

Talasi B. Brooks (ISB #9712)  
ADVOCATES FOR THE WEST  
P.O. Box 1612  
Boise, ID 83712  
(208)342-7024  
(208)342-8286 (fax)  
[tbrooks@advocateswest.org](mailto:tbrooks@advocateswest.org)

*Attorney for Plaintiff  
Western Watersheds Project*

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

WESTERN WATERSHEDS PROJECT,

Plaintiff,

v.

USDA APHIS WILDLIFE SERVICES,

Defendant.

**No. 1:17-cv-197**

**COMPLAINT**

**INTRODUCTION**

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, to compel the Defendant USDA-APHIS Wildlife Services (Wildlife Services) to produce records that Plaintiff Western Watersheds Project requested several months ago concerning Wildlife Services' operations in Idaho.

2. Western Watersheds Project (WWP), an Idaho not-for-profit corporation, requested the documents and records that are the subject of this lawsuit to further its objective of

informing the public about ways in which Wildlife Services' operations are affecting Idaho's wildlife.

3. WWP requested the subject records in FOIA requests to Wildlife Services that the agency received on December 2, 2016 and March 14, 2017. FOIA required Wildlife Services to make "determinations" on the requests by January 2, 2017 and April 11, 2017, respectively.

4. As of the date of filing this Complaint, and despite communications with Wildlife Services' FOIA liaisons and other personnel, WWP has only received a small fraction of the responsive records requested. The releases WWP has received—all in response to the first request—primarily consist of scientific literature, an Environmental Assessment (EA) produced by Wildlife Services, and management plans written by the Idaho Department of Fish & Game (IDFG).

5. To this date, Wildlife Services has not provided a legally adequate determination upon either FOIA request as required by law.

6. In this civil action WWP seeks a court order (1) declaring that Wildlife Services' failure to timely respond to WWP's requests violates FOIA; and (2) ordering Wildlife Services to immediately produce the requested records.

#### **JURISDICTION AND VENUE**

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

8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391 because Plaintiff WWP's principal place of business is in this district, the records requested concern Wildlife Service's activities in this district, and a substantial part of the events or omissions giving rise to the claims herein occurred in this district.

## **PARTIES**

9. Plaintiff WWP is an Idaho non-profit membership organization dedicated to protecting and restoring watersheds and wildlife in the American West through education, public policy initiatives, and legal advocacy. WWP has over 5,000 members and supporters, including many members who live in Idaho. WWP is headquartered in Hailey, Idaho, and has staff in Boise, Idaho, as well as in other western states.

10. WWP's mission is to protect and restore western watersheds and wildlife through education, public policy initiatives and legal advocacy. WWP is active in seeking to protect and improve the public lands, wildlife, and other natural resources and ecological values of western watersheds, particularly by addressing impacts caused by domestic livestock grazing. WWP has long-standing concerns about Wildlife Services' predator control activities to benefit agricultural producers in Idaho and other states, which cause unnecessary killing and injury to wildlife and ecological degradation.

11. To further its mission, WWP often requests information regarding federal programs and activities through the FOIA. WWP then compiles and analyzes the information it obtains through the requests and disseminates it to the public by: (1) presenting the material to its members and supporters, as well as members of other state and national conservation organizations, through its newsletter and email alerts; (2) presenting the materials at national and regional conferences; (3) participating in other public forums, such as local government hearings; (4) issuing press releases and presenting the information to national, regional and local media; (5) posting the information (in a compiled and more readily understandable form) on WWP's internet web site, which has over 2,000 views each month; and (6) periodically posting information in a compiled and more readily understandable form to a heavily trafficked weblog,

The Wildlife News (<http://www.thewildlifefenews.com>) which receives on average over 7,000 visits each week. The records requested in the FOIA requests at issue here will help WWP inform and educate its members and the public about Wildlife Services' predator control activities, which cause unnecessary killing and injury to wildlife and ecological degradation, as well as cost to the public.

12. WWP and its staff and members are directly injured by Wildlife Services' failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. WWP brings this suit on behalf of itself, its staff and its members.

13. Defendant Wildlife Services is an agency or instrumentality of the United States, within the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). Wildlife Services is charged with conducting "wildlife damage management" activities in compliance with local, state and federal laws and regulations. USDA-APHIS handles the processing of FOIA requests regarding APHIS Wildlife Services' operations, through its Riverdale, Maryland-based FOIA program. The searches for information occur primarily in the Wildlife Services "program office." For purposes of this Complaint, APHIS's Riverdale, Maryland-based FOIA program and Wildlife Service's program office are cumulatively referred to as "Wildlife Services."

