

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

FOREST GUARDIANS,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant.

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**Complaint for Declaratory and Injunctive Relief**

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**I. Introduction**

1. Plaintiff, FOREST GUARDIANS challenges Defendant, UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”), illegal withholding of documents under the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552. Forest Guardians seeks the documents at issue to determine why FWS abruptly reversed its prior decision to protect the Mountain Plover, a rare prairie-dwelling bird, under the Endangered Species Act (“ESA”).

## **II. Jurisdiction, Venue and Administrative Appeal**

2. Forest Guardians alleges that FWS, a federal agency, is violating FOIA by improperly withholding the requested documents. Thus, this Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

3. The agency records at issue are apparently located in Colorado. FWS maintains a Regional Office in this judicial district. Forest Guardians also maintains an office in Denver. A substantial part of the events and omissions giving rise to Forest Guardians claims occurred in Colorado. Thus, venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA venue provision) and 28 U.S.C. § 1391(e) (general federal venue provision).

4. Forest Guardians filed an administrative appeal of FWS' decision to withhold the requested documents. FWS received Forest Guardians' administrative appeal more than 20 working days ago. FWS has not responded to Forest Guardians administrative appeal. Therefore, Forest Guardians has exhausted its administrative remedies. See 5 U.S.C. § 552(a)(6)(C)(i).

## **III. Parties**

5. Plaintiff FOREST GUARDIANS sues on behalf of itself and its members. Forest Guardians is a non-profit corporation based in Santa Fe, New Mexico. It maintains an office in Denver, Colorado. Forest Guardians' mission is to defend and restore native wildlife and ecosystems, educate citizens to support forests, rivers, deserts and grasslands in the western United States, and advocate for biological diversity throughout the southwest.

6. Forest Guardian's approximately 1,400 members are concerned with public forests, rivers, deserts, and grasslands in the southwestern United States and the numerous

imperiled species that reside there, including the Mountain Plover. The members and staff of Forest Guardians regularly recreate and pursue educational and scientific pastimes in the current and potential habitat of the Mountain Plover and seek to observe the Mountain Plover in the wild. Forest Guardians members have concrete plans to continue these pursuits. Forest Guardians employs and has as members several scientists who regularly conduct research activities in the habitat of the Mountain Plover. These scientists seek to protect the habitat of the Mountain Plover. Forest Guardians' members seek to compel FWS, the federal agency charged with protecting biologically imperiled species, to follow the laws designed to protect and recover those species and requires the documents responsive to this FOIA requests to accomplish this goal. FWS' failure to disclose the requested information has and will continue to adversely affect Forest Guardians and its members. The relief requested would redress Forest Guardians' injuries.

7. Defendant, United States Fish and Wildlife Service ("FWS") is a federal agency within the Department of the Interior and which has possession and control of the records at issue.

#### **IV. FACTS**

8. The Mountain Plover ("Mountain Plover" or "Plover") is a ground-dwelling bird that breeds in the short and mixed-grass prairies of the Western United States. Unfortunately, the Mountain Plover population has suffered drastic declines in recent decades. Currently, it is estimated that only 5,000-11,000 birds remain. From 1966 to 1991 the Mountain Plover's population declined more than any other endemic bird species in the region – by over 63%. Most of this decline has resulted from land development, agricultural conversion of the native

prairie habitat that the Plover requires, and the drastic decrease in acreage occupied by prairie dogs in the Plover's breeding range and ground squirrels and other burrowing rodents in the plover's winter range.

9. As a result of the continued loss of Mountain Plover habitat, and the declining population of Mountain Plovers in the West, the Biodiversity Legal Foundation submitted a petition to list the Mountain Plover as a threatened or endangered species under the Endangered Species Act ("ESA"). FWS failed to respond to the petition by the mandatory statutory deadline. Consequently, conservation organizations filed a lawsuit against FWS to require it to make a mandatory 90-day finding on the petition. FWS settled the suit, agreeing to publish a 90-day finding in the Federal Register.

10. Subsequently, under the terms of this settlement, FWS made a positive 90 day finding, which determined that the Biodiversity Legal Foundation's petition to list the Mountain Plover presented substantial scientific or commercial information indicating that the petitioned action may be warranted. However, FWS then failed to make a second mandatory finding, a 12-month finding, on the Mountain Plover petition. Again, conservation organizations filed suit to force FWS to make a final decision. As a result of this second suit, FWS issued a proposed rule to list the Mountain Plover as a threatened species in February 1999. FWS issued a second proposal in December 2002 to list the Mountain Plover as a threatened species with a special rule pertaining to agricultural operations. However, FWS subsequently abruptly reversed course and on September 9, 2003 published a final rule finding that listing the Mountain Plover was not warranted – rejecting the Biodiversity Legal Foundation petition.

