

**NO. 14-1435**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**WESTERN ENERGY ALLIANCE,**  
*Plaintiff–Appellant,*

v.

**UNITED STATES FISH AND WILDLIFE SERVICE,**  
*Defendant–Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
MARCIA S. KRIEGER, DISTRICT JUDGE • CASE NO. 13-CV-02811-MSK

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Appeal of Opinion and Order Denying Plaintiff’s  
Motion for Attorney Fees and Costs

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**APPELLANT’S OPENING BRIEF**

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**Oral Argument Requested**  
**Attachment in Native PDF Format Included**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Appellant Western Energy Alliance hereby states, by and through their attorneys, that they are a nonprofit corporation and have no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENTS OF RELATED CASES .....	v
DECISION UNDER REVIEW .....	v
GLOSSARY OF TERMS, ACRONYMS, AND ABBREVIATIONS .....	vi
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	3
STANDARD OF REVIEW .....	5
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT .....	7
CONCLUSION .....	25
ORAL ARGUMENT REQUESTED .....	27
CERTIFICATE OF SERVICE .....	28
CERTIFICATE OF COMPLIANCE .....	29
CERTIFICATE OF DIGITAL SUBMISSION .....	30
ORDER AND DECREE ON APPEAL .....	Attached

## TABLE OF AUTHORITIES

### Cases

<i>Alliance for Responsible CFC Policy, Inc. v. Costle</i> , 631 F.Supp. 1469 (D.D.C. 1986).....	17
<i>Anderson v. Sec’y of Health and Human Services</i> , 80 F.3d 1500 (10th Cir. 1996).....	9, 10
<i>Aviation Data Service v. FAA</i> , 687 F.2d 1319 (10th Cir. 1982).....	9
<i>Batton v. Evers</i> , 598 F.3d 169 (5th Cir. 2010).....	6
<i>Brayton v. Office of the U.S. Trade Representative</i> , 641 F.3d 521 (D.C. Cir. 2011).....	5, 9, 21, 26
<i>Breaux v. Am. Family Mut. Ins. Co.</i> , 554 F.3d 854 (10th Cir. 2009).....	5
<i>Campbell v. U.S. Dep’t of Justice</i> , 164 F.3d 20 (D.C.Cir. 1998).....	19
<i>Casad v. U.S. Dep’t of Health &amp; Human Servs.</i> , 301 F.3d 1247 (10th Cir. 2002).....	21
<i>Davy v. CIA</i> , 550 F.3d 1155 (D.C.Cir. 2008).....	5, 19
<i>Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.</i> , 811 F.Supp.2d 216 (D.D.C. 2011).....	17
<i>Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency</i> , 410 F.3d 1214 (10th Cir. 2005).....	16
<i>Fraternal Order of Police, Metro. Police Dep’t Labor Comm. v. D.C.</i> , 52 A.3d 822 (D.C. 2012).....	10, 23, 24, 26
<i>Homeward Bound, Inc. v. Hissom Mem’l Ctr.</i> , 963 F.2d 1352 (10th Cir. 1992).....	5
<i>Horsehead Indus., Inc. v. United States E.P.A.</i> , 999 F.Supp. 59 (D.D.C. 1998).....	23

<i>Hull v. U.S. Dep't of Labor</i> , No. 04-cv-1264, 2006 U.S. Dist. LEXIS 35054 (D. Colo. May 30, 2006).....	12, 15
<i>Kickapoo Tribe v. Babbitt</i> , 43 F.3d 1491 (D.C.Cir. 1995).....	26
<i>Nationwide Bldg. Maint., Inc. v. Sampson</i> , 559 F.2d 704 (D.C.Cir. 1977).....	26
<i>NLRB v. Robbins Tire &amp; Rubber Co.</i> , 437 U.S. 214, 98 S.Ct. 2311 (1978).....	12
<i>Read v. F.A.A.</i> , 252 F.Supp.2d 1108 (W.D.Wash. 2003).....	23
<i>Seegull Mfg. Co. v. Nat'l Labor Relations Bd.</i> , 741 F.2d 882 (6th Cir. 1984).....	23
<i>Smith v. Freeman</i> , 921 F.2d 1120 (10th Cir. 1990).....	5
<i>Terris, Pravlik &amp; Millian, LLP v. Centers for Medicare &amp; Medicaid Services</i> , 794 F. Supp. 2d 29 (D.D.C. 2011).....	24
<i>Trentadue v. F.B.I.</i> , 572 F.3d 794 (10th Cir. 2009).....	5
<i>Trentadue v. Integrity Comm.</i> , 501 F.3d 1215 (10th Cir. 2007).....	5, 12
<i>Wheeler v. I.R.S.</i> , 37 F.Supp.2d 407 (W.D.Pa. 1998).....	24
<i>Wick Commc'ns Co. v. Montrose Cnty. Bd. of Cnty. Comm.</i> , 81 P.3d 360 (Colo. 2003).....	7

