

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

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, an agency of the United States, and
ANIMAL AND PLANT HEALTH INSPECTION SERVICE, an agency of the United States,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. When the federal government makes controversial decisions that have disastrous results, oversight and accountability are important to ensure that agencies do not repeat the same poor decisions. The Freedom of Information Act (FOIA) plays a vital role in making such oversight and accountability possible.

2. In 2020 and 2021, Defendants National Marine Fisheries Service (NMFS) and Animal and Plant Health Inspection Service (APHIS) (collectively Defendants) made a fateful decision to allow Mystic Aquarium to import five beluga whales from Canada during a pandemic. Plaintiff Friends of Animals and many others warned NMFS of the many dangers this move presented to the beluga whales. NMFS arrogantly and naively dismissed the public's concerns.

3. Sadly, the fears of Friends of Animals and others were proven to have been prescient. Within nine months of their transfer to Mystic Aquarium, two of the young beluga whales were dead and another was critically ill. NMFS had originally authorized the permit to import the belugas on the dubious grounds of scientific research (the “Permit”); yet in the year and a half since the death of the first beluga, NMFS has halted all research.

4. After the tragic and avoidable deaths of the two beluga whales, Friends of Animals submitted FOIA requests to the Defendants to better understand what had happened, learn what the Defendants were doing about it, and to help inform proposals to amend the lax laws and regulations that allowed this import to occur.

5. The Defendants have thwarted effective oversight of their decisions and regulation of the Permit by largely refusing to provide documents responsive to Friends of Animals’ FOIA requests. They have done so on the purported basis that the records are protected by various FOIA exemptions, but have refused to offer anything but the most conclusory explanations of why the exemptions purportedly apply. And Defendants have refused to even describe the documents that they are withholding.

6. Defendants continued to withhold records and refuse to provide specific reasons why any FOIA exemptions applied even after Friends of Animals pointed out Defendants’ errors when it submitted appeals of Defendants’ withholdings.

7. Defendants violated FOIA by refusing to release information that Plaintiff is legally entitled to. Defendants also violated FOIA by failing to comply with the statutory mandates and deadlines imposed by FOIA.

8. Defendants’ obstinance is in plain violation of both the letter and the spirit of FOIA.

9. To remedy Defendants' violation of law, Plaintiff seeks declaratory and injunctive relief requiring Defendants to comply with FOIA and promptly provide the requested material.

JURISDICTION AND VENUE

10. The 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).

11. This Court has authority to grant Plaintiff's requested relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 and 5 U.S.C. § 552(a)(4)(B) (FOIA). This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

12. Defendants have not remedied their violations of FOIA by releasing the unlawfully withheld documents. Therefore, an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

13. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the district where the complainant resides or has a principle place of business. Friends of Animals' Wildlife Law Program resides in Colorado and has a principal place of business in Centennial, Colorado. Venue is also proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

14. Plaintiff FRIENDS OF ANIMALS is a not-for-profit international advocacy organization incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful

view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine *Action Line*, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife so that they can live unfettered in their natural habitats. Defendants' refusal to comply with FOIA injures Friends of Animals' members and staff by preventing them from using the requested information to advocate for their mission, and Defendants' failure to release the wrongfully withheld documents further prolongs these injuries.

15. Defendant the NATIONAL MARINE FISHERIES SERVICE (NMFS) is a federal agency within the Department of Commerce. NMFS has a duty to provide public access to documents in its possession consistent with the requirements of FOIA.

16. Defendant ANIMAL PLANT AND HEALTH INSPECTION SERVICE (APHIS) is a federal agency within the Department of Agriculture. APHIS has a duty to provide public access to documents in its possession consistent with the requirements of FOIA.

LEGAL FRAMEWORK: FREEDOM OF INFORMATION ACT

17. Congress enacted FOIA to ensure public access to federal government records. FOIA carries a presumption of disclosure. *Dep't of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires federal agencies to promptly disclose their records, unless the agency can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The government—not the public—has the burden to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

18. When a requested document contains information that falls under one of the exemptions, FOIA still requires an agency to release all non-exempt portions of the record.

