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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION**

Center for Biological Diversity,) Case No.:
)
Plaintiff,) **COMPLAINT FOR DECLARATORY AND**
) **INJUNCTIVE RELIEF**
v.)
)
U.S. Fish & Wildlife Service,)
)
Defendant.)

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“the Center”) brings this case against the United States Fish and Wildlife Service (“the Service”) to compel the production of records concerning the import and export of wildlife and plants, including imperiled species, as required by the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552 *et seq.*

2. Each year, the United States imports millions of wildlife and plant specimens from around the globe. These imports include everything from python-skin boots, to parrots and turtles destined for the pet trade, to corals, orchids, and shells used for home decor, to lions killed as hunting trophies, as well as zoo and scientific specimens.

3. Many wildlife and plant imports are sourced from the wild, and some are rare or imperiled species. For example, between 2005 and 2014, the United States reportedly imported over 900,000 specimens of nautilus, an increasingly endangered cephalopod in demand for its beautiful shell, from Indo-Pacific nations. In 2013 alone, traders imported nine “cartons” of Nguru pygmy chameleons, a species deemed “Critically Endangered” by the International Union for the Conservation of Nature (“IUCN”), presumably for the pet trade. An undisclosed number of pangolins, a scaly anteater that is now the most traded mammal on Earth, have been imported from Africa in recent years, despite growing evidence that trade threatens pangolins’ continued existence.

4. Trade is the second largest threat to wildlife species behind habitat destruction. The United States is the second largest retail market for wildlife products in the world.

5. Before most foreign wildlife specimens can be imported into the United States, the specimens must be cleared by the U.S. Fish and Service, regardless of whether the import is intended for commercial trade, scientific research, or hunting trophies. 50

C.F.R. § 14.52. To facilitate clearance, importers must submit an import declaration reporting basic data including, *inter alia*, the date and purpose of the import; species name, country of origin, and quantity of specimens imported; various permit numbers; and names of importers, exporters, and carriers. *Id.* § 14.61; USFWS Form 3-177 (revised 03/10). Additionally, the Service requires permits for the import and export of wildlife and plant species that are protected under various laws, including the Endangered Species Act (“ESA”). *See* 16 U.S.C. §§ 1538(a); 1539(a)(1)(A).

6. The Service inputs data from import declarations and permits into its Law Enforcement Management Information Systems (“LEMIS”) database, also denoting whether the Service cleared or refused the import for entry.

7. For years, the Service routinely released data from its LEMIS database to the public when requested under FOIA, providing quantity, names of foreign and U.S. importers and exporters, and the declared value of the wildlife, among other information.

8. This import data is used by the public, including frequently by conservation groups, to track which species of wildlife the Service allows to enter the United States, from where, imported by whom, and in what quantity, in order to analyze which species may be most affected by trade and potentially to seek international and domestic protections as needed.

9. However, in response to a February 24, 2016 FOIA request (“FOIA Request”) submitted by the Center for Biological Diversity, the Service denied several broad categories of import data, including, *inter alia*: (1) quantity of specimens imported, (2) foreign importer/exporter name, (3) name of carrier, and (4) various permit and document numbers (“FOIA Response”). The Service denied this information under FOIA Exemption 4, which exempts confidential commercial information from disclosure. 5 U.S.C. § 552(b)(4). On April 8, 2016, the Center administratively appealed the denial (“FOIA Appeal”). The Service has not responded to the Center’s FOIA Appeal.

10. This action seeks to compel disclosure of this most basic and critical wildlife and plant import data under FOIA.

JURISDICTION AND VENUE

11. Jurisdiction over this action is conferred by FOIA, 5 U.S.C. § 552(a)(4)(B), the Administrative Procedure Act (“APA”), *id.* § 702, and 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). This cause of action arises under the laws of the United States, including FOIA and the APA. An actual, justiciable controversy exists between Plaintiff and Defendant.

12. Venue is proper in the District of Arizona pursuant to 5 U.S.C. § 552(a)(4)(B) because Plaintiff has its principal place of business in this judicial district.

13. Assignment of this case to the Tucson Division of this Court is appropriate because Plaintiff has its principal place of business in Pima County. Local Rule 77.1(a), (c).

PARTIES

14. Plaintiff Center for Biological Diversity (“the Center”) is a 501(c)(3) non-profit conservation organization with 48,575 members. The Center’s headquarters are in Tucson, Arizona, and the Center maintains several other offices across the country and in Mexico. Through science, policy, and environmental law, the Center advocates for the protection of threatened, endangered, and rare species and their habitats throughout the United States and abroad. The Center’s International Program specifically focuses on protecting imperiled species outside U.S. boundaries, including from unsustainable trade.

