. Former Department employees who left the Department within the last 3 months and were PAS, NCSE, and/or Schedule C employees.⁶

If the names or email addresses appear in the documents, then FOIA Personnel must:

notify their Bureau contact for awareness reviews...and provide him/her:

- i. Access to the full set of responsive records in the same format and with the same withholdings that have been approved by [the Office of the Solicitor] (so he/she will see the records exactly as the FOIA requester will); and
- ii. A list of the PAS, NCSE and/or Schedule C employees whose names and/or email addresses are identified in the set of responsive records.⁷

The reviewers then have three days to examine the records or ask for an extension.⁸

Importantly, the Awareness Process memo instructs FOIA personnel to “respond to the FOIA requester in accordance with their usual response process” and states explicitly that “FOIA is a statutory requirement, and full and timely compliance with FOIA obligations is a responsibility of every Department employee.”⁹ The Awareness Policy does not purport to grant any authority to political appointees to alter the release of government documents. Rather, the original memorandum provided the review is to provide “awareness of the information that will be released” and that political appointees are “not expected” to opine on the substance of the FOIA response itself.¹⁰ The updated 2019 memorandum removed the “not expected” language, but indicates that political appointees may follow up with FOIA personnel to understand the “basis” for the production.¹¹

https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_15_freedom_of_information_act_policy_responsibilities_and_procedure.pdf.

⁶ Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries, et. al., Feb. 28, 2019, available at https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries, et. al., May 24, 2018, available at https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_final.pdf.

¹¹ Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries, et. al., Feb. 28, 2019, available at https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf.

Illegal Application of the Awareness Policy

Recent news reports and publicly-released correspondence between DOI officials and FOIA requesters indicate DOI is applying the Awareness Process in a manner that does more than provide “awareness” for appointees, and instead allows political appointees to opine on the substance of FOIA releases and potentially, to illegally delay the production of records and withhold documents from the public.

For example, on June 8, 2018, Western Values Project (“WVP”) sent a FOIA request to the National Park Service (“NPS”) requesting all emails between NPS Congressional Liaison Elaine Hackett and Lolita Zinke, the wife of then-Interior Secretary Ryan Zinke.¹² On July 23, 2018, NPS emailed a response to WVP’s request, writing:

We have completed searching our records and have identified 96 pages of potentially responsive materials that is currently in the review process. I hope to be able to complete the processing for your request within the next couple of weeks.¹³

On August 6, 2018, NPS responded to WVP’s request. NPS released just 16 pages of emails between Ms. Hackett and Ms. Zinke. Additionally, NPS wrote to WVP:

Upon further review, your request is granted in part and denied in part. We are providing 1 file, totaling approximately 16 pages of responsive material. Portions of 6 pages, however, are being withheld under Exemption 6, which allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).¹⁴

On May 22, 2019, *Roll Call* reported that the 80 missing pages were removed by Heather Swift, the communications director for Secretary Zinke. According to *Roll Call*:

[P]olitical officials were alerted that the request was projected for release the following week. Ryan Zinke’s politically appointed communications director, Heather Swift, interceded with the records official.

“A number of pages in this are non-responsive,” Swift wrote, asserting that because a portion of the emails didn’t include Zinke’s wife specifically, they could be left out of whatever was released to the group.

¹² FOIA Request from Chris Saeger, Executive Director of Western Values Project, to Charis Wilson, FOIA Officer for the National Park Services, June 8, 2018, attached as Exhibit A.

¹³ Email from Jessica McHugh, WASO FOIA Liaison, to Chris Saeger, Executive Director of Western Values Project, July 23, 2018, attached as Exhibit B.

¹⁴ Email from Jessica McHugh, WASO FOIA Liaison, to Chris Saeger, Executive Director of Western Values Project, Aug. 6, 2018, attached as Exhibit C.

[Career official Jessica] McHugh disagreed. She said the conversations Swift sought to leave out were included because they were incorporated into the conversations with Lolita Zinke in an email chain. The department was “not able to remove that part of the thread as ‘non-responsive,’” she said in emails provided to CQ Roll Call and shared with Interior Department officials.

Swift replied that they would discuss the issue further and said to “please be sure” two other political appointees were included in the email conversation.¹⁵

Without insight into the withheld documents, it is not possible to ascertain whether Ms. Swift’s intervention improperly blocked the release of responsive records. However, her involvement far exceeded the information awareness to which she was entitled under the Awareness Process, which was limited to “understanding” the “basis” for the FOIA officer’s conclusions. Indeed, it is unclear why Ms. Swift was involved at all. WVP’s request sought communications involving an entirely different political appointee, Elaine Hackett. Indeed, Ms. Swift’s long history of serving as a spokesperson for Secretary Zinke’s in his non-DOI capacity supports an inference that her involvement, and motive, was to protect the Secretary by offering substantive directions to FOIA personnel instead of simply alerting political appointees as to documents’ pending release.¹⁶

Moreover, Ms. Swift’s argument that email chains should be broken into their individual parts to limit the number of responsive records produced is legally unsound. As the United States District Court for the District of Columbia recently explained, an email chain should be treated as a holistic document under the Freedom of Information Act because individual messages within them incorporate and refer to prior messages.¹⁷ In sum, the Awareness Process in that instance morphed into a “Second Guessing Review” that was based in neither the public interest or the law.

Ongoing Reliance on the Awareness Policy

In addition to Ms. Swift’s potentially inappropriate involvement in FOIA requests, DOI appears to be relying on the Awareness Process to interfere with other WVP FOIA requests, in addition to requests by environmental and watchdog organizations and media outlets.

¹⁵ Jacob Holzman, Interior Department Policy let Political Appointees Review FOIA Requests, *Roll Call*, May 22, 2019, available at <http://www.rollcall.com/news/congress/interior-department-policy-let-political-appointees-review-foia-requests>.

¹⁶ See Resume of Heather Swift, available at <http://westernpriorities.org/wp-content/uploads/2018/02/Heather-Swift-Resume.pdf> (showing positions as spokesperson for Ryan Zinke’s congressional office and political campaign).

¹⁷ See *American Oversight v. Department of Health & Human Servs.*, No. 1:17-cv-01448-ABJ at 5 (D.D.C. Mar. 30, 2019) (breaking email chains into individual messages was “unduly literal and stingy” and “day-to-day reality of electric communication as well as the general legal principles to be applied in FOIA cases” indicates “an email chain operates as a single record”).

For instance, on March 16, 2018, WVP submitted a FOIA request to the United States Geological Survey (“USGS”) seeking correspondence sent to or from several USGS officials.¹⁸ On September 21, 2018, USGS informed WVP that they had “been unable to make a determination” regarding the request. While the response from USGS outlines several possible reviews required for the request, it does not mention the Awareness Process. On January 31, 2019, however, USGS acknowledged the delay caused by an Awareness Review:

As of yet, we have been unable to make a determination on your request, USGS201800114; however, we will coordinate an Awareness Review with the DOI senior officials to review the records associated with your request. After the DOI completes their review, we will respond to you. We anticipate that we will complete a final response to you by COB February 15, 2019. However, this date is subject to change as it is possible the DOI senior officials may request additional time for review, or due to lapse in appropriations.

The Awareness Process, as drafted, does not authorize politically appointed agency officials to intervene or interfere with the release of documents in response to FOIA requests. In theory, at least, it contains a 72-hour forfeiture deadline. In practice, however, it appears to have operated as a significant bottleneck. On March 11, 2019, 360 days after WVP submitted the request, USGS released a total of 836 pages to WVP. It is unclear whether and to what extent additional records were withheld as a result of the Awareness Process.