5 U.S.C. § 552(b). FOIA expressly mandates that agencies must disclose any “reasonably segregable portion” to a requester after the redaction of the parts that are exempt. *Id.* The government cannot withhold documents in their entirety “unless it would be impossible to redact the portions of the documents that reveal deliberations.” *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009) (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

19. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such 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).

20. When a party files an administrative appeal, the agency must respond to the appeal within twenty workdays. *Id.* at § 552(a)(6)(A)(ii); *see* 43 C.F.R. § 2.62.

21. An agency’s failure to comply with any timing requirements is deemed constructive denial and satisfies the requester’s requirement to exhaust administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i); *see* 43 C.F.R. § 2.62.

22. FOIA provides this Court with jurisdiction to enjoin agencies “from withholding agency records and to order the production of any such records improperly withheld from” the requester. 5 U.S.C. § 552(a)(4)(B).

23. If an agency withholds any information, it bears the burden of proving that one of the exemptions applies. *Id.* “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dep’t. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). The agency cannot rely on

vague descriptions or assertions that do not provide the requester the “necessary functional description of the documents at issue.” *Campaign for Responsible Transplantation v. U.S. Food & Drug Admin.*, 219 F. Supp. 2d 106, 112 (D.D.C. 2002) (citing *Oglesby*, 79 F.3d at 1184).

24. Exemption 4 allows the government to exclude “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

25. Exemption 5 permits withholding of “inter-agency or intra-agency memorandums or letters that would not be available by law to a party than an agency in litigation with the agency” *Id.* at § 552(b)(5).

26. Exemption 7(A) authorizes the withholding of information that “could reasonably be expected to interfere with enforcement proceedings.” *Id.* at § 552(b)(7).

27. Even if a document falls within an exemption under FOIA, an agency has the authority to construe the exemptions as discretionary rather than mandatory when no harm would result from disclosure of the requested information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979).

FACTUAL BACKGROUND

A. NMFS grants the Permit, and two beluga whales die within months of import.

28. As early as 2015, Mystic Aquarium’s representatives were lobbying NMFS and urging it to allow Mystic Aquarium to import beluga whales from Canada.

29. In 2017, one of Mystic Aquarium’s lobbyists sent a letter to then-Secretary of Commerce Wilbur Ross, explaining that “some obscure regulation” stood in the way of Mystic Aquarium acquiring the belugas, which he hoped “Wilbur,” as the lobbyist addressed the then-Secretary, “can deal with quickly.”

30. Mystic Aquarium’s lobbyist’s letter paid off, as Secretary Ross met with the CEOs of Mystic Aquarium and Georgia Aquarium the following month.

31. A month after the meeting with Secretary Ross, another of Mystic Aquarium’s lobbyists emailed NOAA, mentioning in the email that Secretary Ross “thought a permit would be a great idea.”

32. On October 1, 2019, NMFS published in the Federal Register a notice that Mystic Aquarium had submitted an application to import five beluga whales from Marineland of Canada (the “Application”).

33. The Application was controversial, attracting more than 9,500 public comments.

34. Among those urging NMFS to deny the Application were scientific researchers, nongovernmental organizations, a United States Senator, and a member of Canada’s House of Commons.

35. Among the concerns that commenters, including Friends of Animals, raised was that the proposed transfer to Mystic Aquarium needlessly risked the health and lives of the young beluga whales.

36. Another concern raised by Friends of Animals and other commenters was that the Application appeared to be an inappropriate attempt to use scientific research as a loophole to evade the Marine Mammal Protection Act’s (MMPA) prohibition on the import of cetaceans from a population that NMFS had designated as a depleted population stock.

37. Prior to the Application, never before had NMFS granted a scientific research permit to import cetaceans from a depleted population stock.

38. NMFS conducted an environmental assessment (EA) in connection with the Application and concluded that the proposed import would not significantly impact the environment, and thus NMFS did not conduct an environmental impact statement (EIS).

39. NMFS did not mention the COVID-19 pandemic in the EA that it conducted for the Application.

40. NMFS offered the public no opportunity to comment on the EA it conducted for the Application.

41. NMFS did not open the public comment period back up or otherwise offer the public an opportunity to comment on the risks the COVID-19 pandemic posed to the proposed transfer of the beluga whales.