## Statutes

5 U.S.C. § 552.....	2, 6, 8, 9, 10, 22
16 U.S.C. § 1531, <i>et. seq.</i> .....	15
28 U.S.C. §1291.....	1
28 U.S.C. §1294.....	1

28 U.S.C. §1331 ..... 1

**Other Authorities**

110 Cong. Rec. 17,087 (1967) ..... 13

**RELATED TENTH CIRCUIT COURT OF APPEALS  
CASES STATEMENT**

No prior appeals have been taken in this action.

**RELATED FOIA CASES STATEMENT**

1. *W. Energy Alliance v. Bureau of Land Management*, No. 13-cv-02814-REB-CBS. The Alliance submitted a FOIA request for technical team reports, with which the agency did not comply, and the Alliance filed suit in the United States District Court for the District of Colorado on October 15, 2013.
2. *W. Energy Alliance v. U.S. Geological Survey*, No. 14-cv-01282-KLM. The Alliance submitted two FOIA requests for peer reviews and underlying data for reports, with which the agency did not comply, and the Alliance filed suit in the United States District Court for the District of Colorado on May 6, 2014.

**DECISION UNDER REVIEW**

*W. Energy Alliance v. U.S. Fish & Wildlife Serv.*,  
No. 13-cv-02811-MSK, 2014 WL 4357455 (D. Colo. Sept. 2, 2014).

## **GLOSSARY OF TERMS, ACRONYMS, AND ABBREVIATIONS**

“The Alliance”- The Western Energy Alliance was founded as the Independent Petroleum Association of Mountain States in 1974. The Alliance is a nonprofit trade association representing more than 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West.

“ESA”- The Endangered Species Act was enacted December 28, 1973, and was designed to protect critically imperiled species from extinction as a consequence of economic growth and development untempered by adequate concern and conservation. The ESA is administered by two federal agencies, the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration.

“FOIA”- The Freedom of Information Act is a law that gives citizens the right to access information from the federal government. It is often described as the law that keeps citizens in the know about their government.

“FWS”- The United States Fish and Wildlife Service is a federal government agency within the U.S. Department of the Interior dedicated to the management of fish, wildlife, and natural habitats.

“GRSG”- The Greater Sage-Grouse is a chicken-like bird known for its flamboyant courtship strut. Adults have a long, pointed tail and legs with feathers to the toes. Adult males have a yellow patch over the eye, are grayish on top with a white breast, a dark brown throat and a black belly; two yellowish sacs on the neck are inflated during courtship display. Adult females are mottled gray-brown with a light brown throat and dark belly. They mainly eat sagebrush, but also insects and other plants. The GRSG is the largest grouse in North America, and its range is sagebrush country in the western United States and southern Alberta and Saskatchewan, Canada.

## **JURISDICTIONAL STATEMENT**

The District Court had original jurisdiction under 28 U.S.C. §1331. On September 2, 2014, the District Court entered its Opinion and Order Denying Plaintiff’s Motion for Attorneys Fees. Order and Decree on Appeal at 5. The Alliance timely filed a Notice of Appeal on October 21, 2014. Aplt. App. at 412-413. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1294(1).

