



Tom Buchele  
Managing Attorney and Clinical Professor

Earthrise Law Center at Lewis & Clark Law School  
10101 S Terwilliger Blvd.  
Portland, OR 97219-7799  
*phone* 503-768-6736  
*fax* 503-768-6642  
tbuchele@lclark.edu  
earthriselaw.org

August 13, 2021

Terence R. Peck, FOIA Coordinator  
Ozark-St. Francis National Forest  
100 Reserve Street  
Hot Springs, AZ 71901  
Phone: (501) 321-5272  
Email: Terence.r.peck@usda.gov

**RE: Freedom of Information Act (FOIA) request pursuant to 5 U.S.C. § 552, sent via email to Terence.r.peck@usda.gov, and via U.S. Certified Mail, tracking No. 7018 3090 0002 3430 4877**

Dear Mr. Peck,

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, the Buffalo River Watershed Alliance ("BRWA") hereby formally requests from the Forest Service ("USFS") copies of specific records and/or reports, relating to the discovery and analysis of a Indiana bat maternity colony in the Robert's Gap Project ("Project") area. BRWA requests the following records:

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

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

## **FEE WAIVER REQUEST**

Additionally, BRWA requests that our organization receive a fee waiver pursuant to FOIA and the USFS's implementing regulations for all copy, clerical, and other fees associated with this request. The Freedom of Information Act requires that: "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). While a FOIA requester bears the initial burden of showing entitlement to a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9<sup>th</sup> Cir. 1987), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, as the Ninth Circuit has held a requester meets this burden in situations in which "[t]hey identified why they wanted the [requested information], what they intended to do with it, to whom they planned on distributing it..." *Friends of the Coast Fork v. U.S. Dept. of the Interior*, 110 F. 3d 53, 55 (9<sup>th</sup> Cir. 1997).

BRWA is a 501(c)(3) non-profit organization. BRWA's mission is to preserve and protect the pristine water and air quality of the Buffalo National River through environmental advocacy and public engagement. Its supporters, board members, and staff hike, canoe, camp, fish, swim, bird watch, view wildlife, photograph scenery and wildlife, and engage in other vocational, educational, scientific observation, and recreational activities within the Buffalo National River watershed. BRWA also participates in agency decision-making processes, and has demonstrated the ability to use requested information in commentary to agencies and in public education and outreach through, among other means, educational materials presented at public events, e-mail alerts, newsletters, social media, website and blog postings, and volunteer-based field checking and water quality monitoring. BRWA is requesting the information above to help advance these efforts and to improve our understanding of Forest Service management in the Buffalo National River watershed. BRWA will use the requested records to benefit the general public and may incorporate information provided by the Forest Service in publicly disseminated documents, such as our website, volunteer meetings and trainings, and public workshops. Moreover, BRWA uses requested information to ensure agency compliance with statutes such as the Endangered Species Act, Clean Water Act, NEPA, and NFMA, as well to

assess the cumulative impacts of projects. BRWA is a 501(c)(3) non-profit corporation and will use the requested documents for non-commercial public interest purposes.

The following information is provided to address the factors outlined in the Forest Service's FOIA regulations at 7 C.F.R. § 1.12(p) that the agency is directed to consider when granting a fee waiver request:

- 7 C.F.R. § 1.12(p)(3)(i): whether the subject of the request “[concerns] identifiable operations or activities of the Federal government[.]” BRWA’s fee waiver request pertains to the Forest Service’s role in management of forests on federal lands, and is relevant to numerous federal laws.
- 7 C.F.R. § 1.12(p)(3)(ii): whether disclosure of the requested records is “meaningfully informative about government operations or activities to be ‘likely to contribute’ to an increased public understanding of those operations or activities.” BRWA will use this information, which it has not been able to find publicly, to aid in its understanding of past, current, and proposed future management impacts in the area the information concerns.
- 7 C.F.R. § 1.12(p)(3)(iii): whether the information will contribute “to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the requester’s individual understanding.” BRWA’s fee waiver request serves the public in myriad ways. First, there is great public concern and controversy over the management of forests on public land, particularly in regard to timber sales. BRWA will examine the requested information to help ensure adequate protection of public resources as well as compliance with relevant and applicable environmental laws. BRWA’s conclusions will be shared with USFS and will be made available to a broad audience; BRWA’s website acts as a repository for information relevant to the condition and protection of the Buffalo National River and surrounding public lands, and BRWA also shares information with the public through email alerts, social media, collaborative group work, and public events. These efforts contribute “significantly” to the public’s understanding of agency actions on public lands in Arkansas. *See id.* at § 1.12(p)(3)(iv).
- 7 C.F.R. § § 1.12(p)(4)(i) and (ii): whether “[c]omponents [have identified] any commercial interest of the requester”, for “a waiver [...] is justified where the public interest is greater than any identified commercial interest in disclosure.” BRWA has no commercial interest or economic interest in the requested information. Its interest is in protecting the water and air quality in the Buffalo River watershed through participating in agency decision-making processes and educating the public about agency actions that impact public lands. It is interested in ensuring that USFS comply with state and national laws designed to protect the natural legacy of our public lands. The requested information is crucial to serving the goals of public education and government accountability.

In considering whether BRWA meets the fee-waiver criteria, it is vital that the Forest Service remember that the FOIA carries a presumption of disclosure, and that the FOIA fee-waiver amendments of 1986 were designed specifically to facilitate access to government records for non-profit, public interest groups such as BRWA without the payment of fees. The Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of fee

waivers for noncommercial requesters.” *Carlucci*, 835 F.2d at 1284 (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

Thank you in advance for your time and attention in this matter, and we look forward to hearing from you shortly. For BRWA, time is of the essence in obtaining the requested documents. Accordingly, and to the extent it is manageable for the Forest Service, I ask for expedited processing of this FOIA request (although this is not a formal request for expedited processing under the Forest Service’s regulations). As Earthrise Law Center is representing BRWA for purposes of this FOIA request, if you have any questions, please feel free to contact me at [tbuchele@lclark.edu](mailto:tbuchele@lclark.edu), or by phone at (503) 768-6736.

Sincerely,



Tom Buchele  
Counsel for Buffalo River  
Watershed Alliance