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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**[FWS-HQ-LE-2016-N156; FF09L00200-FX-LE18110900000]**

**Freedom of Information Act; Notice of Lawsuit**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** The U.S. Fish and Wildlife Service seeks information about potential objections to the public release of possibly confidential information regarding import and export activities tracked via the Service's Law Enforcement Management Information System. We issue this notice and solicit this information in response to a lawsuit under the Freedom of Information Act.

**DATES:** You must submit comments on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by one of the following methods:

- *Email:* [lawenforcement@fws.gov](mailto:lawenforcement@fws.gov).
- *Fax:* (703) 358-2271.
- *U.S. mail or hand-delivery:* U.S. Fish and Wildlife Service, Office of Law Enforcement (FOIA), 5275 Leesburg Pike (MS: OLE), Falls Church, VA 22041.

**FOR FURTHER INFORMATION CONTACT:** Michael Jenkins, Management Analyst Specialist, USFWS, Office of Law Enforcement, 5275 Leesburg Pike, Falls Church VA, 22041; telephone (703) 358-1949.

## **SUPPLEMENTARY INFORMATION:**

This notice is issued under part 2 of title 43 of the Code of Federal Regulations (CFR), which sets forth regulations for administration of the Freedom of Information Act (FOIA) by the U.S. Department of the Interior (“the Department”).

We, the U.S. Fish and Wildlife Service (“the Service”), hereby announce that information related to records for the import and export of all wildlife specimens to and from the United States may be disclosed under FOIA (43 CFR 2.27(b)).

Submitters of this type of information can contact the Service to review records subject to possible release. If you are a submitter of this information, the Service will presume that you do not object to the disclosure of your information if a response to this notice is not received by the date specified above in **DATES**.

### **I. Background**

The Department is soliciting views from submitters with respect to whether certain records constitute “trade secrets and commercial or financial information obtained from a person [that are] privileged or confidential” information under the FOIA, 5 U.S.C. 552(b)(4). The records at issue concern information in the Service’s Law Enforcement Management Information System (LEMIS) relating to the import and export of all wildlife specimens to and from the United States:

- a. for the years 2002 through 2010, 2013, and 2014;
- b. of any taxonomic class, whether live, dead, parts, or products; and
- c. with the following variables to be included in the records: Control Number, Species Code, Class, Genus, Species, Subspecies, Generic Name, Specific Name, Wildlife Description, Quantity, Unit, Value, Country of Origin, Country Import/Export,

Purpose, Source, Act, Disposition Code, Disposition Date, Shipment Date, Import/Export, Port Code, U.S. Importer/Exporter, and Foreign Importer/Exporter.

This notice relates to FOIA requests by Humane Society International (HSI) of June 2, 2014; August 21, 2014; June 3, 2015; and November 3, 2015. In response to these FOIA requests, the Service withheld the “Declared Value of Wildlife” and “Foreign Importer/Exporter” columns in their entirety under FOIA Exemption 4. The Service withheld additional information under Exemptions 6 and 7(C). The Service’s response to these FOIA requests is now the subject of a lawsuit, *Humane Society Int’l v. U.S. FWS*, No. 16-720 (D.D.C., filed Apr. 18, 2016). A copy of HSI’s three FOIA requests, as well as the complaint filed in the United States District Court for the District of Columbia, has been posted on:

<https://www.fws.gov/le/businesses.html#FOIAMatters>. Upon request, the Service will provide submitters the relevant submitter information that the Service found to be responsive to HSI’s requests.

## **II. Issues for Comment:**

The Department has been asked to release certain information in LEMIS for the years 2002 through 2010, 2013, and 2014 relating to the import and export of all wildlife specimens to and from the United States. This notice provides you with the opportunity to object to the public release of these records if they are exempt from disclosure under FOIA, 5 U.S.C. 552(b). Please reference *Humane Society Int’l v. U.S. FWS*, No. 16-720, in any communications regarding this matter.

If you wish to object to the disclosure of these records, the Department’s FOIA regulations (“regulations”) require you to submit a “detailed written statement”

setting forth the justification for withholding any portion of the information under any exemption of the FOIA. See 43 CFR 2.30.

Under FOIA's Exemption 4, 5 U.S.C. 552(b)(4), "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from disclosure under the FOIA. When the Department has reason to believe that information that is responsive to a FOIA request may be exempt from disclosure under FOIA's Exemption 4, the regulations require the Department to provide notice to the submitter(s) of the responsive material and advise the submitter(s) of the procedures for objecting to the release of the requested material. This publication serves as notice.

Further, if you object to the public disclosure of the records (or any portions of records) at issue in *Humane Society v. U.S. FWS*, No. 16-720 (D.D.C., filed Apr. 18, 2016), on the basis that the information submitted is protected by FOIA Exemption 4, then the regulations require the "detailed written statement" referenced above to include a "specific and detailed discussion" of the following:

(i) Whether the Government required the information to be submitted and, if so, how substantial competitive or other business harm would likely result from release; or

(ii) Whether you provided the information voluntarily and, if so, how the information in question fits into a category of information that you customarily do not release to the public.