## **STATEMENT OF THE ISSUES**

Whether the United States District Court for the District of Colorado (“District Court”) erred in denying Western Energy Alliance’s (“Alliance”) Motion for Attorney Fees and Costs against the U.S. Fish and Wildlife Service (“FWS”) for noncompliance with the Freedom of Information Act (“FOIA”), when the Alliance demonstrated that:

1. The records the Alliance requested pursuant to FOIA benefitted the public;
2. Any commercial benefit to the Alliance was nominal and attenuated;
3. The Alliance’s interest in the records was substantially informational in nature;
4. The FWS lacked a reasonable basis in law for withholding the records; and
5. The FWS exhibited obduracy and a pattern of bad behavior.

## STATEMENT OF THE CASE

On May 2, 2013, the Alliance submitted a request under FOIA to the FWS for documents and correspondence related to peer review of the Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives Final Report (“COT Report”) with which the FWS failed to comply. Aplt. App. at 15-16 (“FOIA Request”). The Alliance was forced to file a Complaint against the FWS on October 15, 2013. Aplt. App. at 4-15. *W. Energy Alliance v. U.S. Fish & Wildlife Serv.*, No. 13-CV-02811-MSK (D. Colo. Oct. 15, 2013). The Complaint sought an Order of the Court declaring that the FWS violated and continued to violate FOIA by failing to make a determination regarding the FOIA Request. Aplt. App. at 11. The Alliance also sought to enjoin the FWS from illegally withholding information responsive to the FOIA Request, and compel the FWS to release such information. *Id.* Eventually, the FWS released the requested information, and by January 22, 2014, the parties reached an agreement and filed a Stipulation of Dismissal and Proposed Briefing Schedule for Fees and Costs. Aplt. App. at 40-41. The Alliance filed a Motion for Attorney Fees and Costs on February 21, 2014, pursuant to 5 U.S.C. § 552 (a)(4)(E). Aplt. App. at 46-85. The FWS filed a Response to the Alliance’s Motion for Attorney Fees and Costs on March 14, 2014. Aplt. App. at 86-388. The Alliance filed a Reply in Support of its Motion for Attorney Fees and Costs on March 27, 2014. Aplt. App. at 389-406. The District Court ultimately

denied Plaintiff's Motion for Attorney Fees and Costs on September 2, 2014, which the Alliance now appeals. Order and Decree on Appeal at 5.

### **STATEMENT OF FACTS**

1. On May 2, 2013, the Alliance properly submitted its FOIA Request to the FWS, specifically seeking information regarding how peer review was conducted on the COT Report. Aplt. App. at 15-16 ("FOIA Request").
2. The Alliance wished to analyze the sufficiency of peer review and compliance with federal law and guidance for the highly influential COT Report which synthesized extensive research and delineated conservation objectives with respect to the Greater Sage-Grouse ("GRSG"). *Id.*
3. The COT Report was, and is, heavily relied upon by the FWS in its decision-making with respect to the GRSG. *Id.*
4. The information requested by the Alliance in its FOIA Request had never been made available to the public, despite agency and Obama Administration policies and orders on transparency and scientific integrity.
5. As of June 14, 2013, the Alliance had received no acknowledgement, response, or other communication from the FWS with respect to its FOIA Request.

6. Accordingly, the Alliance sent a second letter to the FWS on June 14, 2013, reiterating its FOIA Request and reminding the FWS of its obligations under FOIA. Aplt. App. at 17 (“Follow-up Request”).
7. Four (4) days later, on June 18, 2013, the FWS acknowledged that it received the FOIA Request and the Follow-up Request via email, but failed to fulfill the Alliance’s FOIA Request or address the substance of either of the Alliance’s correspondences. Aplt. App. at 18 (“Acknowledgement”).
8. On July 30, 2013, the Alliance submitted a Data Quality Act (“DQA”) challenge to the FWS, citing Office of Management and Budget (“OMB”) and FWS policies and guidelines, that also require disclosure of the information requested pursuant to FOIA.
9. On October 15, 2013, the Alliance filed suit under FOIA. Aplt. App. at 4-19 (“Complaint”).
10. On October 24, 2013, and December 3, 2013, the FWS released the requested information. Aplt. App. at 65.
11. On January 22, 2014, the parties filed a Stipulation of Dismissal and Proposed Briefing Schedule for Fees and Costs. Aplt. App. at 40-43.
12. On February 21, 2014, the Alliance filed a Motion for Attorney Fees and Costs. Aplt. App. at 46-85.