Documents obtained by WVP show the Awareness Review was applied to requests from American Oversight, American Bridge, Democracy Forward, the Washington Post, and more. The process appears to have delayed the release of documents in many instances. For example, documents indicate requests by American Oversight and WVP related to the Trump International Hotel were scheduled to clear the Awareness Process by March 12, 2019, but were not released publicly until March 20, 2019.¹⁹ Given DOI’s FOIA backlog, the compound effect of days- or weeks-long delays arising from the Awareness Process may severely strain DOI’s resources and impair its ability to meet its legal obligations (not to mention be inconsistent with the text of the Awareness Process itself).

Litigation Regarding the Awareness Policy

On March 19, 2019, the Southern Environmental Law Center (“SELC”) and Defenders of Wildlife (“Defenders”) filed a lawsuit against DOI officials and the United States Fish and Wildlife Service (“FWS”) regarding delays caused by the Awareness Process. Specifically, SELC and Defenders alleged:

¹⁸ FOIA Request from Chris Saeger, Executive Director of Western Values Project, to FOIA Officer for the United States Geologic Survey, March 16, 2018, attached as Exhibit D.

¹⁹ Email from Charis Wilson, NPS FOIA Officer to NPS Staff, March 12, 2019, accessed June 17, 2019, *available at* <https://www.documentcloud.org/documents/6150332-19-809-Responsives-REDACTED.html#document/p175>); National Park Service FOIA Reading Room, Shutdown Related Emails November 28, 2018 - January 29, 2019 (Added March 20, 2019), accessed June 17, 2018, *available at* <https://www.nps.gov/aboutus/foia/foia-frd.htm>.

This policy necessarily increases the duration of the FOIA response review process for applicable records. First, FOIA staff must take the time to search responsive records for the names of dozens of political appointees at the Department. Second, political appointees are afforded at least three days to review records, and they are allowed to request an indefinite amount of additional review time during which they may question the basis of the disclosures.²⁰

The lawsuit also points out the inconsistency between this policy and the statutory obligations of FOIA:

The Awareness Process Memorandum does not explain what role or expertise political appointees have in the fulfillment of the Department's statutory obligations under FOIA; the sole purpose offered is "to facilitate awareness of the information that will be released."²¹

And:

The Awareness Process Memorandum notes that political appointee reviewers may "follow up" as needed to "understand" a decision whether to disclose records. *Id.* The policy described in the Awareness Process Memorandum therefore makes political appointees aware of a decision to disclose politically sensitive documents pursuant to FOIA, and simultaneously connects the concerned political appointee with an attorney in the Solicitor's Office who, under a related policy, can unilaterally override the decision to disclose the records.²²

In another lawsuit, SELC alleged that DOI relied on the Awareness Process to interfere with a FOIA request sent to NPS on December 14, 2017. Specifically, SELC complained:

Defendants' policy of mandatory review by political appointees and the Office of the Solicitor, as described in the Awareness Process Memorandum, adds an additional layer of review and associated delay to FOIA responses, which is not related to the fulfillment of Defendants' statutory obligations under FOIA. The Awareness Process Memorandum is in direct conflict with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. See 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). The Awareness Process also has the intent and the effect of interjecting political considerations into the decision whether to disclose documents under FOIA. See 5 U.S.C. § 552(a)(8)(A), (b).²³

²⁰ Complaint at 78, *Southern Environmental Law Center v. Leopoldo Miranda*, No. 3:19cv00017 (W.D. Va. Mar. 19, 2019), available at [https://www.southernenvironment.org/uploads/words_docs/2019-3-19_Complaint_\(DKT1\)_Exhibits_1-9.pdf](https://www.southernenvironment.org/uploads/words_docs/2019-3-19_Complaint_(DKT1)_Exhibits_1-9.pdf).

²¹ *Id.* at 76.

²² *Id.* at 77.

²³ Complaint at 82, *Southern Environmental Law Center v. David Bernhardt*, No. 3:19cv00011 (W.D. Va. Feb. 21, 2019), attached as Exhibit E.

The evidence outlined in this letter is consistent with the allegations of these lawsuits.

Congressional Scrutiny of Political Interference in the FOIA Process

In addition to the problems demonstrated through individual FOIA requests, members of Congress have also questioned whether DOI's implementation of the Awareness Process is legal. On May 22, 2019, Sen. Patrick Leahy (D-VT) asked Interior Secretary David Bernhardt about the Awareness Process during a hearing before the Senate Appropriations Subcommittee on Interior, Environment, and Related Agencies.²⁴ Sen. Leahy asked:

This morning there is reporting that the Interior Department has allowed political appointees to referee responses to FOIA requests, to interfere in them, something that raises real questions of illegality.... What is the legal basis for the Department's so-called Awareness Review process by which political appointees, who are not in the traditional FOIA office, are given the opportunity to weigh in and potentially influence responses to FOIA requests? Is there a legal basis for that?²⁵

Secretary Bernhardt defended the Awareness Process by claiming that it does not affect the documents that are released:

There is certainly a legal basis for the employees to be made aware of the.... response documentation.... It's a process that is very long-standing in the Department. What's different is that a memo was put together to explain it, but it's very long-standing in the Department, where an Awareness Review is provided, you get a look at the documents, say, hey, is there anything in here that might not be responsive, might be privileged? And then you can go ask a lawyer about it. And that is a long-standing process, we definitely formalized it. It's completely legal.

What is troubling to me when I read that article this morning was the concept that it would be slowing the reviews down. Because that's not what the policy says. The policy says basically you have a certain amount of time and these go out.²⁶

Sen. Leahy pressed Secretary Bernhardt about whether the Awareness Process was enabling political appointees to block the release of records. He expressed alarm that political appointees were changing responses "so that it's not an honest answer." Secretary Bernhardt

²⁴ Benjamin J. Hulac, *Bernhardt Defends Interior Public Records Review Policy*, *Roll Call*, May 22, 2019, available at <https://www.rollcall.com/news/congress/bernhardt-defends-interior-public-records-review-policy>.

²⁵ *Recording of Review of the FY2020 Budget Request for the U.S. Department of the Interior*, *Subcommittee on Interior, Environment, and Related Agencies*, May 22, 2019, beginning at 1:09:20, available at <https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-the-us-department-of-the-interior>.

²⁶ *Id.*

claimed that the Awareness Process was not interfering with the release of records. He said, “If it’s responsive its going out.”²⁷

However, the documents WVP obtained, as well as the reporting by *Roll Call*, indicate that political appointees are interfering with the review process and Interior is failing to provide “honest answers.”

Congressional concern about political interference in the FOIA process is bipartisan and longstanding. For example, on August 23, 2010, Sen. Charles Grassley (R-IA) and then-Rep. Darrell Issa (R-CA) sent a letter to the Office of the Inspector General at the Department of State requesting an investigation into political interference in the FOIA process at that agency. Sen. Grassley and Rep. Issa wrote:

This new layer of political review is not only alarming, but a betrayal of President Obama's pledge to increase transparency in government. The President campaigned for office on a promise to “return government to the people by bringing government to the people,” and make government “open and transparent so that anyone can see that our business is the people's business.” It appears that not everyone in the Administration has taken this pledge to heart. We write to you today to inquire about the full breadth of this practice, and whether the Department of State is also engaged in the political filtering of information requests.²⁸

The State Department Inspector General investigated the concerns.²⁹ The DOI Inspector General should to the same here.