15. The Center and its members are harmed by the Service’s failure to comply with FOIA’s statutory deadlines and the Service’s unlawful failure to disclose data responsive to the Center’s FOIA Request. These violations preclude the Center from understanding the type, quantity, and other important information about wildlife and plant imports that the Service allows into the United States.

16. Import data is critical to the Center and its International Program's operations. Center staff use the data to: track which species are most in trade; determine the volume of trade in particular species in order to evaluate trade as a threat; ascertain the purpose of commercial trade, including whether trade is for medicinal, decorative, fashion, or pet and aquarium purposes by learning the identity of importers and exporters; determine the country of origin; and other purposes. The data and our subsequent analysis informs the Center's organizational strategy, including for determining which species may require additional study and scientific research, advocacy for both domestic and international protections, or increased public awareness. The Center also collects, distills, and distributes the data to keep our members and the broader public informed on critical species protection matters.

17. The Center's organizational interests and activities are and will be adversely affected if the Service continues to violate FOIA's appeal determination deadline and continues to unlawfully withhold records responsive to the Center's FOIA Request. The Center's harms will likely be redressed by an appeal determination from the Service and disclosure of responsive records.

18. Defendant United States Fish and Wildlife Service ("the Service") is a federal governmental agency within the meaning of 5 U.S.C. § 552(f)(1) and is a bureau within the United States Department of the Interior. The Service enforces federal wildlife laws, including clearing wildlife imported into the United States and implementing the ESA, and the Service maintains the LEMIS database. The Service is in possession and control of the records that the Center seeks.

STATUTORY BACKGROUND

Freedom of Information Act

19. The Freedom of Information Act ("FOIA") ensures both an open government and government accountability through transparency. FOIA requires "each agency, upon any request for records . . . shall make the records promptly available to any

person.” 5 U.S.C. § 552(a)(3); *see* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009).

20. FOIA carries a strong presumption in favor of public disclosure.

21. Under FOIA, an agency may withhold a record *only* if the record qualifies for one of nine narrowly construed statutory exemptions. 5 U.S.C. § 552(b)(1)–(9). The agency bears the burden of proving a record qualifies for a FOIA exemption and thus was lawfully withheld. *Id.* § 552(a)(4)(B). If the agency determines that a portion of responsive records is exempt from disclosure, the agency must nonetheless provide “[a]ny reasonably segregable portion” after redacting the exempt information, and the agency must explain why the redacted portions were withheld. *Id.* § 552(b).

22. Under FOIA Exemption 4, an agency may withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* § 552(b)(4).

23. Information is not confidential under FOIA Exemption 4 if the information is released or is available to the public in other formats or under other statutes.

24. To ensure prompt disclosure of information, FOIA imposes strict deadlines on federal agencies for responding to both FOIA requests and appeals. Specifically, upon receiving a FOIA request, an agency has 20 working days to respond to the request. *Id.* § 552(a)(6)(A)(i). A requestor may file an administrative appeal of an agency’s failure to disclose requested records in part or in full, and an agency must make a determination on any such appeal within 20 working days. *Id.* § 552(a)(6)(A)(ii). A requestor is deemed to have exhausted its administrative remedies and may seek immediate judicial review of the matter if the agency fails to comply with the statutory deadlines. *Id.* § 552(a)(6)(C)(i).

Legal Authorities Governing Wildlife Import

25. Pursuant to the Service’s authority under several statutes that govern and restrict importation of wildlife into the United States, including the ESA, the Lacey Act,

the Migratory Bird Treaty Act, the African Elephant Conservation Act, and the Wild Bird Conservation Act, the Service's regulations require that a Service officer "must clear all wildlife imported into the United States prior to release from detention by Customs officers," with limited exemptions. 50 C.F.R. § 14.52(a).

26. To facilitate clearance, importers must submit an import declaration reporting basic data. *Id.* § 14.61. The declaration must record, *inter alia*, the date and purpose of the import; species name, country of origin, and quantity of specimens imported; various permit and document numbers; and names of importers, exporters, and carriers. See USFWS Form 3-177 (revised 03/10), available at: https://www.fws.gov/le/pdf/3177_1.pdf.

27. The Service inputs data from import declarations into the LEMIS database, denoting whether the Service cleared or refused the import for entry and whether the item was confiscated or abandoned.

28. Additionally, some ESA-listed wildlife and plant species are subject to import and export prohibitions, restrictions, and permitting requirements. Specifically, the ESA prohibits the importation of all endangered and many threatened-listed species, although the Service may grant import permits for scientific purposes or to enhance the species' survival. 16 U.S.C. §§ 1538(a); 1539(a)(1)(A); 50 C.F.R. § 17.31. The ESA requires the Service to publish notice and seek public comment on each endangered species import permit application. 16 U.S.C. § 1539(a). To facilitate notice and comment, the Service routinely discloses to the public importer/exporter names, quantity, country of origin, and location of wild capture or breeder name and location, copies of permits, and shipping details for live specimens.