42. On August 7, 2020, NMFS approved the Application and granted the Permit.

43. Mystic Aquarium represented to NMFS that it would only import healthy whales from Marineland.

44. In December 2020, Mystic Aquarium requested a minor amendment to the Permit in order to replace three beluga whales “with health issues” with three other healthy beluga whales.

45. NMFS approved the minor amendment the Permit and allowed the substitution of the three beluga whales.

46. Friends of Animals sued NMFS in 2020 in federal court in Connecticut in an effort to vacate the Permit and prevent the unnecessarily risky transfer of the five beluga whales.

47. The court ultimately ruled in favor of NMFS and against Friends of Animals on its legal claims.

48. Mystic Aquarium transported the five beluga whales from Marineland in Canada to its facility in Mystic, Connecticut, on May 14 and 15, 2021.

49. On August 6, 2021, less than three months after the import, the one male beluga whale Mystic Aquarium had imported from Marineland and one of the three beluga whales Mystic Aquarium had substituted in December, Havok, died.

50. Havok was only six years old when he died.

51. On February 11, 2022, Havana, one of the female beluga whales Mystic Aquarium had imported from Marineland, died.

52. Havana was only six years old when she died.

53. In 2021 and 2022, Mystic revealed that a third beluga whale it had imported from Marineland (and another one of the beluga whales that had been substituted for a beluga whale with health issues), Jetta, was gravely ill.

54. Since Havok's death, NMFS has not allowed Mystic Aquarium to resume research on the beluga whales it imported from Marineland.

55. Defendants have not released any reports or investigations that they have performed about the health or deaths of the beluga whales at Mystic Aquarium.

B. Friends of Animals submits a FOIA request to NMFS.

56. On February 25, 2022, Friends of Animals submitted a FOIA request to NMFS for documents relating to the deaths of the beluga whales at Mystic Aquarium (the "NMFS Request").

57. NMFS assigned the NMFS Request the control number DOC-NOAA 2022-000851.

58. In a letter dated April 7, 2022, NMFS informed Friends of Animals that it had located "potential confidential commercial information provided by Mystic Aquarium that

is responsive to your request.” NMFS advised that it had provided Mystic Aquarium with an opportunity to object to disclosure and was awaiting its response.

59. NMFS requested an extension to provide responsive records by May 27, 2022, which Friends of Animals granted.

60. NMFS provided interim responses of 91 records on April 12, 2022, 47 records on May 6, 2022, 181 records on June 17, 2022, and 68 records on July 18, 2022.

61. NMFS provided its final response to the NMFS Request on August 30, 2022 (“NMFS’s Final Response”).

62. In NMFS’s Final Response, the agency explained that it was partially withholding 5 records pursuant to Exemption 4.

63. NMFS’s full explanation for why the records were protected by Exemption 4 was the following: “The information is commercial or financial, obtained from a person, and treated as privileged or confidential.”

64. In NMFS’s Final Response, the agency also explained that it was fully withholding 129 records pursuant to Exemption 5.

65. NMFS’s full explanation for why the records were protected by Exemption 5 was the following: “The records are exempted from disclosure through the Deliberative Process privilege and contain deliberative predecisional communications or materials.”

66. In NMFS’s Final Response, the agency also explained that it had referred 333 records to APHIS, and that Friends of Animals could expect a direct response from APHIS.

67. NMFS did not produce an index describing each of the documents it withheld and specifying the reasons why each document fell within the claimed exemption, commonly known as a Vaughn index. *See Vaughn v. Rosen*, 484 F.2d 820, 827-29 (D.C. Cir. 1973).

68. Instead, NMFS only provided conclusory statements with regard to the redacted information, claiming the information fell within FOIA Exemptions 4 and 5.

69. NMFS produced such little information regarding the withheld documents that Friends of Animals could not determine why a particular document was prepared, what the document discusses, or whether the record should be protected from disclosure.

70. On November 22, 2022, Friends of Animals filed a timely administrative FOIA appeal within 90 calendar days of NMFS's Final Response (the "NMFS Appeal").

71. NMFS did not respond to the appeal within FOIA's statutorily mandated twenty workday time limit.

72. As of the date of this Complaint, NMFS has still not responded to Friends of Animals' NMFS Appeal.

73. Friends of Animals has fully exhausted its administrative remedies regarding the NMFS Request, as administrative remedies are deemed exhausted whenever an agency failed to comply with the applicable time limits, as stated by 5 U.S.C. § 552(a)(6)(C).