13. On March 14, 2014, the FWS filed a Response to the Alliance’s Motion for Attorney Fees and Costs. Aplt. App. at 86-388.
14. The Alliance Replied in Support of its Motion for Attorney Fees and Costs on March 27, 2014. Aplt. App. at 389-406.
15. On September 2, 2014, the District Court ruled the Alliance was eligible to receive fees and costs under FOIA, but was not entitled to them. Order and Decree on Appeal at 5.

### **STANDARD OF REVIEW**

The factual determinations of the trial court are viewed under an “abuse of discretion” standard. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1237 (10th Cir. 2007); *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011) (*citing Davy v. CIA*, 550 F.3d 1155, 1158 (D.C.Cir.2008)). A district court’s award of attorney fees will also be reviewed for an abuse of discretion. *Homeward Bound, Inc. v. Hissom Mem’l Ctr.*, 963 F.2d 1352, 1354 (10th Cir. 1992) (*citing Smith v. Freeman*, 921 F.2d 1120, 1122 (10<sup>th</sup> Cir. 1990)). “A district court abuses its discretion where it commits a legal error, relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling.” *Trentadue v. F.B.I.*, 572 F.3d 794, 806 (10th Cir. 2009) (*citing Breaux v. Am. Family Mut. Ins. Co.*, 554 F.3d 854, 866 (10th Cir. 2009)).

In FOIA actions, a district court also abuses its discretion if it relies primarily upon an agency affidavit, where alternative procedures would more fully provide accurate basis for decision. *Batton v. Evers*, 598 F.3d 169 (5th Cir. 2010) (*citing* 5 U.S.C.A. § 552).

### **SUMMARY OF THE ARGUMENT**

The FWS, as a government agency with exclusive possession of influential information which the public has a statutory right to request, improperly and inexcusably failed to comply with the requirements of FOIA. 5 U.S.C. § 552. The FWS's imprudent conduct directly caused the Alliance to incur attorney fees and costs. The Alliance was eligible and entitled to its fees and costs under FOIA. Consequently, the District Court abused its discretion in not granting an award of attorney fees and costs, where the Alliance demonstrated that:

1. The contents of the requested documents were distributed broadly and contained inherently beneficial information for policy makers and the general public;
2. The Alliance is a nonprofit acting to further the interests of the public as well as its membership, such that any indirect commercial benefit to the Alliance was both negligible and overshadowed by their informational function;

3. The Alliance's interest in the requested documents, which the Alliance shared freely, was predominantly investigatory in nature;
4. The FWS admittedly lacked a reasonable legal basis for withholding the information; and
5. The FWS exhibited obduracy and a pattern of bad behavior which entitle the Alliance to its fees and costs notwithstanding the other factors addressed herein.

Consequently, an award of attorney fees and costs was justified, and the District Court abused its discretion by committing legal errors and relying on clearly erroneous factual findings.

### **ARGUMENT**

The application of FOIA is dependent on a showing that an agency improperly withheld agency records. *Wick Commc'ns Co. v. Montrose Cnty. Bd. of Cnty. Comm.*, 81 P.3d 360, 362 (Colo. 2003). In its FOIA Request, the Alliance requested: 1) the names and institutions of employment and/or affiliations (*e.g.*, university, scientific organization, corporation, agency, etc.) of all persons contacted for the purposes of providing peer review of the COT Report; 2) the names and institution of employment or affiliation (*e.g.*, university, scientific organization, corporation, etc.) of those who actually engaged in peer review of the

COT Report (the “Peer Reviewers”); 3) the questions asked and/or issues presented to the Peer Reviewers with respect to the COT Report; and 4) any formal or informal report(s), paper(s), data compilation(s), communication(s), comment(s), red-line(s), summary(ies) or other document type related to the Peer Reviewers’ review or impression of the COT Report. Aplt. App. at 15-16. The COT Report is a highly influential government document that will impact land use on public lands in at least eleven (11) western states,<sup>1</sup> and ultimately, the decision on whether or not to list the GRSG under the Endangered Species Act (“ESA”).