The Department Has Applied the Awareness Process in Contravention of Law

For 53 years, Americans have had access to public documents through the FOIA. In 2016, Congress updated the FOIA to codify a “presumption of openness,” which directs agencies to operate under the premise that government documents belong to the public. Specifically, the FOIA Improvement Act of 2016 provided that agencies can only withhold information from the public if:

the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection;

or

²⁷ *Id.*

²⁸ Response to Congressional Inquiry on Department of State Leadership’s Role in Freedom of Information Act Processes, Office of Inspector General, U.S. Department of State and the Broadcasting Board of Governors, Oct. 2010, Appendix 1, available at <https://nsarchive2.gwu.edu/news/20150205/docs/2010%20Oct%20-%20Inspector%20General%20Report%20-%20Response%20to%20Congressional%20Inquiry%20on%20Department%20of%20State%20Leaderships%20Role%20in%20Freedom%20of%20Information%20Act%20Process.pdf>.

²⁹ *Id.*

disclosure is prohibited by law;³⁰

Beyond the enumerated exemptions, agencies are required by law to release records to the public. Sen. Leahy noted the importance of this presumption when the bill was signed into law:

[O]ur bill codifies President Obama's historic 2009 memorandum requiring agencies to follow a "Presumption of Openness" when considering the release of government information under FOIA. This policy was first put into place by President Clinton but then repealed by President Bush. President Obama reinstated it as one of his first acts in office. By codifying the "Presumption of Openness," we ensure that all future administrations operate under the presumption that government information – except in narrowly tailored circumstances – belongs in the hands of the people.³¹

Additionally, Chapter 15 in the DOI's manual, which outlines its FOIA policies, states:

The policy of the Department is to provide the public prompt access to information in accordance with the requirements and intent of the FOIA.³²

Expanding on the policy, on November 20, 2018, Secretary Zinke issued Secretary's Order 3371. That order explains that:

The Department is fully committed to an equitable FOIA program that ensures compliance with statutory requirements of transparency, accountability, and prompt production.³³

Despite these sources of law, the DOI's Awareness Policy has permitted DOI to violate the FOIA.

Notwithstanding the language in the Awareness Review memoranda establishing forfeiture deadlines and limiting the scope of political appointee engagement to alter FOIA productions, DOI is clearly using the Awareness Process to prevent the public release of certain documents. As *Roll Call* reported, a DOI FOIA staffer identified 96 pages of documents to release to WVP in response to the FOIA request regarding Lola Zinke. Ms. Swift, a political

³⁰ See FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D) (2016) (codified at 5 U.S.C. § 552 (a)(8)(A)).

³¹ Press Release, Statement of Senator Patrick Leahy On Presidential Signing of S. 337, the FOIA Improvement Act of 2015 (sic), Office of U.S. Senator Patrick Leahy, June 30, 2016, available at <https://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-on-presidential-signing-of-s-337-the-foia-improvement-act-of-2015>.

³² Department of the Interior, Department Manual, Chapter 15: Freedom of Information Act Policy Responsibilities, and Procedures, Aug. 5, 2016, § 15.2, available at https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_15_freedom_of_information_act_policy_responsibilities_and_procedu.pdf.

³³ Interior Secretary's Order 3371, The Department of the Interior Freedom of Information Act Program, Nov. 20, 2018, § 2, available at https://www.doi.gov/sites/doi.gov/files/uploads/so_3371.pdf.

appointee, interfered with the process and forced a release just 16 pages. Ms. Swift's intervention appears to have directly violated the FOIA, which provides that agencies can withhold records only if releasing the records would cause foreseeable harm or is prohibited by law. It seems clear that the only foreseeable harm caused by the release of the records was to the reputation of Ms. Swift's boss and political benefactor, Secretary Zinke.

Importantly, the Awareness Process memo does not authorize any political appointee to interfere with any FOIA request. The process, as outlined, may narrowly constitute a lawful practice. In practice, however, the implementation of the Awareness Process is violating the FOIA. Because this process is largely hidden from the public, our groups have no way of knowing how many additional documents have been illegally withheld or delayed.

Further, while the FOIA requires agencies to respond to FOIA requests by making "the records promptly available to any person,"³⁴ by requiring FOIA responders to consult with political appointees whenever appointees are mentioned in responsive documents, this additional level of review – even when documents are not improperly withheld – results in the release of documents being delayed improperly.

Conclusion

Non-profit organizations have experienced first-hand how DOI has employed the Awareness Process to delay responding to our requests and forgo releasing responsive documents to which we are guaranteed by law. Therefore, the Inspector General should undertake an inquiry to determine whether political officials within DOI are complying with the FOIA as required by law.

Sincerely,

/s/ Daniel Stevens

Daniel Stevens
Executive Director
Campaign for Accountability

/s/ Austin Evers

Austin Evers
Executive Director
American Oversight

/s/ Shripal Shah

Shripal Shah
Vice President
American Bridge 21st Century Foundation

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward

/s/ Kyle Herrig

Kyle Herrig
Sr. Advisor, Western Values Project
Western Values Project

³⁴ See 5 U.S.C. § 552(a)(3)(A).

EXHIBIT A



704C East 13th Street, Suite 568
Whitefish, MT 59937
406-438-1918

Ms. Charis Wilson
FOIA Officer
National Park Service
charis_wilson@nps.gov

June 8, 2018

FOIA REQUEST

Dear Records Request Officer:

Pursuant to the Freedom of Information Act, I request access to and copies of all emails between NPS Congressional Liaison Elaine Hackett and Lolita "Lola" Hand Zinke, since and including January 1, 2017. This should include, but not be limited to, all emails sent by Ms. Hackett to lolazinke@gmail.com, as well as all emails from that gmail address to Ms. Hackett.

"All emails" should include, but not be limited to, all correspondence sent between, carbon copied ("CC") between, or blind carbon copied ("BCC") between Elaine Hackett and Lola Zinke during this time period.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), Western Values Project requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹

Western Values Project requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding" of government operations and is not "primarily in the commercial interest of the requester."² The disclosure of the information sought under this request

¹ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

² 5 U.S.C. § 552(a)(4)(A)(iii)

will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public's business.

This request is primarily and fundamentally for non-commercial purposes. As a project of a 501(c)(3) organization, Western Values Project does not have a commercial purpose and the release of the information requested is not in Western Values Project's financial interest. Western Values Project's mission is to give a voice to Western values in the national conversation about resource development and public lands conservation, a space too often dominated by industry lobbyists and their government allies. Western Values Project will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. Western Values Project will also make materials it gathers available on our public website <http://www.westernvaluesproject.org/>.

Accordingly, Western Values Project qualifies for a fee waiver.

Conclusion

If possible, I would prefer to receive this information electronically via e-mail at csaeger@westernvaluesproject.org.

If you have questions or need additional information, please feel free to contact Brad Hennessy, my associate who will be handling all follow-up on this request. Brad can be reached at brad@westernvaluesproject.org or at (406) 924-9491.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. If any documents are withheld based on the Agency's interpretation of any exemption, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Specifically, this *Vaughn* index should describe withheld documents with enough specificity as to determine whether the material is exempt under the act and must describe each document or portion withheld.

Thank you for your assistance.

Sincerely,

Chris Saeger
Executive Director
Western Values Project

EXHIBIT B



Chris Saeger <csaeger@westernvaluesproject.org>

Hackett-Zinke correspondence: [EXTERNAL] FOIA Request

WASO FOIA Requests, NPS <waso_foia_requests@nps.gov>

Mon, Jul 23, 2018 at 6:21 PM

To: Chris Saeger <csaeger@westernvaluesproject.org>

Cc: Jessica McHugh <jessica_mchugh@nps.gov>

Mr. Seeger,

I apologize for the delay in getting this information to you. I wanted, however, to provide you with a status update on your request.

