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

IDAHO CONSERVATION LEAGUE,

Plaintiff,

v.

U.S. AIR FORCE,

Defendant.

No. 1:23-cv-440

COMPLAINT

INTRODUCTION

1. Plaintiff Idaho Conservation League (“ICL”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel Defendant U.S. Air Force to approve ICL’s fee waiver request and produce records sought in ICL’s May 15, 2023 FOIA request related to the Air Force’s “Airspace Optimization for Readiness, Mountain Home Air Force Base” proposal to expand and intensify military aircraft trainings over the Owyhee Canyonlands of Idaho, Oregon, and Nevada.

2. The Air Force’s “Airspace Optimization” proposal would expand and intensify military training overflights from the Mountain Home Air Force Base by lowering supersonic and subsonic fighter training exercises, including over Wilderness Areas, Wild and Scenic

Rivers, and key habitats for greater sage-grouse and bighorn sheep, and impact the quiet and solitude of the Owyhee Canyonlands region that is prized by ICL and its members and staff. For these and other reasons, ICL is deeply concerned about the impacts of the Airspace Optimization proposal on the environment, natural resources, wildlife, communities, recreation values, its 30,000 supporters, and other members of the public.

3. To better understand these impacts, ICL submitted a FOIA request for records about the Air Force's preparation of an Environmental Impact Statement ("EIS") that was released to the public in March 2023. As part of this request, ICL asked for a waiver of fees under FOIA because the nonprofit organization sought the records to further the substantial public interest in the Airspace Optimization proposal and shed light on how it will affect the environment and people who use and enjoy the Owyhee Canyonlands region.

4. Although the Air Force initially agreed with ICL and granted a fee waiver, the Air Force subsequently reversed course, claiming that ICL has a commercial interest in the records and must pay a hefty bill to obtain them. The Air Force relied on unsupported assumptions and unlawful reasons to deny this fee waiver request given that ICL's request seeks to further the public interest in protecting the Owyhee Canyonlands and not to benefit any commercial interests.

5. As a result, the Air Force has impeded ICL's access to public records about a matter of substantial public importance for months, in violation of FOIA's requirement that the Air Force produce such records promptly and without charge for a public interest organization like ICL.

6. ICL requests that the Court correct the Air Force's unlawful fee waiver denial and order the Air Force to promptly produce all requested documents.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and under 28 U.S.C. § 1331, because this action arises under the laws of the United States, including FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201.

8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because Plaintiff ICL's principal place of business is in this district and at least some of the records are, on information and belief, located in the District of Idaho at the Air Force's Mountain Home Air Force Base.

9. The federal government waived sovereign immunity in this action pursuant to 5 U.S.C. § 552(a)(4)(B).

10. Plaintiff ICL submitted a timely administrative appeal of the Air Force's fee waiver denial, but the Air Force did not respond within twenty working days as required. 5 U.S.C. § 552(a)(6)(A)(ii). ICL thus exhausted all administrative remedies as required under FOIA, 5 U.S.C. § 552(a)(6)(C)(i), prior to bringing this action.

PARTIES

11. Plaintiff ICL is a nonprofit organization dedicated to protecting and restoring Idaho's public lands and the native plants, fish, and wildlife that depend on them. ICL represents over 30,000 supporters who are interested in protecting the land, water, fish, and wildlife in Idaho. ICL is headquartered in Boise, Idaho, and has staff in Boise, Ketchum, Sandpoint, and McCall, Idaho.

12. ICL's mission is to create a conservation community and pragmatic, enduring solutions that protect and restore Idaho's air, water, land, and wildlife. ICL is deeply committed

to protecting the resource values that make the Owyhee Canyonlands unique, along with the people who recreate, enjoy and depend upon this area.

13. To further its mission, ICL frequently sends FOIA requests to federal agencies to better understand the context and rationale for decisions affecting public resources. ICL's staff compile and analyze information that ICL obtains through FOIA requests, and disseminate it to the public through ICL's website, newsletters, press releases, social media postings, public presentations, and other means. The records sought here will help ICL inform and educate its members and the public about the potential effects of the Airspace Optimization proposal on the Owyhee Canyonlands and encourage the Air Force to adopt a less harmful alternative.