FOIA mandates that agencies “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of [a FOIA] 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)(C) (emphasis added). Nevertheless, the FWS concedes that it did not respond to the Alliance’s request for records until litigation commenced, even in the absence of legal justification for doing so. Order and Decree on Appeal at 4-5.

Under FOIA, “the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this

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<sup>1</sup> States: Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, Utah, South Dakota, and North Dakota.

section in which the complainant has substantially prevailed.” *See* 5 U.S.C. § 552(E)(i); *Anderson v. Sec’y of Health and Human Services*, 80 F.3d 1500, 1504 (10th Cir. 1996); *Aviation Data Service v. FAA*, 687 F.2d 1319, 1323 (10th Cir. 1982). A complainant has substantially prevailed if the complainant has obtained relief through either: I) a judicial order, or an enforceable written agreement or consent decree; or II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial. 5 U.S.C. § 552(E)(ii). The District Court held the Alliance was eligible as a prevailing party. Order and Decree on Appeal at 2.

### **I. Eligibility to Receive an Award of Attorney Fees and Costs**

Both Congress and the Circuit Court of Appeals for the District of Columbia have recognized the importance of preventing “an agency [from] simply refus[ing] a FOIA Request, [and] wait[ing] for a lawsuit to be filed,” because “agencies could force FOIA plaintiffs to incur litigation costs while simultaneously ensuring that they could never obtain the merits judgment they needed to become eligible for attorney fees.” *Brayton*, 641 F.3d at 525 (D.C. Cir. 2011). Congress passed the OPEN Government Act of 2007, which allows for “FOIA fee awards in the absence of a court decree,” as the Act redefined “substantially prevail[ing]” to include “obtain[ing] relief through ... a voluntary or unilateral change in position

by the agency, if the complainant's claim is not insubstantial." Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552(a)(4)(E)(ii)).

Here, after exhausting its administrative remedies through its initial FOIA Request, Follow-up Request, and correspondence to the FWS, the Alliance filed suit. Aplt. App. at 4-19. It was only after the Alliance commenced litigation that the FWS released the requested information. Order and Decree on Appeal at 4. In doing so, the FWS "voluntary or unilateral[ly] change[d]" its "position" by providing the requested records. 5 U.S.C. § 552(a)(4)(E)(ii). Where the Alliance received the previously improperly withheld records, the Alliance "substantially prevailed," and was thereby eligible for an award of attorney fees under FOIA. *Id.* The District Court correctly concluded that the Alliance was eligible to receive a fee award, and was charged exclusively with determining whether a fee award was "justified." Order and Decree on Appeal at 2.

## **II. Entitlement to Receive an Award of Attorney Fees and Costs**

Courts consider four factors in determining whether an award is justified under FOIA: 1) the public benefit derived from the case; 2) the commercial benefit to the complainant; 3) the nature of the complainant's interest in the records sought; and 4) whether the agency had a reasonable legal basis for withholding the records. *Anderson*, 80 F.3d at 1504 (10th Cir. 1996). However, even where any or all of the four (4) factors are found lacking, courts have awarded attorney fees and

costs in the presence of government obduracy. *See Fraternal Order of Police, Metro. Police Dep't Labor Comm. v. D.C.*, 52 A.3d 822, 835 (D.C. 2012).

### **1. Considerable Public Benefit**

The District Court found that there was “no demonstration that the documents were disseminated for the benefit of the ‘public’ as opposed to the benefit of only [the Alliance]’s dues paying members.” Order and Decree on Appeal at 3. The District Court also decided that the Alliance “used the material exclusively for the benefit of its members and failed to disseminate it to the public.” *Id.*

The District Court abused its discretion by failing to consider evidence presented that the information obtained by the Alliance was subsequently shared with its members, a myriad of other stakeholders interested in science in public decision making regarding the GRSG, and government officials at the state and federal levels. Aplt. App. at 65, ¶ 11. In addition, concerns about agency science as a result of the information requested have been covered by various news reporting outlets.<sup>2</sup> Information gleaned from the records the Alliance requested under FOIA was also ultimately shared in correspondence to Sally Jewel, the U.S.