29. The United States is also a Party to the Convention on International Trade in Endangered Species of Fauna and Flora ("CITES"). 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975). Additional import and export prohibitions, restrictions, and permitting requirements apply to species listed under the CITES. *Id.*; 16 U.S.C. §

1538(c). CITES requires all Parties to maintain detailed records of trade in CITES specimens, including the names and addresses of exporters and importers, quantity of wildlife traded, and other information. CITES, Art. VIII(6). Parties must submit an annual report, summarizing those records, to the CITES Secretariat. CITES, Art. VIII(7)(a). The Secretariat then publishes data on its publicly accessible CITES Trade Database. *See* <http://trade.cites.org/#>.

30. Additionally, in general, vessels that make entry into the United States must submit a manifest to U.S. Customs and Border Patrol (“CBP”), including a cargo declaration. 19 U.S.C. § 1431(a); 19 C.F.R. § 4.7(a) (requiring submission of Customs Form 1302). Vessel cargo data is compiled daily in CBP’s Automated Manifest System (“AMS”) and “is available to interested members of the public on CD-ROM” for a fee upon request, including vessel name, arrival date, description of goods, manifest quantity, manifest units, piece count, weight, bill of lading number, and the importer’s name and address, unless the importer expressly seeks confidential treatment of its name and address through a regulatory process. 19 C.F.R. § 103.31(e). AMS data released to the public regularly contains names of importers, quantity, and carrier names.

31. Accredited members of the press are also permitted to examine vessel manifests. *Id.* § 103.31(a)(3). All information from the inward manifest may be copied and published, unless the importer seeks confidential treatment of its name and address through a regulatory process. *Id.* § 103(d)(1)(iv). Private sector media services then make the data available to the public for a fee. For example, the Journal of Commerce’s Port Import Export Reporting Service (“PIERS”) collects and analyzes U.S. seaborne imports from vessel manifest documents. *See* <https://www.ihs.com/products/piers.html>. PIERS reports made available to the fee-paying public frequently contain names of importers and shippers, quantity, and value of imports.

Administrative Procedure Act

32. The Administrative Procedure Act (“APA”) provides for judicial review of final agency actions for persons adversely affected or aggrieved by the agency action. 5 U.S.C. § 702.

33. The APA requires a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, of otherwise not in accordance with law.” *Id.* § 706.

34. An agency action is arbitrary and capricious if the agency fails to provide an adequate explanation for its action and if the agency diverges from prior policies and standards without providing a reasoned explanation.

FACTUAL BACKGROUND

35. On February 24, 2016, the Center submitted its FOIA Request to U.S. Fish and Wildlife Service. The Center requested “all Law Enforcement Management Information System (‘LEMIS’) data regarding any imports and exports of fish and/or wildlife from January 1, 2005 to the present, including but not limited to all information submitted on Form 3-117 or its predecessor forms:

- (a) Date of import/export,
- (b) Port of clearance,
- (c) Purpose code,
- (d) Customs document number,
- (e) Name of carrier,
- (f) Air waybill of bill of lading number,
- (g) Transportation code,
- (h) Number of cartons of wildlife,
- (i) Names of U.S. importer/exporter and foreign importer/exporter with country code,
- (j) Scientific and common name of species,
- (k) Foreign CITES permit and U.S. permit numbers,
- (l) Description and source codes,
- (m) Country of origin code,
- (n) Quantity/unit, and

- (o) Monetary value.”

36. The Service received the Center’s FOIA Request on February 24, 2016 and assigned the Request the tracking number FWS-2016-00509.

37. On March 4, 2016, the Service responded to the Center’s FOIA Request. The Service’s response letter stated that the Service was “releasing shipment/species information from the following data fields in report form” on accompanying Excel spreadsheets:

- (a) Species code,
- (b) Genus,
- (c) Species,
- (d) Subspecies,
- (e) Specific name,
- (f) Generic name,
- (g) Wildlife description,
- (h) Unit,
- (i) Number of cartons,
- (j) Country of export or import,
- (k) Purpose,
- (l) Source,
- (m) Act,
- (n) Disposition code,
- (o) Disposition date,
- (p) Shipment date,
- (q) Import or export flag,
- (r) Port code,
- (s) Transportation mode, and
- (t) U.S. business.

38. However, the Service informed the Center that it was withholding entire data categories from the spreadsheets. Specifically, the Service withheld the following information pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4):

- (a) Customs document number,
- (b) Name of carrier,
- (c) Air waybill of bill of lading number,

- (d) Foreign CITES permit and U.S. permit numbers,
- (e) Quantity,
- (f) Declared value of wildlife, and
- (g) Foreign importer/exporter.