#### **THE FREEDOM OF INFORMATION ACT**

14. FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1st Sess. 1965). As the Supreme Court has affirmed, "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB*

*v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Accordingly, “the basic purpose” of FOIA is “to open agency action to the light of public scrutiny.” *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

15. FOIA requires that federal agencies shall determine within twenty (20) working days after receipt of a request whether to comply with it. 5 U.S.C. § 552(a)(6)(A); 7 C.F.R. §§ 1.7, 370.1.

16. The Secretary of Agriculture’s FOIA regulations, which apply to agencies within USDA, including Wildlife Services, *see* 7 C.F.R. § 1.1, provide that the date of receipt of the request is the day it is received by the agency and office responsible for processing FOIA requests, in this case APHIS’s Riverdale, Maryland FOIA office. 7 C.F.R. § 1.13. If an agency seeks clarification of a request to identify the records sought, the date of receipt of the request is the date of receipt of the amended or clarified request. 7 C.F.R. § 1.5(c).

17. In determining whether to comply with a request, the agency must first gather and review the requested documents. *Citizens for Responsibility and Ethics in Wash. v. Federal Election Com’n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (*CREW*).

18. Then, the agency making the determination “must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, 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.” *CREW*, 711 F.3d at 186.

19. The agency “shall immediately notify the [requester] of [its] determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i). “The requirement that the agency notify the requester about administrative appeal rights [] indicates that the ‘determination’ must be substantive, not just a statement of a future intent to produce non-exempt responsive documents.” *CREW*, 711 F.3d at 186.

20. The FOIA provides that “[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(C)(i).

21. An untimely determination or response is a violation of FOIA, regardless of the final outcome of the request. *Gilmore v. U.S. Dept. of Energy*, 33 F.Supp.2d 1184, 1188 (N.D. Cal. 1998), *Ore. Natural Desert Ass’n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D. Or. 2006).

22. In case of specified unusual circumstances, the time limits prescribed in the statute may be extended by written notice to the requester “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). *See also* 7 C.F.R. § 1.16. “Unusual circumstances” means “only to the extent reasonably necessary to the proper processing of the particular requests” the need to search for and collect records from separate offices; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or the need for consultation with another agency. *Id.* § 552(a)(6)(B)(iii).

23. The agency and the requester may agree to an extension of time, but “[a]ny such agreement should be confirmed in writing and should specify clearly the total time agreed upon.” 7 C.F.R. § 1.16(d). “No such notice shall specify a date that would result in an extension for

more than ten working days,” except as provided elsewhere in the statute. 5 U.S.C. § 552(a)(6)(B)(i) (emphasis added).

24. Under “exceptional circumstances,” where the agency is showing diligence in responding to the request, a court may retain jurisdiction and allow the agency additional time to complete its review of the records. 5 U.S.C. § 552(6)(C)(i). The term “exceptional circumstances” does not include delay that results from a predictable agency workload of requests, and the court may consider refusal of the requester to modify the request or timeframe in determining whether exceptional circumstances exist. *Id.* § 552(6)(C)(ii), (iii).

25. “If the agency does not make a ‘determination’ within the relevant statutory time period, the requester may file suit without exhausting administrative appeal remedies.” *CREW*, 711 F.3d at 185; 7 C.F.R. § 1.17.

#### **STATEMENT OF FACTS**

##### **A. FOIA Request 2017-APHIS-966-F: 2016 Idaho WS EA Project File**

26. On December 2, 2016, WWP submitted via electronic mail a FOIA request for the Project File supporting Wildlife Services’ Environmental Assessment for its Predator Damage Management activities in Idaho, issued in November 2016. Wildlife Services received the request on December 2, 2016 and assigned it No. 2017-APHIS-966-F. WWP included a fee waiver request for the requested records. The estimated date of completion for the request was January 2, 2017.

27. On December 15, 2016, the FOIA liaison assigned to the request, Ms. Janice Shipman, contacted counsel for WWP, purportedly regarding narrowing the scope of the request.

28. Counsel for WWP conferred with Ms. Shipman, along with two other FOIA personnel, Mr. Gerry Brooks (FOIA office), and Mr. Stephen Kendrot (program office), on

December 19, 2016. However, the officers did not ask to narrow the request, they simply asked for an extension for response due to the holidays. Counsel for WWP agreed and noted that the FOIA office could speed its response by simply releasing responsive public documents like Environmental Assessments and scientific literature without first reviewing and redacting them. The program office stated it would complete its search by January 13, 2017, with the records to be released by the FOIA office by January 27, 2017. The FOIA office stated it would produce responsive documents on a rolling basis, and WWP agreed to revisit the estimated date of completion with Wildlife Services once it received responsive records from the program office.

29. On January 13, 2017, after counsel for WWP further conferred with Mr. Brooks, Ms. Shipman informed WWP its request for a fee waiver had been granted. Mr. Brooks also informed WWP that the FOIA office had not received responsive records from the program office.