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<sup>2</sup> *Ex. see* CBS Denver, *Gunnison Sage Grouse Gets Federal Protection*, <http://denver.cbslocal.com/2014/11/12/gunnison-sage-grouse-gets-federal-protection/> (posted Nov. 12, 2014) (last visited Dec. 12, 2014 at 11:04 AM); *see also* CBS Denver, *U.S. Senate Majority Could Rest on the Sage Grouse*, <http://denver.cbslocal.com/2014/07/05/u-s-senate-majority-could-rest-on-the-sage-grouse/> (posted July 5, 2014) (last visited Dec. 12, 2014 at 11:28 AM).

Department of Interior Secretary, and Dan Ashe, the Director of the Fish and Wildlife Service (“Director Ashe”).” *Id.* The Alliance communicated its concerns with congressional representatives on several occasions, in particular those involved in drafting H.R. 4315 on March 27, 2014, a measure designed to bolster transparency and scientific integrity in ESA decisions that is also known as the “21<sup>st</sup> Century Endangered Species Transparency Act.”<sup>3</sup> The records procured by the Alliance were shared with governors, state agencies, state legislators, county commissioners, other industry groups, conservation groups, and other stakeholders. *Aplt. App.* at 64-65. The Alliance’s efforts to make the requested records public also helped persuade Colorado Governor John Hickenlooper to raise concerns about agency science and call for a more flexible and adaptive approach to GRSG conservation. *Aplt. App.* at 65. In addition, the Alliance compiled, summarized, and disseminated the information over publicly accessible internet pages. *Id.* Planned dissemination of information, especially when initiated free of charge, through posting on a website is a “key factor” in the public benefit analysis. *Hull v. U.S. Dep’t of Labor*, No. 04-cv-1264, 2006 U.S. Dist. LEXIS 35054, at \*6 (D. Colo. May 30, 2006).

The very purpose of FOIA “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold

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<sup>3</sup> Authenticated U.S. Government Information GPO, *Union Calendar No. 403 H.R.4315*, <https://www.congress.gov/113/bills/hr4315/BILLS-113hr4315rh.pdf> (last visited Dec. 8, 2014).

the governors accountable to the governed.” *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1225 (10th Cir. 2007) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)); see also 110 Cong. Rec. 17,087 (1964) (statement of Sen. Edward V. Long) (“A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.”).

Similarly, President Obama has openly declared that his “[a]dministration is committed to creating an unprecedented level of openness in Government,” by “work[ing] together to ensure the public trust and establish a system of transparency, public participation, and collaboration.”<sup>4</sup> President Obama believes that “[o]penness will strengthen our democracy and promote efficiency and effectiveness in Government.”<sup>5</sup> The importance of government transparency cannot be overstated, as “[t]ransparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset.”<sup>6</sup> President Obama intends for his Administration to “disclose information rapidly in forms that the

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<sup>4</sup> Barack Obama, *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies*, [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment) (last visited Dec. 2, 2014, 1:12 PM).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (emphasis added).

public can readily find and use.”<sup>7</sup> To that end, executive departments and agencies are explicitly instructed to “harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.”<sup>8</sup>

Aside from the principled importance of governmental transparency, information regarding peer review on the COT Report will be extremely influential in land use decisions and regulatory measures in the West for decades to come.<sup>9</sup> Highly technical and intricate in nature, the COT Report is a one hundred thirteen (113) page document with conclusions on wildlife ecology, wildlife science, conservation biology, grouse biology, and grouse population dynamics.<sup>10</sup> Director Ashe recognized the importance of the document and its potential shortcomings in his March 22, 2013, letter accompanying the public release of the COT Report.<sup>11</sup> According to Director Ashe, the COT Report acknowledges the uncertainty associated with issuing such a report, but aims to “stimulate discussions” regarding

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Valerie Richardson, Washington Times, *Greater Sage-Grouse Buffer Zones May Ruffle Feathers in Western States*, <http://www.washingtontimes.com/news/2014/nov/25/greater-sage-grouse-buffer-zones-may-ruffle-feathe/?page=all> (posted Nov. 25, 2014) (last visited Dec. 15, 2014 at 11:52 AM).