In accordance with 43 CFR 2.15 the National Park Service processes requests on a first-in, first-out basis within several processing tracks. As of today, there are currently 4 "normal" and 0 "simple" or "expedited" requests ahead of yours in the processing queue.

We have completed searching our records and have identified 96 pages of potentially responsive materials that is currently in the review process. I hope to be able to complete the processing for your request within the next couple of weeks.

Please note, because we were not able to process your request within the required twenty workday period you have the right to appeal. You may file an appeal by writing to:

Freedom of Information Act Appeals Officer
Office of the Solicitor
U.S. Department of the Interior
[1849 C Street, NW](#)
MS-6556-MIB,
Washington, D.C. 20240
foia.appeals@sol.doi.gov

Your failure-to-timely-respond appeal may be filed anytime between now and the date we issue our final response. The appeal should be marked, both on the envelope and the face of the appeal letter, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal should be accompanied by a copy of your original request and copies of all correspondence between yourself and the National Park Service related to this request, along with any information you have which leads you to believe our response to be in error. Note, any appeal received after 5 p.m. EST will be considered to have been received on the next business day.

Sincerely,

Jessica McHugh
WASO FOIA Liaison
202-354-1449
waso_foia_requests@nps.gov

[Quoted text hidden]

EXHIBIT C



Chris Saeger <csaeger@westernvaluesproject.org>

FOIA NPS-2018-00843 (Seager) Hackett-Zinke correspondence

1 message

WASO FOIA Requests, NPS <waso_foia_requests@nps.gov>

Mon, Aug 6, 2018 at 3:01 PM

To: Chris Saeger <csaeger@westernvaluesproject.org>

Cc: Jessica McHugh <jessica_mchugh@nps.gov>

Mr. Seager,

The email is in response to your FOIA NPS-2018-00843, dated June 8, 2018 in which you requested:

"...copies of all emails between NPS Congressional Liaison Elaine Hackett and Lolita "Lola" Hand Zinke, since and including January 1, 2017. This should include, but not be limited to, all emails sent by Ms. Hackett to lolazinke@gmail.com, as well as all emails from that gmail address to Ms. Hackett.

All emails" should include, but not be limited to, all correspondence sent between, carbon copied ("CC") between, or blind carbon copied ("BCC") between Elaine Hackett and Lola Zinke during this time period."

Upon further review, your request is granted in part and denied in part. We are providing 1 file, totaling approximately 16 pages of responsive material. Portions of 6 pages, however, are being withheld under Exemption 6, which allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

The phrase "similar files" covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information. Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.

The burden is on the requester to establish that disclosure would serve the public interest. When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which the greater result of disclosure is: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public. The information that has been withheld under Exemption 6 consists of personal information containing private telephone numbers and private addresses. We have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6.

Pursuant to regulation, 43 CFR 2.24(b) the following person is responsible for this denial:

Jessica McHugh, WASO FOIA Liaison
National Park Service

Additionally the following attorney was consulted during the preparation of this response:

Jason Waanders, Office of the Solicitor
U.S. Department of the Interior, Washington, D.C.

You have the right to appeal this denial of your request. You may file an appeal by writing to:

Freedom of Information Act Appeals Officer
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, NW
MS-6556-MIB,
Washington, D.C. 20240
foia.appeals@sol.doi.gov

Your appeal must be received no later than 90 workdays after the date of this final response. The appeal should be marked, both on the envelope and the face of the appeal letter, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal should be accompanied by a copy of your original request and copies of all correspondence between yourself and the National Park Service related to this request, along with any information you have which leads you to believe the records are available, including where they might be found, if the location is known to you. Please note, appeals received after 5 p.m. EST will be considered to have been received as of the following day.

Also as part of the 2007 OPEN Government Act 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 nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

You may contact OGIS in any of the following ways:

Office of Government Information Services (OGIS)
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

Please note, we do not bill requesters for FOIA processing fees when their fees are less than \$50.00, because the cost of collection would be greater than the fee collected. See 43 C.F.R. § 2.37(g). The fees associated with processing your request have totaled less than \$50.00. Therefore, there is no billable fee for the processing of this request. Additionally, because the National Park Service creates and maintains law enforcement records, we are required by the Department of Justice to provide the following information, even though it may or may not apply to your specific request. 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 we are required to give all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Should you have any further questions regarding this request, please feel free to contact me. I can be reached at the address above or by phone at 202-351-1449. I may also be reached via email at Jessica_McHugh@nps.gov.

Sincerely,

Jessica McHugh
WASO FOIA Liaison
202-354-1449
waso_foia_requests@nps.gov

On Mon, Jul 23, 2018 at 7:20 PM, Chris Saeger <csaeger@westernvaluesproject.org> wrote:

Ms. McHugh,

- 1) Thanks for the update on timeframe, it's much appreciated.
- 2) No sweat, that's not even the worst typo of my name I've seen today!

Chris

On Mon, Jul 23, 2018 at 6:24 PM, WASO FOIA Requests, NPS <waso_foia_requests@nps.gov> wrote:

Mr. Saeger,

Please, also, accept my apologies for the typo on your name in my previous email.

On Mon, Jul 23, 2018 at 6:21 PM, WASO FOIA Requests, NPS <waso_foia_requests@nps.gov> wrote:

Mr. Seeger,

I apologize for the delay in getting this information to you. I wanted, however, to provide you with a status update on your request.

In accordance with 43 CFR 2.15 the National Park Service processes requests on a first-in, first-out basis within several processing tracks. As of today, there are currently 4 "normal" and 0 "simple" or "expedited" requests

ahead of yours in the processing queue.

We have completed searching our records and have identified 96 pages of potentially responsive materials that is currently in the review process. I hope to be able to complete the processing for your request within the next couple of weeks.

Please note, because we were not able to process your request within the required twenty workday period you have the right to appeal. You may file an appeal by writing to:

Freedom of Information Act Appeals Officer
Office of the Solicitor
U.S. Department of the Interior
[1849 C Street, NW](#)
MS-6556-MIB,
Washington, D.C. 20240
foia.appeals@sol.doi.gov

Your failure-to-timely-respond appeal may be filed anytime between now and the date we issue our final response. The appeal should be marked, both on the envelope and the face of the appeal letter, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal should be accompanied by a copy of your original request and copies of all correspondence between yourself and the National Park Service related to this request, along with any information you have which leads you to believe our response to be in error. Note, any appeal received after 5 p.m. EST will be considered to have been received on the next business day.

Sincerely,

Jessica McHugh
WASO FOIA Liaison
202-354-1449
waso_foia_requests@nps.gov

On Wed, Jun 13, 2018 at 8:36 AM, WASO FOIA Requests, NPS <waso_foia_requests@nps.gov> wrote:
Mr. Saeger,

Your request has been received and has been assigned tracking number NPS-2018-00843. All future correspondence relating to this request should reference this tracking number.

In accordance with [43 CFR 2.15](#) the National Park Service processes requests on a first-in, first-out basis within several processing tracks. Your request has been placed in the "normal" track. There are currently 10 requests ahead of this request in the processing queue.

We have classified you as an "other-use" requester and your request for a fee waiver has been granted.