30. On January 23, 2017, Mr. Brooks informed counsel for WWP via email that the FOIA office still had not received responsive records from the program office. Counsel for WWP informed Mr. Brooks that WWP would have to consider legal actions if the records were not timely produced.

31. On January 23, 2017, Ms. Shipman mailed WWP a “first partial response,” consisting of several email communications, some of which were fully or partially redacted and labeled with the number of the exemption from disclosure claimed.

32. On February 2, 2017, Ms. Shipman informed WWP that 587 pages of emails between the U.S. Fish and Wildlife Services (FWS) and APHIS had been referred to FWS for “consult” and that they would be released once received back from FWS.

33. On March 3, 2017, Wildlife Services sent WWP a “second partial response,” which mostly consisted of scientific literature, as well as a paper copy of the Federal Land Policy and Management Act.

34. On March 23, 2017, Wildlife Services released a “third partial response” to the FOIA request—consisting of an EA regarding predator damage management in Texas.

35. On April 4, 2017, Wildlife Services mailed a fourth partial response to WWP primarily consisting of IDFG management plans and scientific literature.

36. On April 4, 2017, Ms. Shipman also informed WWP that the records included 71,937 pages of emails that needed to be reviewed and proposed a schedule whereby Wildlife Services would release 500 pages monthly, beginning on April 28, 2017.

37. WWP refused to agree to this schedule because at that rate, the response would take 12 years to complete. In response, Ms. Shipman, mentioning her workload, proposed providing 2500 pages a month, beginning May 26, 2017, which would give an estimated completion date in September 2019. WWP responded that such a timeline was still too lengthy. Ms. Shipman did not respond and WWP now files suit.

38. Wildlife Services has never informed WWP of the scope of the documents it plans to produce and withhold, or the basis for projected withholdings with respect to this request. Nor has Wildlife Services ever informed WWP of its right to appeal. Wildlife Services’ timeframe for response far exceeds the ten additional days for response Wildlife Services may request under the statute, and WWP’s communications with Ms. Shipman suggest that she did not have the full set of responsive records until April 4, 2017, four months after the response was due.

39. Wildlife Services has never made the legally-required determination on WWP's request and has stated in letters that it will notify WWP of its appeal rights when Wildlife Services has completed its piecemeal production of records.

**B. FOIA Request Regarding 2016-17 Work Plans, CSAs, Summary Reports**

40. On March 14, 2017, WWP sent Wildlife Services a FOIA request by email, requesting Wildlife Services' 2016-17 annual work plans, cooperative service agreements (CSAs), and summary reports. On March 16, 2017, after a query from WWP, Wildlife Services acknowledged receiving the request on March 14, 2017, and assigned it a "due date" of April 11, 2017. The request was assigned to FOIA liaison Ms. Rasheena Spears.

41. WWP received no further communications from Wildlife Services regarding this request.

42. On April 12, 2017, counsel for WWP contacted Ms. Spears to inquire whether responsive records had been mailed to WWP and, if not, when they could be expected. On May 1, 2017, counsel for WWP again contacted Ms. Spears, notifying her that Wildlife Services had violated the FOIA deadline provision and that WWP would sue if the records were not promptly released.

43. To date, WWP has received no response to either query, and has not received any responsive records.

44. Wildlife Services never requested, and WWP never granted, an extension of the time for response with respect to this request. Wildlife Services has never informed WWP of the scope of the documents it plans to produce and withhold, or the basis for projected withholdings. Wildlife Services has not informed WWP of whether its request for a fee waiver has been

granted. Nor has Wildlife Services ever informed WWP of its right to appeal from Wildlife Services' determination.

**Relevant Facts With Respect to Both Requests**

45. Wildlife Services has not rendered a timely and adequate determination with respect to either request.

46. Wildlife Services has not informed WWP with regards to either request whether it expects to fully comply with the requests, which documents might be withheld and why, or of WWP's right to appeal.

47. Wildlife Services has not fully responded to either request.

48. Upon information and belief, Wildlife Services' response has been hampered because the Wildlife Services program office has not released records to the FOIA office in time for the FOIA office to render a determination by the statutory deadline.

49. Upon information and belief, Wildlife Services undertakes "double review" of these records, whereby the Wildlife Services program office first reviews the records and they are then reviewed a second time by the FOIA office. This system impedes timely release of the records.

50. Wildlife Services' failure to timely and fully respond to WWP's requests frustrates WWP's pursuit of its objective to educate its members, the public, and decision makers about Wildlife Services' predator control activities to benefit agricultural producers in Idaho, which cause unnecessary killing and injury to wildlife and ecological degradation.

**FIRST CLAIM FOR RELIEF**

**Violations of FOIA—Failure to timely respond to 2017-APHIS-966-F.**

51. WWP realleges and incorporates by reference all preceding paragraphs.

52. Wildlife Services has violated and continues to violate the FOIA and USDA's FOIA regulations by failing to provide WWP with a timely and full response to the FOIA request described above, including but not limited to for the following reasons.