(iii) Certification that the information is confidential, that you have not disclosed the information to the public, and that the information is not routinely

available to the public from other sources.

In order for information to qualify for protection under Exemption 4 as a “trade secret,” the information must be “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires there be a direct relationship between the information at issue and the productive process. *Id.* Should you wish to object to the disclosure of any of the information in the documents on the basis that such information is a trade secret, the specific and detailed discussion must explain how each category of information the objections are related to qualify for protection under Exemption 4 as a “trade secret.” The explanation must also identify a direct relationship between the information and the productive process.

In order for information to qualify for protection under the aspect of Exemption 4 that protects privileged or confidential commercial or financial information, the first requirement is that the information must be either “commercial or financial.” In determining whether documents are “commercial or financial,” the D.C. Circuit has firmly held that these terms should be given their “ordinary meanings” and that records are commercial so long as you have “commercial interest” in them. See *Public Citizen*, 704 F.2d at 1290 (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982), and *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 (D.C. Cir. 1980)); see also *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (stating “information is ‘commercial’ under

[Exemption 4] if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'").

The specific and detailed discussion that you provide must explain how the information relates to your commercial interest and the commercial function the information serves or the commercial nature of the information.

The test to determine if information is "privileged" or "confidential" under Exemption 4 depends on whether the submitter was required to provide the information to the Government or whether the submitter voluntarily disclosed the information to the Government. *Bartholdi Cable. Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997). Where you voluntarily provide information to the Government, the information will be considered confidential for the purposes of Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* (citing *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*)). Alternatively, where the Government requires you to provide information (as is the case for the information at hand), then commercial or financial information generally is "confidential" under Exemption 4 "if disclosure . . . is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained." *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A showing of substantial competitive harm is necessary only where the information in question is required to be submitted to the Government.

You must explain whether you voluntarily provided the information in question or whether the Government required the information to be submitted. Should you assert that you voluntarily submitted the information, you must also explain how the information in question fits into a category of information that you customarily do not release to the public. If you assert that the Government required you to submit the information in question (as is the case for the information at hand), then you must explain how substantial competitive or other business harm would likely result from release.

To demonstrate that disclosure is likely to cause substantial competitive harm, there must be evidence that: (1) you face actual competition; and (2) substantial competitive injury would likely result from disclosure. See *Lions Raisins v. USDA*, 354 F.3d 1072, 1079 (9<sup>th</sup> Cir. 2004); *Inner City Press/Community on the Move v. Federal Reserve System*, 380 F. Supp. 2d 211, 220 (S.D.N.Y. 2005); *People for the Ethical Treatment of Animals v. USDA*, 2005 U.S. Dist. LEXIS 10586, at 15 (D.D.C. May 24, 2005); *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) (“*National Parks II*”).

In order for the Department to fully evaluate whether you are likely to suffer substantial competitive injury from disclosure of the withheld information, any objections on this basis must include a detailed explanation of who your competitors are and the nature of the competition. You must also explain with specificity how disclosure of each category of information that you object to disclosing on this basis would provide your competitors with valuable insights into your operation, give competitors pricing advantages over you, or unfairly give advantage to competitors

in future business negotiations, or any other information that sufficiently explains the substantial competitive injury that would likely result from disclosure. *National Parks II*, 547 F.2d at 684; *Center for Public Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 194 (D.D.C. 2002); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 29 (D.D.C.2000). Additionally, as noted above, you must also certify that any information you object to disclosing is confidential, you have not disclosed the information to the public, and the information is not routinely available to the public from other sources. See 43 CFR 2.30–2.31.

As a final matter, please be aware that the FOIA requires that “any reasonably segregable portion of a record” must be released after appropriate application of the FOIA’s nine exemptions. See 5 U.S.C. 552(b) (discussion after exemptions). In addition, please note that, where a record contains both exempt and nonexempt material, the bureau will generally separate and release the nonexempt information when responding to a FOIA request. 43 CFR 2.25. You should be mindful of this segregability requirement in formulating any objections you may have to the disclosure of the information sought by HSI.

### **III. Submission of Objections:**

Should you wish to object to disclosure of any of the requested records (or portions thereof), the Department must receive from you all of the information requested above by no later than the date specified above in **DATES**.

If you do not submit any objections to the disclosure of the information (or portions thereof) to HSI on or before the date specified above in **DATES**, the Department will presume that you do not object to such disclosure and may release



the information without redaction. Please note that the Department, not you, is responsible for deciding whether the information should be released or withheld. If we decide to release records over your objections, we will inform you at least 10 business days in advance of the intended release.

Please note that any comments you submit to the Department objecting to the disclosure of the documents may be subject to disclosure under the FOIA if the Department receives a FOIA request for them. In the event your comments contain commercial or financial information and a requester asks for the comments under the FOIA, the Department will notify you and give you an opportunity to comment on the disclosure of such information.

Dated: October 27, 2016\_\_\_\_\_.

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\_Stephen Gustin\_\_\_\_\_

*Acting Director, U.S. Fish and Wildlife Service.*

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