Please note for future requests, as an "other-user", we may charge you for some of our search and duplication costs, but we would not charge you for our review costs; you are also entitled to up to 2 hours of search time and 100 pages of photocopies (or an equivalent volume) for free. See 43 C.F.R. § 2.39. If, after taking into consideration your fee category entitlements, our processing costs are less than \$50.00, we would not bill you because the cost of collection would be greater than the fee collected. See 43 C.F.R. § 2.37(g)

You should expect our response by July 6, 2018. If you do not receive our response by that date you may file an appeal by writing to:

Freedom of Information Act Appeals Officer
Office of the Solicitor
U.S. Department of the Interior
[1849 C Street, NW](#)
MS-6556-MIB,
Washington, D.C. 20240
foia.appeals@sol.doi.gov

Your failure-to-timely-respond appeal may be filed anytime after the estimated response date provided above and the date we issue our final response. The appeal should be marked, both on the envelope and the face of the appeal letter, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal should be accompanied by a copy of your original request and copies of all correspondence between yourself and the National Park Service related to this request, along with any information you have which leads you to believe our response to be in error. Note, any appeal received after 5 p.m. EST will be considered to have been received on the next business day.

Sincerely,

Jessica C. McHugh
WASO FOIA Liaison
202-354-1449
waso_foia_requests@nps.gov

On Mon, Jun 11, 2018 at 9:33 AM, FOIA, NPS <npsfoia@nps.gov> wrote:

Hi Jessica,

I am routing this request to you for processing. Let me know if it turns out another office needs to search for responsive records.

As usual I've cc'd the requester so they know who will be handling their request.

Thanks,

C.

Ms. Charis Wilson, PhD, CRM
NPS FOIA Officer
[12795 W. Alameda Parkway](#)
PO Box 25287
Denver, CO 80225-0287
303-969-2959
Fax: 303-969-2557
1-855-NPS-FOIA
npsfoia@nps.gov

----- Forwarded message -----

From: **Chris Saeger** <csaeger@westernvaluesproject.org>
Date: Fri, Jun 8, 2018 at 4:47 PM
Subject: [EXTERNAL] FOIA Request
To: "FOIA, NPS" <npsfoia@nps.gov>, charis_wilson@nps.gov

Dear Records Request Officer:

Pursuant to the Freedom of Information Act, I request access to and copies of all emails between NPS Congressional Liaison Elaine Hackett and Lolita "Lola" Hand Zinke, since and including January 1, 2017. This should include, but not be limited to, all emails sent by Ms. Hackett to lolazinke@gmail.com, as well as all emails from that gmail address to Ms. Hackett.

"All emails" should include, but not be limited to, all correspondence sent between, carbon copied ("CC") between, or blind carbon copied ("BCC") between Elaine Hackett and Lola Zinke during this time period.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), Western Values Project requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).
[1]

Western Values Project requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations and is not “primarily in the commercial interest of the requester.”^[2] The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public’s business.

This request is primarily and fundamentally for non-commercial purposes. As a project of a 501(c)(3) organization, Western Values Project does not have a commercial purpose and the release of the information requested is not in Western Values Project’s financial interest. Western Values Project’s mission is to give a voice to Western values in the national conversation about resource development and public lands conservation, a space too often dominated by industry lobbyists and their government allies. Western Values Project will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. Western Values Project will also make materials it gathers available on our public website
<http://www.westernvaluesproject.org/>.

Accordingly, Western Values Project qualifies for a fee waiver.

Conclusion

If possible, I would prefer to receive this information electronically via e-mail at csaeger@westernvaluesproject.org.

If you have questions or need additional information, please feel free to contact Brad Hennessy, my associate who will be handling all follow-up on this request. Brad can be reached at brad@westernvaluesproject.org or at (406) 924-9491.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. If any documents are withheld based on the Agency’s interpretation of any exemption, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Specifically, this *Vaughn* index should describe withheld documents with enough specificity as to determine whether the material is exempt under the act and must describe each document or portion withheld.

Thank you for your assistance.

Sincerely,

Chris Saeger
Executive Director
Western Values Project

[1] See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

[2] 5 U.S.C. § 552(a)(4)(A)(iii)



18-843 Responsive redacted.pdf
1418K

EXHIBIT D



704C East 13th Street, Suite 568
Whitefish, MT 59937
406-438-1918

FOIA Officer
United States Geological Survey
5522 Research Park Drive
Baltimore, MD 21228
E-mail: foia@usgs.gov

March 16, 2018

FOIA REQUEST

Dear Records Request Officer:

Pursuant to the Freedom of Information Act, I request access to and copies of all correspondence, including but not limited to letters, texts, emails, and faxes, to or from the following United States Geological Survey officials from December 11, 2017 to December 22, 2017:

- Acting Director William Werkhesier
- Deputy Acting Director David Applegate
- Chief of Staff Judy Nowkowski
- Associate Director, Communications and Publishing, Betsy Hildebrandt
- Murray Hitzman
- Larry Meinert

I also request access to and copies of all correspondence, including but not limited to letters, texts, emails, and faxes, to or from the above list of USGS officials and the below list of Department of Interior officials at any point since December 9, 2017:

- Secretary Ryan Zinke
- Deputy Secretary David Bernhardt
- Todd Willens
- Steven Howke
- Downey Magallanes
- Andrea Travnicek
- Tim Petty
- Austin Ewell
- Ryan Nichols
- Vincent DeVito

- Caroline Boulton
- Leila Getto
- Joe Balash
- Heather Swift
- Laura Rigas

"All correspondence" should include, but not be limited to, copies of digital and hardcopy information sent by, sent to, carbon copying ("CC"), or blind carbon copying ("BCC") any of these individuals during this time period.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), Western Values Project requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹

Western Values Project requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding" of government operations and is not "primarily in the commercial interest of the requester."² The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public's business.

This request is primarily and fundamentally for non-commercial purposes. As a project of a 501(c)(3) organization, Western Values Project does not have a commercial purpose and the release of the information requested is not in Western Values Project's financial interest. Western Values Project's mission is to give a voice to Western values in the national conversation about resource development and public lands conservation, a space too often dominated by industry lobbyists and their government allies. Western Values Project will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. Western Values Project will also make materials it gathers available on our public website <http://www.westernvaluesproject.org/>.

Accordingly, Western Values Project qualifies for a fee waiver.

Conclusion

If possible, I would prefer to receive this information electronically via e-mail at csaeger@westernvaluesproject.org.

¹ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

² 5 U.S.C. § 552(a)(4)(A)(iii)

If you have questions or need additional information from me, please feel free to call me at (406) 438-1918.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. If any documents are withheld based on the Agency's interpretation of any exemption, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Specifically, this *Vaughn* index should describe withheld documents with enough specificity as to determine whether the material is exempt under the act and must describe each document or portion withheld.

Thank you for your assistance.

Sincerely,

Chris Saeger
Executive Director
Western Values Project

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:19-cv-00011

SOUTHERN ENVIRONMENTAL LAW
CENTER,

Plaintiff,

v.

DAVID BERNHARDT, in his official
capacity as Acting Secretary of the
Department of the Interior,

DANIEL SMITH, in his official capacity as
Deputy Director Exercising the Authority of
Director for the National Park Service, an
agency within the Department of the Interior,
and

DANIEL JORJANI, in his official capacity as
Principal Deputy Solicitor Exercising the
Authority of Solicitor, the head of the Office
of the Solicitor, an agency within the
Department of Interior,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This Freedom of Information Act (“FOIA”) suit challenges Defendants’ unlawful and unreasonable delay in responding to requests for records relating to the Atlantic Coast Pipeline.

2. Plaintiff Southern Environmental Law Center (“SELC”), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, requested information in the custody of the National Park Service (“NPS”) on December 14, 2017. The

information related to the Atlantic Coast Pipeline, a time-sensitive matter of extraordinary public concern.