39. The Service provided the following rationale for withholding the information under FOIA Exemption 4:

The withheld information is commercial or financial information. The company that supplied this information (the submitter) is considered a person, because the term ‘person,’ under the FOIA, includes a wide range of entities including corporations. Information that was required to be submitted is considered “confidential” if disclosure of it “is likely to cause substantial harm to the competitive position of the person from whom the information was obtained,” or harm the Government’s ability to obtain it in the future. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

40. On April 8, 2016, the Center electronically submitted an appeal of the Service’s withholdings (“FOIA Appeal”), challenging the Service’s application of FOIA Exemption 4. Among other arguments, the Center explained that the requested data is not commercial; the data has already been disclosed in other formats or is publicly available from other sources; disclosure of the data will not cause substantial competitive harm; portions of the withheld data had already been released to the Center and other members of the public in response to similar FOIA requests in the past, and the Service failed to properly justify its withholding.

41. The Center has not received a determination on its FOIA Appeal.

42. On several occasions in the past, the Center submitted FOIA requests for similar information and in response, received LEMIS data including data denied by the Service in response to the Center’s February 24, 2016 request.

43. For example, on July 17, 2013, the Center submitted a FOIA request for, *inter alia*, “[a]ny records providing data on the number of wild caught snakes of any species exported from the United States in the last ten years,” noting “this request could

be fulfilled with LEMIS data provided by the Office of Law Enforcement.” In response, on July 31, 2013, the Service provided the Center with LEMIS data, including both quantity and foreign importer/exporter names.

44. Similarly, on October 27, 2015, the Center submitted a FOIA request for, *inter alia*, “[a]ny records providing data on the number of live tropical fish, sea horses, and corals of any species imported into the United States in the last ten years,” noting “this request could be fulfilled with Law Enforcement Management Information System (‘LEMIS’) data.” In response, on October 29, 2015, the Service provided the Center with LEMIS data, including quantity of specimens imported.

45. Prior to 2013, the Service routinely released LEMIS quantity, foreign import/exporter names, and declared value of wildlife data to requesters through FOIA.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Failure to Comply with Appeal Determination Deadline

46. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

47. The Service failed to “make a determination with respect to” the Center’s April 8, 2016 FOIA Appeal “within twenty days (excepting Saturdays, Sundays, and legal public holidays)” after receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

48. The Service’s failure to provide a timely determination on the Center’s FOIA Appeal violates FOIA. *Id.*

49. The Court should compel the Service to promptly make a determination on the Center’s FOIA Appeal and disclose all responsive records. *Id.* §§ 706(1); 552(a)(4)(B).

SECOND CLAIM FOR RELIEF

Unlawful Withholding of Records Responsive to the Center's FOIA Request

50. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

51. Plaintiff has a statutory right of access to the public records requested in its FOIA Request, 5 U.S.C. § 552(a)(3), and there is no lawful basis for Defendant's withholding of data responsive to that Request, under FOIA Exemption 4. *Id.* § 552 (b)(4).

52. The Service's failure to disclose data responsive to the Center's FOIA Request violates FOIA. *Id.* § 552(a)(3).

53. The Court should compel production of records improperly withheld. *Id.* § 552(a)(4)(B).

THIRD CLAIM FOR RELIEF

54. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

55. Defendant's March 4, 2016 FOIA Response was a final agency action. Defendant failed to timely determine Plaintiff's FOIA Appeal, and Plaintiff has exhausted all of its administrative remedies. 5 U.S.C. § 552(a)(6)(A)(ii), (a)(2)(C).

56. Defendant's March 4, 2016 FOIA Response failed to provide an adequate rationale for the Service's decision to withhold records and is inconsistent with previous FOIA responses, in which the Service provided quantity, foreign exporter/importer, and other data.

57. The Service's March 4, 2016 FOIA Response violates the APA.

58. The Court should hold unlawful and set aside the Service's March 4, 2016 response to the Center's FOIA request as arbitrary, capricious, an abuse of discretion, and not in accordance with FOIA and compel the Service to disclose all responsive records. *Id.* §§ 706(2); 552(a)(4)(B).

RELIEF REQUESTED

For the reasons stated above, Plaintiff respectfully requests that the Court grant the following relief:

1. Declare that Defendant's failure to timely make a determination on Plaintiff's FOIA Appeal is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), and is an agency action that has been unlawfully withheld and unreasonably delayed, *id.* § 706(1).
2. Declare that Defendant's failure to disclose the requested records to Plaintiff is unlawful under FOIA. 5 U.S.C. § 552(a)(3).
3. Declare that Defendant's March 4, 2016 FOIA Response is arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706(2).
4. Order Defendant to promptly provide Plaintiff with all records that are responsive to its FOIA Request.
5. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.
6. Grant such other and further relief as the Court may deem just and proper

DATED: August 8, 2016

Respectfully submitted,

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