14. ICL and its staff and members are directly injured by the Air Force's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. The Air Force's refusal to grant ICL's fee waiver request forced the organization to choose between paying for public records that it is entitled to obtain under FOIA for free, or incurring the costs of litigating its statutory entitlement to a fee waiver to obtain public records that it needs to further its mission. By withholding records, the Air Force prevents ICL from obtaining, in a timely manner, information relevant to imminent management actions or other time-sensitive matters. In turn, these delays and withholdings harm ICL by impeding the organization's efforts to fulfill its mission and denying the organization and its members timely access to information. ICL brings this suit on behalf of itself, its staff, and its members.

15. Defendant U.S. AIR FORCE is a military department within the U.S. Department of Defense within the Executive Branch of the U.S. Government. Pursuant to 5 U.S.C. § 552(f), the U.S. Air Force is subject to FOIA's requirements because it is a military department in the possession and control of the records sought by ICL.

FACTUAL AND LEGAL BACKGROUND

The Freedom of Information Act

16. FOIA aims to “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation omitted). To serve these aims, FOIA requires federal agencies to make its records available to the public upon request. 5 U.S.C. § 552(a)(3)(A). An agency must make records “promptly available” that are not exempt from disclosure under one of FOIA’s nine narrow exceptions. *Id.* § 552(a)(3)(A), (b).

17. FOIA requires agencies to provide records without charge or at a reduced charge “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). FOIA’s fee waiver provision ““is to be liberally construed in favor of waivers for noncommercial requesters.”” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 90 (1986) (statement of Sen. Patrick Leahy)).

18. The Air Force has issued its own FOIA regulations that affirm and expand on its duty to grant fee waivers when release of the records would further the public interest and are not in the commercial interest of the requester. 32 C.F.R. § 286.12(l).

19. When responding to a FOIA request, agencies must conduct “a search reasonably calculated to uncover all relevant documents.” *Weisberg v. U.S. Dep’t of Just.*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (quoting *Weisberg v. U.S. Dep’t of Just.*, 705 F.2d 1344, 1350–51 (D.C. Cir. 1983)). To do so, the agency must use “methods which can be reasonably expected to produce the information requested.” *Reps. Comm. for Freedom of Press v. Fed. Bureau of*

Investigation, 877 F.3d 399, 400 (D.C. Cir. 2017) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

20. Within twenty business days of receiving a request for records, an agency must determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents. 5 U.S.C. § 552(a)(6)(A). FOIA also requires agencies to “promptly” produce all responsive records. 5 U.S.C. § 552(a)(3)(A). This “typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Resp. and Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

ICL’s FOIA Request

21. On May 15, 2023, ICL submitted a FOIA request to the Air Force seeking records related to the Owyhee Airspace Optimization proposal and the Air Force’s March 2023 Final Environmental Impact Statement (EIS) on that proposal.

22. ICL sought nine categories of records including those that the Air Force considered when preparing the EIS, drafts of the EIS, public comments on the Airspace Optimization proposal and draft EIS, references cited in the EIS, and consultations with expert agencies over the impacts of the Airspace Optimization proposal on endangered species and historic and tribal resources. ICL also sought the Air Force’s communications about the Airspace Optimization proposal and the EIS, the majority of which involved external communications with members of the public, other governmental entities, and non-Air Force employees. A small percentage of the records sought involved internal Air Force communications.

23. On May 23, 2023, the Air Force acknowledged the request, assigned it tracking number 2023-03922-F, and granted ICL’s fee waiver request.

24. On May 30, 2023, the Air Force sent an amended acknowledgement letter that reversed its prior decision and denied ICL's fee waiver request. It asserted that ICL was a "commercial requestor" not entitled to a fee waiver, because of its supposed history of litigation and because the type of material it requested (internal communications) may be exempt from FOIA. The Air Force did not provide additional detail to justify its fee waiver denial. Instead, it estimated that ICL would need to pay search fees of almost \$10,000 to obtain access to the public records requested.

25. On June 8, 2023, ICL informed the Air Force that ICL was unwilling to pay for the costs associated with its FOIA request and that it disagreed with the Air Force's grounds for denying the request.

26. On June 30, 2023, the Air Force reaffirmed its decision to deny ICL's fee waiver request and produced a few responsive documents. The Air Force provided little additional support for its decision, asserting—without any support—that ICL did not actually seek the documents to "shed light on the EIS process" but instead sought them to "prepare for litigation and recover associated costs from the government." The Air Force also claimed—again, without support—that the records sought were already released to the public or would be made available to the public. The Air Force also misinterpreted ICL's FOIA request as only seeking publicly available documents and internal communications, and limited its search accordingly.