C. APHIS Request

74. On February 25, 2022, Friends of Animals submitted a FOIA request to APHIS for records relating to the deaths of beluga whales at Mystic Aquarium, including communications with Mystic Aquarium, documents relating to inspections of Mystic Aquarium, and documents relating to the health of the five beluga whales that Mystic Aquarium imported in 2021 (the "APHIS Request").

75. APHIS assigned the APHIS Request number 2022-APHIS-02339-F.

76. On June 9, 2022, APHIS provided its response to the APHIS Request ("APHIS's Response").

77. In APHIS's Response, APHIS indicated that there were approximately 1,400 pages of records responsive to the APHIS Request.

78. However, APHIS indicated that it was withholding all of these records pursuant to Exemption 7(A) because they "are part of an ongoing enforcement matter."

79. APHIS did not produce an index describing the records it withheld and specifying the reasons why the records fell within the claimed exemption, commonly known as a Vaughn index.

80. Instead, APHIS only provided conclusory statements with regard to the withheld records, claiming the information fell within FOIA Exemption 7(A) because it is related to an ongoing investigation.

81. APHIS produced such little information regarding the withheld documents that Friends of Animals could not determine why a particular document was prepared, what the document discusses, or whether it should be protected from disclosure.

82. Friends of Animals filed a timely administrative FOIA appeal of APHIS's Response on August 15, 2022 (the "APHIS Appeal").

83. APHIS responded to the APHIS Appeal on September 29, 2022.

84. APHIS granted the APHIS Appeal in part and denied it in part.

85. The only documents that APHIS provided in response to the APHIS Appeal were publicly available inspection reports, for which APHIS directed Plaintiff to APHIS's website.

86. Other than those publicly available inspection reports, APHIS provided no other records in response to the APHIS Appeal.

87. APHIS notified Friends of Animals that it considered the APHIS Appeal closed and intended to take no further action, advising Friends of Animals that it could seek judicial review.

88. Friends of Animals has fully exhausted its administrative remedies regarding the APHIS Request.

**CLAIM FOR RELIEF
(Freedom of Information Act)**

89. Plaintiff herein incorporates all information and allegations contained in the preceding paragraphs.

90. Defendants have a legal duty under FOIA to provide non-exempt documents that are responsive to Plaintiff's FOIA requests.

91. Defendants failed to provide all documents responsive to Plaintiff's FOIA requests.

92. Instead, Defendants withheld or redacted documents, claiming that they were protected from disclosure under FOIA pursuant to Exemptions 4, 5, and 7(A).

93. Defendants improperly invoked the FOIA exemptions, in some cases applying exemptions when no such exemptions should have been applied at all and in other cases applying exemptions too broadly and not releasing information that they were obligated to.

94. Defendants failed to sufficiently describe the documents withheld and failed to sufficiently explain why they had invoked FOIA exemptions and in doing so did not justify that their withholdings were proper.

95. Plaintiff appealed Defendants' decisions to redact information and withhold documents before the statutory deadlines elapsed.

96. In response to Plaintiff's FOIA appeals, Defendants did not release all of the information and documents requested.

97. NMFS's failure to respond to Plaintiff's NMFS Appeal at all within the statutory timeline violated FOIA.

98. Plaintiff exhausted its administrative remedies by filing the APHIS Appeal and the NMFS Appeal.

99. Defendants did not meet their burden to demonstrate that their withholdings properly fit into recognized FOIA exemptions.

100. Defendants' failure to disclose responsive documents is a violation of FOIA.

PRAYER FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated FOIA by failing to timely respond to Friends of Animals' FOIA appeals;
2. Declare that Defendants violated FOIA by withholding responsive documents from Friends of Animals;
3. Order that Defendants disclose all the records requested in their entirety and challenged in Friends of Animals' FOIA appeals by a certain date;
4. Award Friends of Animals its costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Friends of Animals any other relief that the Court deems just and proper.

Dated: March 30, 2023

Respectfully Submitted,

/s/ Stephen R. Hernick

Stephen R. Hernick
Friends of Animals Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
(720) 949-7791
shernick@friendsofanimals.org

Attorney for Plaintiff Friends of Animals