3. After an initial exchange of communications acknowledging the request and Plaintiff's voluntary narrowing of the request to reduce its scope, NPS has ceased responding to Plaintiff's inquiries about the request's status and has not provided responsive records.

4. Prior to SELC's request, and while it was pending, Defendants adopted policies and practices that directly caused or contributed to the unlawful withholding of the requested public records.

5. Defendants have violated FOIA by failing to promptly provide requested information and make a determination within 20 working days of receiving a request. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). SELC seeks a declaration that Defendants have violated FOIA and an order requiring Defendants to provide all nonexempt, responsive documents without further delay and enjoining the use of Defendants' unlawful policies and practices.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

7. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), SELC is "deemed to have exhausted [its] administrative remedies" because Defendants have "fail[ed] to comply with the applicable time limit provisions."

8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

PARTIES

Plaintiffs

9. SELC is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states.

10. SELC is a “person” for purposes of FOIA, 5 U.S.C. § 551(2).

11. SELC uses public advocacy and the law to protect the people and the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information. SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

12. As part of its mission, SELC regularly submits FOIA requests to agencies within the Department of the Interior, including the NPS. SELC intends to continue submitting such requests in the future.

Defendants

13. The Department of the Interior is an “agency” for purposes of FOIA. David Bernhardt, named in his official capacity as Acting Secretary of the Department of the Interior, has ultimate responsibility for the decisions of the Department and agencies within it, including the National Park Service and the Office of the Solicitor.

14. NPS is an “agency” for purposes of FOIA. Daniel Smith, named in his official capacity as Deputy Director Exercising the Authority of Director for the National Park Service, has assumed responsibility for the decisions of NPS under the color of law pursuant to Secretarial Order 3345, Amendment No. 24 (January 29, 2019).

15. The Office of the Solicitor is an “agency” for purposes of FOIA. Daniel Jorjani, named in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, has assumed responsibility for the decisions of the Office of the Solicitor under the color of law pursuant to Secretarial Order 3345, Amendment No. 24 (January 29, 2019).

16. NPS, the Office of the Solicitor, and/or other bureaus or officials within the Department of Interior have possession or control of the requested information.

FACTS

17. Fourteen months ago, on December 14, 2017, SELC submitted a FOIA request to NPS seeking “records ... related to the [Atlantic Coast Pipeline’s] crossing of the Blue Ridge Parkway or Appalachian National Scenic Trail.” A copy of this FOIA request is attached as Exhibit 1.

18. Defendants have withheld the requested information from SELC and have failed to make a determination within 20 days as required by FOIA.

The Atlantic Coast Pipeline

19. The Atlantic Coast Pipeline (“the Pipeline”) is an interstate natural gas pipeline that, as proposed, would cross both the Blue Ridge Parkway and the Appalachian National Scenic Trail, both of which are units of the National Park System and administered by NPS.

20. The Blue Ridge Parkway is the most visited unit in the National Park System. As proposed and permitted by Defendants, the Pipeline would scar views from two of the Parkway’s

scenic overlooks.

21. The Appalachian National Scenic Trail is a globally recognized footpath that receives over 3 million visitors annually and has been administered by the Department of the Interior since 1968. Pipeline construction would impact trail users.

22. The Federal Energy Regulatory Commission (“FERC”) is responsible for approving the Pipeline, but FERC’s final approval of the Pipeline hinges on the issuance of permits by other agencies with jurisdiction, including components of the Department of Interior such as NPS and the U.S. Fish and Wildlife Service.

23. For years, federal permitting agencies, including those within the Department of the Interior, were not prepared to allow the Pipeline to move forward without additional analysis and mitigation. Although their concerns were not addressed, federal agencies nonetheless abruptly reversed course in late 2016 and began issuing project approvals in 2017.

24. These sudden reversals were not justified by the permitting agencies. Each and every permit for the Pipeline issued by a component of Department of Interior, including NPS, or directly affecting resources within the jurisdiction of the Department of Interior, has since been invalidated as arbitrary and capricious, withdrawn, or stayed pending judicial review.

25. The U.S. Fish and Wildlife Service’s permit was vacated by the Fourth Circuit Court of Appeals on May 15, 2018, because it was arbitrary and capricious and failed to set enforceable limits on the amount of harm Atlantic and FERC could inflict on threatened and endangered species.

26. The U.S. Forest Service permit decision purporting to allow the Pipeline to cross the NPS-administered Appalachian National Scenic Trail, which was unlawfully issued with the consent of NPS, was vacated by the Fourth Circuit Court of Appeals on December 13, 2018,

because it was arbitrary and capricious and beyond the agency's statutory authority.

27. The NPS permit decision authorizing the Pipeline to cross the Blue Ridge Parkway was vacated by the Fourth Circuit Court of Appeals on August 6, 2018, because it was arbitrary and capricious and because the agency failed to demonstrate that the pipeline crossing was consistent with the use of the Blue Ridge Parkway for park purposes.

28. On September 14, 2018, almost immediately after the NPS permit authorizing the Pipeline to cross the Blue Ridge Parkway was invalidated, Defendants reissued the permit in substantially identical form and largely on the same administrative record. That permit was also challenged, and Defendants voluntarily withdrew it in order to "reconsider its determinations regarding the impact of the right-of-way on the environmental and cultural resources of the Parkway." Resp'ts' Mot. for Vol. Remand, *Sierra Club v. National Park Service*, Case No. 18-2095 (4th Cir. Jan. 16, 2019) (ECF No. 50).

29. These controversies related to the pipeline are matters of ongoing public concern. Despite court decisions invalidating necessary approvals Atlantic has announced in the press that it is confident NPS will "promptly...reissue the permit" allowing the crossing of Blue Ridge Parkway to proceed. Dominion recently informed its investors that it expects the pipeline will be partly operational by the end of 2020 and fully operational by the end of 2021. To meet that promised schedule, Atlantic must obtain needed permits and begin construction immediately.

Unavailability of the Requested Information

30. Only minimal information about Defendants' involvement in approving the Pipeline's impacts to the Blue Ridge Parkway and the Appalachian National Scenic Trail has been made available through the submission of the Administrative Record in connection with legal challenges to the respective permits.

31. For example, the record of NPS's decision to authorize the proposed crossing of the Blue Ridge Parkway did not include "any explanation, let alone a satisfactory one," as to why the Pipeline crossing would be "consistent with the purposes of the Parkway and the Park System." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018).

32. The Administrative Record filed by NPS in *Sierra Club* did not adequately explain NPS's decision to approve the Blue Ridge Parkway crossing because of an Administration-wide policy to exclude deliberative documents categorically from Administrative Records. The October 20, 2017 Memorandum describing that policy is attached as Exhibit 2.

33. In addition to the Administration-wide policy to exclude deliberative documents categorically from Administrative Records, the Department of Interior or bureau(s) thereof have been instructed by the Department of Justice with respect to the Atlantic Coast Pipeline in particular to prepare a "more limited" Administrative Record.

34. The Administrative Record filed by NPS with the Court to document its two-year long process considering the Atlantic Coast Pipeline's proposed crossing of the Blue Ridge Parkway consisted of fewer than 100 documents.

35. The basis for NPS's unlawful decision to approve the Pipeline's crossing of the Blue Ridge Parkway would be documented, if at all, in the records that are the subject of this Complaint, which Defendants have not provided.