<sup>10</sup> Dan Ashe, The Fish and Wildlife Service, <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/COT/COT-Report-with-Dear-Interested-Reader-Letter.pdf>, at 1-2, (published March 22, 2013) (last visited Dec. 8, 2014).

<sup>11</sup> *Id.*

the GRSG and planning efforts.<sup>12</sup> Such discussions will become increasingly important, as the FWS has until September 30, 2015,<sup>13</sup> to determine whether the GRSG should be listed under the ESA. 16 U.S.C. §1531 *et seq.* How the COT Report reflects issues of science and policy on the GRSG is acutely important to this public dialogue.

Colorado Courts have found particular public benefit from disclosure of records concerning an agency's investigation of plans implicating "millions of Americans" who have an interest in ensuring their plans remain solvent and viable. *Hull*, No. 04-cv-1264, 2006 U.S. Dist. LEXIS 35054, at \*6 (D. Colo. May 30, 2006) (records pertaining to Department of Labor's investigation of Corporate pension plans). Such is clearly the case here, as the GRSG inhabit one hundred eighty-six (186) million acres across eleven (11) western states and two (2) Canadian provinces.<sup>14</sup> Land management plans that cover almost sixty (60) million acres<sup>15</sup> of public land in the West are now being amended to reflect GRSG

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<sup>12</sup> *Id.*

<sup>13</sup> Phil Taylor, E&E Publishing, LLC, <http://www.eenews.net/stories/1060010271> (posted Dec. 10, 2014) (last visited Dec. 13, 2014 at 1:06 PM) ("Interior is under court order to decide by Sept. 30, 2015, whether to propose listing the wide-ranging greater sage grouse as threatened or endangered, or to decide that protections are no longer needed").

<sup>14</sup> Natural Resources Conservation Service, the United States Department of Agriculture, *Greater Sage Grouse*, <http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/?cid=stelprdb1047022> (last visited on Dec. 5, 2014 at 2:49 PM).

<sup>15</sup> Acreage estimates range between fifty-seven (57) and sixty (60) million acres. See Jim Robbins, Nature Conservancy Magazine, *Can the Sage Grouse Recover from an Energy Boom in the West*, <http://magazine.nature.org/features/sage-grouse-on-the-life-list.xml> (last visited Dec. 12, 2014 at 11:53 AM); see also Center for Biological Diversity, *Scorecard Grades Feds*

conservation measures recommended in the COT Report and other agency documents.<sup>16</sup> In addition, the FWS will undoubtedly rely on the COT Report in its upcoming ESA listing decision on the GRSG.<sup>17</sup>

The purpose of FOIA is to provide the public with information that sheds light on the government's performance of its duties. *See Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1217 (10th Cir.2005). Here, the FWS unequivocally failed to perform its duties, and the Alliance was forced to incur the cost of holding the FWS accountable. *Aplt. App.* at 66, ¶ 14. Where the Alliance clearly demonstrated that the FOIA Request records verifiably benefitted the public, this factor weighs heavily in favor of an award of attorney fees and costs. The District Court abused its discretion in finding against the Alliance on this factor.

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*on Following Their Own Scientists' Recommendations for Protecting Greater Sage Grouse*, [http://www.biologicaldiversity.org/news/press\\_releases/2014/greater-sage-grouse-08-18-2014.html](http://www.biologicaldiversity.org/news/press_releases/2014/greater-sage-grouse-08-18-2014.html) (released August 18, 2014) (last visited Dec. 5, 2014 at 1:45 PM).

<sup>16</sup> United States Department of the Interior Bureau of Land Management News Release from the Wyoming State Office, *Federal Agencies Announce Initial Step to Incorporate Greater Sage-Grouse Conservation Measures into Land Management Plans*, [http://www.blm.gov/wy/st/en/info/news\\_room/2011/december/08sg-conservation.html](http://www.blm.gov/wy/st/en/info/news_room/2011/december/08sg-conservation.html) (released Dec. 8, 2011) (last visited Dec. 5, 2014 at 1:51 PM) (“GRSG currently use as much as 47 million acres of land managed by the BLM, and about nine million acres of land managed by the USFS”).