53. WWP has a statutory right to the records sought and there is no legal basis for Wildlife Services to assert that any of FOIA's nine disclosure exemptions apply to prevent their disclosure. 5 U.S.C. § 552(b)(1)–(9). Defendants' failure to produce the documents is therefore a constructive denial and unlawful withholding.

54. WWP has a statutory right to have Wildlife Services process the request in a manner which complies with FOIA. WWP's rights in this regard were violated when Wildlife Services unlawfully delayed the response to the request beyond the determination deadlines imposed by FOIA. 5 U.S.C. § 552(a)(6)(A)(i), (ii).

55. Wildlife Services has failed to make an adequate and timely determination with respect to WWP's FOIA Request 2017-APHIS-966-F because the statutory 20 days for response have passed and Wildlife Services has failed to inform WWP whether it plans to comply with the request; when WWP may anticipate to receive a full response; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

56. Wildlife Services has violated the statutory deadline because it failed to make a timely determination on the request. 7 C.F.R. § 1.7(c).

57. Wildlife Services has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

58. Wildlife Services is improperly withholding records from WWP in violation of FOIA.

59. Unless enjoined and made subject to a declaration of WWP's legal rights by this Court, Wildlife Services will continue to violate the rights of WWP to receive public records under the FOIA.

**SECOND CLAIM FOR RELIEF**

**Violation of FOIA—Failure to timely respond to FOIA Request 2017-APHIS-02748-F.**

60. WWP realleges and incorporates by reference all preceding paragraphs.

61. Wildlife Services has violated and continues to violate the FOIA and USDA's FOIA regulations by failing to provide WWP with a timely and full response to the FOIA request described above, including but not limited to for the following reasons.

62. WWP has a statutory right to the records sought and there is no legal basis for Wildlife Services to assert that any of FOIA's nine disclosure exemptions apply to prevent their disclosure. 5 U.S.C. § 552(b)(1)–(9). Defendants' failure to produce the documents is therefore a constructive denial and unlawful withholding.

63. WWP has a statutory right to have Wildlife Services process the request in a manner which complies with FOIA. WWP's rights in this regard were violated when Wildlife Services unlawfully delayed the response to the request beyond the determination deadlines imposed by FOIA. 5 U.S.C. § 552(a)(6)(A)(i), (ii).

64. Wildlife Services has failed to make an adequate and timely determination with respect to WWP's FOIA Request 2017-APHIS-02748-F because the statutory 20 days for response have passed and Wildlife Services has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate to receive responsive documents; and if not, the reasons for which it is

denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

65. Wildlife Services has failed to notify WWP of any “unusual circumstances” in a notice that also set forth a date on which the determination was expected to be dispatched within ten working days of the statutory 20-day deadline, as required by FOIA. 5 U.S.C. § 552(a)(6)(B)(i), 43 C.F.R. § 2.13.

66. Wildlife Services has failed to provide WWP an opportunity to limit the scope of the request so that it might have been processed within the statutory time limit, as required by FOIA. 5 U.S.C. § 552(a)(6)(B)(ii).

67. Wildlife Services has failed to provide an estimated date on which it will complete the request, as required by FOIA. *Id.* § 552(a)(7)(B)(ii).

68. Wildlife Services has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

69. Wildlife Services is improperly withholding records from WWP in violation of FOIA.

70. Unless enjoined and made subject to a declaration of WWP’s legal rights by this Court, Wildlife Services will continue to violate the rights of WWP to receive public records under the FOIA.

#### **PRAYER FOR RELIEF**

WHEREFORE, WWP respectfully prays that this Court:

A. Declare that Wildlife Services’ failure to provide WWP with timely and full responses to WWP’s FOIA requests described above, including its failure to make timely

determinations and produce all records requested, is in violation of the FOIA, 5 U.S.C. § 552(a)(6).

B. Order Wildlife Services to immediately and fully provide WWP with any and all remaining agency records responsive to WWP's FOIA requests described above, 5 U.S.C. § 552(a)(4)(B), including any and all such records that would be responsive as of the date of such court order.

C. Award WWP its reasonable costs, litigation expenses, and attorney's fees incurred in prosecuting this civil action under the FOIA, 5 U.S.C. § 552(a)(4)(E), and/or all other applicable authorities.

D. Grant such other and further relief as the Court deems just and proper.

Dated: May 5, 2017

Respectfully submitted,

s/ Talasi B. Brooks  
Talasi B. Brooks (ISB #9712)  
ADVOCATES FOR THE WEST  
P.O. Box 1612  
Boise, ID 83712  
(208)342-7024  
(208)342-8286 (fax)  
[tbrooks@advocateswest.org](mailto:tbrooks@advocateswest.org)

Attorney for Plaintiff