Defendants' Failure to Timely Process SELC's Request

36. SELC submitted its request for "records ... related to the crossing of the Blue Ridge Parkway or Appalachian National Scenic Trail" on December 14, 2017, the same day that news reports first disclosed that NPS had issued a permit for the ACP to cross the Blue Ridge Parkway.

37. SELC staff called the FOIA officer assigned to their request as well as the Headquarters Office of the Blue Ridge Parkway multiple times asking NPS to share informally the final permit it had issued for the ACP, without success. Although the National Park Service maintains a public information website for planning activities related to the Blue Ridge Parkway, no documents related to the project have been posted there. NPS staff from the Blue Ridge Parkway Supervisor's office informed SELC that sharing that final document would require approval from senior management.

38. Finally, on December 22, 2017, Atlantic posted the permit as an attachment to a regular weekly status report filed in the electronic docket for the project maintained by FERC. SELC staff discovered it there on December 29, 2017, and, after reviewing and confirming that the authorization was issued without valid statutory authority, filed a Petition for Review on behalf of their clients on January 19, 2018. In briefing in that case, NPS faulted petitioners for waiting "38 days after NPS granted the right-of-way" before challenging the approval.

39. On January 9, 2018, SELC requested an update on the status of its December 14, 2017 FOIA request, and offered to help clarify the scope of the request, but NPS did not respond.

40. On February 28, 2018, two and a half months after SELC's request was submitted, NPS belatedly acknowledged its receipt and produced two documents, the final permits it had issued to Atlantic—the only two documents NPS knew for certain Petitioners already possessed.

41. In its February 28, 2018 communication, NPS also sought additional clarification of the request. NPS explained that "more than 90 NPS staff in more than a half dozen offices" would potentially have possession of responsive records. Despite being able to identify the requested records' custodians, NPS nonetheless took the position that the records were not

“describe[d] ... in sufficient detail to enable an employee familiar with the subject area of the request to locate responsive records with a reasonable amount of effort.”

42. In response to NPS’s communication, SELC promptly clarified categories of records sought, which narrowed the scope of the request. Specifically, Plaintiff narrowed the date range and subject matter of the request on the good-faith assumption that Defendants would thereafter timely respond to the request as required by law. Plaintiff offered to narrow the request even further if NPS would describe the categories of responsive records.

43. NPS did not provide such a description but, eventually, on April 4, 2018, replied that agency staff were “working on preparing a list for you of materials or categories.”

44. On May 23, 2018, Plaintiff contacted NPS for an update on the request. NPS replied they were working on “an advanced search query” for email searches and that NPS “will keep you posted.”

45. On July 9, 2018, nearly seven months after the request was initially submitted and six weeks after NPS stated it was working on a search of digital records, Plaintiff again contacted NPS asking for an estimated date of completion for the request. That communication went unanswered.

Defendants’ Policies and Practices Affecting SELC’s Request

46. On May 24, 2018, the Department of Interior issued a memorandum (the “Awareness Process Memorandum”) significantly affecting the production of digital records pursuant to FOIA. That memorandum is attached as Exhibit 3.

47. Pursuant to the Awareness Process Memorandum, all responsive emails and attachments must be searched for the names and email addresses of all political appointees within the Department of Interior. If any are found, the “full set of responsive records” must be

provided to those political appointee(s), and the Office of the Solicitor must be notified “simultaneously.” The political appointee(s) and the Office of the Solicitor must be given 72 hours to review the records, which time may be further extended at the reviewers’ request.

48. The Awareness Process Memorandum does not explain what role or expertise political appointees have in the fulfillment of the Department’s statutory obligations under FOIA; the sole purpose offered is “to facilitate awareness of the information that will be released” and to allow reviewers to “follow up” as needed to “understand” the decision whether to disclose records.

49. A related policy, described in Secretarial Order 3371, attached as Exhibit 4, consolidates authority over the Department of Interior’s FOIA program in the Office of the Solicitor, including final authority over any FOIA request or withholding, with the sole exception of requests to the Office of the Inspector General. The Office of the Solicitor does not have access to the factual information relevant to whether a record submitted to another bureau within the Department of Interior may be withheld unless such information is provided by that other bureau.

50. The policy described in the Awareness Process Memorandum simultaneously makes political appointees and attorneys in the Office of the Solicitor aware of the decision to disclose politically sensitive documents pursuant to FOIA, and thereby connects any concerned political appointee with an attorney who, under Secretarial Order 3371, can override the decision to disclose that document.

51. Also while SELC’s request was pending, Defendants adopted yet another policy, this one intended to remain confidential, concerning the “coordination” of FOIA responses with the preparation of Administrative Records for decisions challenged under the Administrative

Procedure Act. Defendants' policy is expressed in a September 6, 2018 Memorandum to the U.S. Fish and Wildlife Service, hereinafter the "Deliberative Process Memorandum," which is attached as Exhibit 5.

52. The Deliberative Process Memorandum explains the Department of Interior's position that Administrative Records "should not include deliberative documents" and requires FOIA staff to "process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could subsequently be included in an [Administrative Record]."

53. The Deliberative Process Memorandum further describes "categories of information and documents that should be considered for withholding in full or in part under [the] deliberative process privilege," and notes that "careful review" of FOIA responses is needed in order to "protect[] our decisions" and avoid discovery during related litigation.

54. The Deliberative Process Memorandum also incorporates by reference an earlier policy—the Foreseeable Harm Memorandum, attached as Exhibit 6—which itself creates an additional layer of review for deliberative documents: Whenever FOIA officers believe that disclosure of deliberative documents is appropriate, the Foreseeable Harm Memorandum requires them to consult again and "seek additional information" from other staff who may be able to provide a justification for withholding.

55. SELC's request has been subject to the policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum.

56. Defendants' policies and practices, as described separately in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the

Foreseeable Harm Memorandum, individually and together comprise a concerted effort to prevent the disclosure of records required to be disclosed under FOIA, and, upon information and belief have been the primary cause of the delays and withholdings affecting SELC's request.

57. Defendants' policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum have been adopted and implemented under the authority and direction of Defendants David Bernhardt, Daniel Smith, and Daniel Jorjani.

58. Under the process dictated by these policies, records responsive to SELC's request would be subjected to multiple reviews, including review by the Office of the Solicitor and/or political appointees within the Department of the Interior, for the purpose of withholding any records that might tend to show that agencies within the Department of Interior acted unlawfully or in bad faith with respect to approvals for the Pipeline.

59. Upon information and belief, SELC's FOIA request to NPS encompassed a number of records tending to show unlawful agency action and bad faith, which were made subject to delay, multiple layers of review, heightened scrutiny, and withholding under Defendants' policies.

Defendants' Unlawful Withholdings

60. To date, other than the belated provision of the two final permits themselves, neither NPS nor any other component of the Department of Interior has provided any documents responsive to Plaintiff's December 14, 2017 FOIA request to NPS.

61. Since May 25, 2018, SELC has not received any communication from Defendants related to the request.

62. More than 20 working days have passed since Plaintiff submitted this request.

63. The Department of Interior is continuing to process approvals for the Pipeline. Accordingly, the records sought by Plaintiff remain of urgent public interest. Delay associated with the production of these records is therefore tantamount to denial of documents.

Records Created Subsequent to SELC's Request

64. Subsequent to the submission of SELC's request, NPS has continued to create and receive records related to the Pipeline's crossing of the Blue Ridge Parkway and the Appalachian National Scenic Trail.

65. Had NPS fulfilled Plaintiff's request as required by law, Plaintiff would have been able to submit follow-up requests based on the information provided, which would have included records created or received up to the present date.