11. As a result of this abrupt change in position by FWS and the rejection of the Plover petition conservation organizations began to investigate whether to challenge FWS' decision not to list the Mountain Plover. On September 12, 2003, Dr. Nicole Rosmarino, of Forest Guardians, sent nearly identical FOIA requests to the 8 FWS offices involved in the Plover decision. The FWS offices were: Washington, DC FWS FOIA office, FWS Region 2 in Albuquerque, New Mexico, FWS Region 1 in Portland, Oregon, FWS Region 6 in Denver, FWS Western Colorado Ecological Services Field Office, FWS Wyoming Ecological Services Field Office, FWS Billings Ecological Services Sub-Office and the FWS Carlsbad Office. The eight FOIA requests sought scientific documents and evidence of political influence as well as other materials that would shed light on the basis for FWS' decision not to list the Plover.

12. Despite FOIA's mandate that agencies respond to FOIA requests within twenty working days, 5 U.S.C. § 552(a)(6)(A)(i), FWS failed to provide any of the requested documents. After waiting nearly ten months and making several follow-up inquiries as to the status of its FOIA requests, Forest Guardians filed an initial FOIA lawsuit, Forest Guardians v. United States Fish and Wildlife Service, Civil Action 04-N-1396(OES) (D. Colo.) on July 9, 2004. Approximately 3 days after this lawsuit was filed FWS' counsel contacted Forest Guardians' counsel and provided several boxes of documents responsive to Forest Guardians' FOIA requests. FWS explained these documents and the FOIA response had been neglected in the press of other affairs. Consequently, on August 16, 2004, Forest Guardians dismissed Civil Action 04-N-1396 (OES) voluntarily and without prejudice.

13. Thus once forced by a pending lawsuit FWS did release some of the documents requested to Forest Guardians on July 12, 2004. However, FWS' response to Forest Guardians' FOIA request, the subject of the instant complaint, is deficient in three respects.

14. First, FWS failed to release all severable factual material contained within the documents that it withheld. Rather than providing Forest Guardians with copies of all relevant documents, FWS elected to withhold a number of documents pertaining to the Plover listing decision. FWS cited exemptions to FOIA disclosure requirements as its basis for refusing to release these documents. Specifically, FWS cited FOIA exemptions 5 and 6. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 6 permits 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).

15. While exemptions 5 and 6 thus provide a way for FWS to retain sensitive information, they do not permit FWS to use the mere presence of such information in a document as a way to shroud the entire document in a veil of secrecy. Rather, FWS must disclose reasonably severable factual information contained within documents to which Exemptions 5 and 6 apply. See EPA v. Mink, 410 U.S. 73, 91 (1973) (rejecting the suggestion that all factual matter in a document was exempted from disclosure on the basis of the applicability of a statutory exemption). However, FWS has not done this; instead it has violated FOIA by withholding such documents in their entirety.

16. Second, FWS failed to provide Forest Guardians with an adequate index to the withheld documents. FOIA requires that FWS provide Plaintiff with such an index. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). This index, commonly referred to as a “Vaughn Index,” must specify what documents have been withheld and which FOIA exemptions are claimed as to those documents, and must further “demonstrate a logical basis for the defendant’s claim that the harms against which the statutory exemptions seek to protect will likely occur.” Public Employees for Environmental Responsibility v. EPA, 978 F. Supp. 955, 961 (D. Colo. 1997). See also Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (stating that the Vaughn index must be “sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA”). Here, FWS has failed to provide sufficient detail to enable Forest Guardians to discern why the withheld documents were not released. FWS’ Vaughn index merely lists the number of the FOIA exemption which FWS claims as to each document, usually without any explanation of how or why this exemption applies. FOIA requires more than this, and thus FWS’ failure to provide an adequate index to withheld documents constitutes a violation of FOIA.

17. Finally, FWS failed to conduct an adequate search for documents responsive to Plaintiff’s FOIA request. The index of documents released to Plaintiff indicates that certain documents were to be provided in electronic format, specifically public hearing transcripts from Colorado and the Riverside County Multi-Species Habitat Conservation Plan. However, these electronic files were not included among the documents that FWS provided to Plaintiff. This clearly violates FWS’s duty to make available all records requested under FOIA that are not

subject to a FOIA exemption. See 5 U.S.C. § 552(a)(3) (“each agency, upon any request for records . . . shall make the records promptly available”).