27. On July 27, 2023, ICL administratively appealed the Air Force's denial of its fee waiver request and associated refusal to timely produce the full set of requested records in compliance with FOIA. The Air Force confirmed receipt of ICL's appeal on August 7th but to date has not responded to that administrative appeal.

CLAIMS FOR RELIEF

CLAIM I

Violation of FOIA: Improper Denial of Fee Waiver Request

28. ICL realleges and incorporates by reference all preceding paragraphs.

29. ICL is entitled to a fee waiver for its FOIA request because it is a nonprofit organization and it intends to use the information gained from the FOIA request to further the public understanding of the Owyhee Airspace Optimization proposal and its potential impacts on the Owyhee Canyonlands and its many outstanding natural resources. The Airspace Optimization proposal is a highly controversial one that has garnered substantial public interest given the widespread harm that it threatens to the Owyhee Canyonlands region and the people who live, work, and enjoy it.

30. The Air Force's denial of ICL's fee waiver request was unreasonable because it relied on incorrect assumptions about ICL and factors that are irrelevant to the granting of fee waivers. The Air Force unreasonably rejected ICL's asserted need for the documents, which was to shed light on the Air Force's EIS process and better understand the environmental impacts of the Airspace Optimization proposal. Instead, the Air Force assumed, without any support or explanation, that ICL sought the records solely to prepare for litigation. Moreover, ICL's history of, or potential interest in litigation, was not a permissible basis for denying a fee waiver request, because ICL solely seeks to further public interests and not private, commercial ones.

31. The Air Force's denial of ICL's fee waiver request is a violation of 5 U.S.C. § 552(a)(4)(A)(iii). ICL is therefore entitled to injunctive and declaratory relief granting it a fee waiver for its FOIA request.

CLAIM II

Violation of FOIA: Failure to Promptly Produce Records

32. ICL realleges and incorporates by reference all preceding paragraphs.

33. ICL has a statutory right to prompt production of the non-exempt records sought in its FOIA request. 5 U.S.C. § 552(a)(3)(A).

34. The Air Force failed to produce all of the non-exempt records that ICL requested in a timely manner. The Air Force has unreasonably and unlawfully impeded ICL's access to these records for months, which has harmed and continues to harm the organization and the public interest in the requested information.

35. The Air Force's violations of FOIA have deprived ICL of its right to receive public records and injured ICL's interests, which will continue absent the relief requested herein.

36. ICL is therefore entitled to declaratory and injunctive relief stating that the U.S. Air Force violated FOIA and requiring the Air Force to promptly produce responsive records.

CLAIM III

Violation of FOIA: Failure to Conduct an Adequate Search

37. ICL realleges and incorporates by reference all preceding paragraphs.

38. ICL has a statutory right to an adequate search, reasonably calculated to discover records it requested in its FOIA request. 5 U.S.C. § 552(a)(3)(A)–(D).

39. The Air Force has misconstrued ICL's FOIA request by incorrectly claiming that all requested documents are already in the public record (which they are not) or will be released at some later unspecified date (which they have not), or are internal documents that are exempt from production. By misconstruing ICL's FOIA request, the Air Force has not conducted "a search reasonably calculated to uncover all relevant documents." *Weisberg*, 745 F.2d at 1485.

40. ICL is therefore entitled to declaratory and injunctive relief stating that the Air Force violated FOIA, and requiring the Air Force to conduct an adequate search that is responsive to ICL's FOIA request.

PRAYER FOR RELIEF

WHEREFORE, ICL respectfully prays that this Court:

- A. Declare, hold, and adjudge that the Air Force has violated FOIA for any or all of the violations identified above;
- B. Order the Air Force to grant ICL's fee waiver request immediately;
- C. Order the Air Force to produce all non-exempt public records in response to ICL's FOIA request within thirty (30) days;
- D. Enter such other declaratory relief and temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter;
- E. Award ICL its reasonable costs, litigation expenses, and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) and/or all other applicable authorities;
- F. Grant such other and further relief as ICL may hereinafter request or as the Court deems just and proper.

Dated: October 10, 2023

Respectfully submitted,

s/Laurence J. Lucas

Laurence ("Laird") J. Lucas (ISB #124854)

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