LEGAL BACKGROUND

66. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check against corruption and to hold the governors accountable to the governed.'" *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

67. "[T]he time provisions of the Act are central to its purpose." *Hayden v. U.S. Dep't of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to "promptly" make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must "determine . . . whether to comply" with a request within 20 working days of receiving the

request, and they must “immediately notify” the requester of that determination. *Id.*

§ 552(a)(6)(A).

68. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

69. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. *Id.* § 552(a)(6)(B).

70. Agencies within the Department of Interior may extend the deadline to respond in order to seek clarification from a requester, but the deadline can be tolled only as long as “the time it takes [the requester] to respond to one written communication ... reasonably asking for clarifying information.” 43 C.F.R. §2.18(a).

71. Under FOIA, if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 5 U.S.C. § 552(a)(6)(B)(ii).

72. Records may be withheld under FOIA only pursuant to one of FOIA’s narrowly defined exemptions. 5 U.S.C. § 552(b).

73. Although Exemption 5 to FOIA incorporates the deliberative process privilege, deliberative documents cannot be categorically withheld. The FOIA Improvement Act of 2016, P.L. 114-185 (2016), was intended to codify a presumption of disclosure and to curb agencies’ overuse of the deliberative process privilege. H.R. Rep. No. 114-391; S. Rep. No. 114-4. Deliberative documents must be disclosed unless the agency reasonably determines that

disclosure of that particular document would harm an interest protected by the deliberative process privilege. 5 U.S.C. § 552(a)(8)(A)(i)(I); *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 76-79 (D.D.C. 2018).

CLAIMS FOR RELIEF

Count 1 – Unlawful Withholding of Responsive Records

74. Plaintiff incorporates by reference paragraphs 1 through 73 of this Complaint as if fully stated herein.

75. Defendants have violated FOIA by failing to provide SELC with all non-exempt responsive records described in its FOIA request.

76. By failing to provide SELC with all non-exempt responsive records described in its FOIA request, Defendants have denied SELC's right to this information as provided by law under the Freedom of Information Act.

77. The unlawful withholding of records to which SELC is entitled lacks any substantial justification and is arbitrary and capricious.

78. During the time period in which Defendants have been in violation of FOIA, Defendants have continued to create and receive records related to the subject matter of SELC's request. Defendants' failure to timely respond to SELC's request has hampered SELC's ability to submit follow-up requests.

79. Unless enjoined by this Court to provide non-exempt, responsive records, including records created both prior to and subsequent to the date SELC's request was submitted, Defendants will continue to violate SELC's legal right to be provided with the records to which it is entitled under FOIA.

80. SELC is directly and adversely affected and aggrieved by Defendants' failure to provide responsive records to its FOIA request as described above.

Count 2 – Unlawful Policies and Practices that Caused or Contributed to Unlawful Withholdings

81. Plaintiff incorporates by reference paragraphs 1 through 73 of this Complaint as if fully stated herein.

82. Defendants' policy of mandatory review by political appointees and the Office of the Solicitor, as described in the Awareness Process Memorandum, adds an additional layer of review and associated delay to FOIA responses, which is not related to the fulfillment of Defendants' statutory obligations under FOIA. The Awareness Process Memorandum is in direct conflict with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). The Awareness Process also has the intent and the effect of interjecting political considerations into the decision whether to disclose documents under FOIA. *See* 5 U.S.C. § 552(a)(8)(A), (b).

83. Because the Office of the Solicitor lacks familiarity with the facts relevant to whether records may properly be withheld, the consolidation of authority over FOIA requests in the Office of the Solicitor, as described in Secretarial Order 3371, either causes inefficiency and delay inconsistent with FOIA's time limits, *see* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A), or causes withholdings based on impermissible factors such as political sensitivity of the records, *see* 5 U.S.C. § 552(a)(8)(A), (b), or both.

84. Defendants' policy of "careful review" to ensure "consistency" between FOIA responses and Defendants' related policy of categorically excluding deliberative documents from Administrative Records, as described in the Deliberative Process Memorandum, is inconsistent with Defendants' legal obligation to withhold documents only when the agency reasonably

foresees that disclosure would harm an interest protected by the deliberative process privilege. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). It also causes or contributes to delays which are not related to lawful considerations under FOIA, and it is therefore inconsistent with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

85. Defendants' policy of requiring FOIA staff to "seek additional information" rather than disclosing records whenever they find that disclosure would not cause foreseeable harm, as described in the Foreseeable Harm Memorandum, is inconsistent with Defendants' obligation to withhold documents only when the agency foresees that disclosure would harm an interest protected by a FOIA exemption. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). It also causes or contributes to delays which are not related to lawful considerations under FOIA, and it is therefore inconsistent with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

86. Defendants' policies, separately and in concert, are designed to effect a broad policy of secrecy that is inconsistent with Defendants' obligations under FOIA. The policies require multiple layers of review, creating a process that is incapable of compliance with FOIA's time limits. These multiple layers of review and the consolidation of authority over FOIA in an office ill equipped to make factual determinations under FOIA are not intended to further FOIA's purposes or requirements, but are instead intended to facilitate the withholding of records for reasons not permitted or contemplated by FOIA, including avoiding political scrutiny, protecting unlawful agency decisions from judicial review, and avoiding discovery in cases where the records would show the agency acted in bad faith.

87. Defendants' policies, individually and in concert, caused or contributed to the delays and withholdings of the records sought by SELC's request.

88. Because SELC intends to continue submitting FOIA requests to agencies within the Department of Interior, Defendants' policies will continue to harm SELC's interests unless enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(i) Declare that Defendants have violated and are continuing to violate FOIA by failing to timely respond to SELC's request with the determination required under FOIA;

(ii) Declare that Defendants have violated and are continuing to violate FOIA by improperly withholding documents that are responsive to SELC's request;

(iii) Direct Defendants to provide all nonexempt, responsive documents to SELC without further delay, including any and all records created or received up to the date of this Court's Order;

(iv) Declare that the policies set out in the Awareness Process Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(v) Declare that the policies set out in Secretarial Order 3371 violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would

foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(vi) Declare that the policies set out in the Deliberative Process Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(vii) Declare that the policies set out in the Foreseeable Harm Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(viii) Declare that these policies, taken together, violate FOIA because they preclude Defendants from meeting the time limits established by FOIA and because they are intended to facilitate the withholding of records for reasons not permitted or contemplated by FOIA, including avoiding political scrutiny, protecting unlawful agency decisions from judicial review, and avoiding discovery in cases where the records would show the agency acted in bad faith.

(ix) Enjoin Defendants' application of the unlawful policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum;

(x) Retain jurisdiction over this matter to rule on any assertions by Defendants that any responsive documents cannot be found or are exempt from disclosure;

(xi) Order Defendants to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b), in the event that Defendants determine that certain responsive records are exempt from disclosure;

(xii) Award Plaintiff's reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);

(xiii) Find, pursuant to 5 U.S.C. § 552(a)(4)(F)(i), that the circumstances surrounding this withholding raise questions whether Defendants acted arbitrarily and capriciously with respect to the withholding; and find further that Defendants David Bernhardt, Daniel Smith, and Daniel Jorjani, by adopting and directing the implementation of policies and practices intended to cause unlawful delays and withholdings, are primarily responsible for the arbitrary and capricious conduct; and

(xiv) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 21st day of February, 2019.

/s/ Kristin Davis
Local Counsel – VA Bar No. 85076

/s/ Sam Evans
Sam Evans – NC Bar No. 44992 (*pro hac vice* pending)

/s/ Kym Hunter
Kym Hunter – NC Bar No. 41333 (*pro hac vice* pending)

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