18. Upon receipt of FWS’s response to its FOIA request, Forest Guardians timely filed an appeal with the United States Department of the Interior. FOIA allows agencies twenty business days to respond to such appeals. 5 U.S.C. § 552(a)(6)(ii). More than several months have elapsed since FWS received Forest Guardians’ appeal, but FWS still has taken no action on the appeal. FOIA provides that such a failure to respond constitutes the exhaustion of a requester’s administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i). Thus, Forest Guardians’ FOIA claims are ripe for judicial review.

## **V. Claims**

### **A. First Claim for Relief (Improper Withholding of Factual Material)**

19. Each allegation set forth in the Complaint is incorporated herein by reference.

20. Under FOIA, FWS must release requested agency records unless the information falls within one of the nine FOIA exemptions. 5 U.S.C. § 552(b); 32 C.F.R. § 518.22. FWS bears the burden of proving that an exemption applies. 5 U.S.C. § 552(a)(4)(B); 32 C.F.R. § 518.77.

21. When FWS asserts an exemption to the statutory duty to release a document, FOIA requires that factual material in the document must be disclosed unless such disclosure will compromise the purposes of the exemption. See EPA v. Mink, 410 U.S. at 91.

22. In responding to Forest Guardians’ FOIA request, FWS withheld factual information that was reasonably severable from the FOIA-exempt portions of withheld documents.



**B. Second Claim for Relief  
(Inadequate Vaughn Index)**

23. Each allegation set forth in the Complaint is incorporated herein by reference.

24. Under FOIA, FWS must provide Forest Guardians with a Vaughn index of documents withheld from FOIA disclosure. This index must be sufficient to allow Forest Guardians to draw conclusions as to the validity of the cited exemption's application to a specific document. See Founding Church of Scientology, 603 F.2d at 949.

25. The Vaughn index that FWS provided in responding to Forest Guardians' FOIA request does not provide sufficient information to enable Forest Guardians to discern why the withheld documents might be exempt from disclosure. Thus, FWS has not met its obligations under FOIA.

**C. Third Claim for Relief  
(Inadequate Search)**

26. Each allegation set forth in the Complaint is incorporated herein by reference.

27. FOIA requires that agencies make available all requested records that are not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3).

28. FWS provided Forest Guardians with an index of released documents, which indicates that certain documents were to be provided in electronic format. However, these electronic files were not provided to Forest Guardians.

## **PRAYER FOR RELIEF**

WHEREFORE, Forest Guardians requests that this Court:

- (A) Declare FWS' refusal to segregate and disclose factual material in those documents as to which it asserts a FOIA exemption to be in violation of FOIA;
- (B) Order FWS to make such portions of the requested records available to Forest Guardians within 10 days of entry of a final order;
- (C) Declare the index to withheld documents that FWS provided to Forest Guardians to be in violation of the minimum requirements for such indices imposed by FOIA;
- (D) Order FWS to provide Forest Guardians with a sufficient index to withheld documents within 10 days of entry of a final order;
- (E) Declare FWS's failure to provide copies of the electronic files referenced in the index of released documents to be in violation of the minimum standards for agency document searches imposed by FOIA;
- (F) Order FWS to provide Forest Guardians with copies of the missing electronic files within 10 days of entry of a final order;
- (G) Award the Forest Guardians its costs and reasonable attorneys' fees for this action as provided in 5 U.S.C. § 552(a)(4)(E);
- (H) Issue a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding pursuant to 5 U.S.C. § 552(a)(4)(F);
- (I) Grant such other and further relief as the Court deems just and proper.

Respectfully Submitted,

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James Jay Tutchton (CO Bar # 21138)  
Environmental Law Clinic  
University of Denver College of Law  
2255 E. Evans Ave., Rm. 365M  
Denver, CO 80208  
Phone: (303) 871-6034  
Fax: (303) 871-6991

Robert Ukeiley (CO Bar # 26747)  
Robert Ukeiley, P.S.C.  
Attorney At Law  
433 Chestnut Street  
Berea, KY 40403  
Tel: (859) 986-5402  
Fax: (859) 986-1299  
E-mail: rukeiley@igc.org

Counsel for Plaintiffs

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Plaintiff's Address:

Forest Guardians  
312 Montezuma Ave. Suite A  
Santa Fe, NM 87501