<sup>17</sup> Defenders of Wildlife, *Federal Conservation Plans Would Fail to Conserve Greater Sage-Grouse*, <http://www.defenders.org/press-release/defenders-report-federal-conservation-plans-would-fail-protect-greater-sage-grouse> (posted March 11, 2014) (last visited Dec. 5, 2014 at 2:04 PM) (“The Bureau of Land Management (BLM) and other agencies initiated the planning strategy to implement new land use and management plans on 60 million acres of public land to support sage-grouse recovery before the Fish and Wildlife Service makes its formal listing decision in 2015”).

## 2. Attenuated and Negligible Commercial Benefit to The Alliance

The District Court found that “by obtaining the FOIA material and [using the] information exclusively to support the limited interests that make up its membership,” the Alliance received commercial benefit. Order and Decree on Appeal at 3.

The District Court abused its discretion by failing to consider evidence presented that the Alliance is a nonprofit<sup>18</sup> regional trade organization which focuses on federal legislative, regulatory, environmental, public lands and other policy issues. Aplt. App. at 63-64, ¶¶3, 7. Courts have held that “fee recovery is often appropriate...when the plaintiff is a nonprofit public interest group.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 811 F.Supp.2d 216, 235 (D.D.C. 2011) (citing *Alliance for Responsible CFC Policy, Inc. v. Costle*, 631 F.Supp. 1469, 1471 (D.D.C. 1986)). The Alliance is organized under Internal Revenue Code Section 501(c)(6), and is not organized for profiting or engaging in activities “ordinarily carried on for profit.” Aplt. App. at 394.

Black’s Law Dictionary defines “public interest” as “the general welfare of the public that warrants recognition and protection;” and “something in which the public as a whole has a stake; esp., an interest that justifies governmental

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<sup>18</sup> Colorado Secretary of State, Business Database listing for Western Energy Alliance, <http://www.sos.state.co.us/biz/BusinessEntityDetail.do?quitButtonDestination=BusinessEntityResults&nameTyp=ENT&entityId2=19871271775&srchTyp=ENTITY&fileId=20101428453&masterFileId=19871271775> (last visited Dec. 1, 2014).

regulation.” Black's Law Dictionary (9th ed. 2009). Clearly, the public has a stake in the use of sound science in agency decision-making of this scope. Even if the Court views the Alliance’s interests in the narrowest sense, domestic energy production is crucial to our modern society and national security.<sup>19</sup> Because the Alliance had no commercial interest in information relative to peer review of the COT Report, the Alliance is entitled to reasonable fees and costs.

Furthermore, the District Court failed to recognize the Alliance added significantly to the public discourse on agency science used in the land use management decisions related to GRSG. The Alliance expressed concerns with the agency science based upon the information it received and shared this information and their concerns with myriad stakeholders, the press, policy-makers, and the populous. Were the Court to uphold the District Court’s decision, only the narrowest class of Plaintiffs could ever recover fees under FOIA. In effect, all trade associations, including agricultural, telecommunications, small business, renewable energy, and securities industry groups would be precluded from an award of fees and costs under FOIA.

Here, the Alliance did not seek the information for the direct financial benefit of its members. Aplt. App. at 64-65, ¶¶ 7, 11. Instead, the Alliance

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<sup>19</sup> Matthew Brown and Mead Gruver, Huffington Post, *Fate of the Struggling Greater Sage Grouse Shaping Energy Development in U.S. West*, [http://www.huffingtonpost.com/2014/12/04/greater-sage-grouse-us-energy\\_n\\_6269806.html](http://www.huffingtonpost.com/2014/12/04/greater-sage-grouse-us-energy_n_6269806.html) (posted Dec. 4, 2014 at 12:01 PM) (last visited Dec. 5, 2014 at 2:32 PM).

attempted to examine the information giving rise to the COT Report, and peer review thereof, to inform and educate its members as well as other stakeholders, policy-makers, and the public. Aplt. App. at 64, ¶8. The Alliance is a nonprofit entity, and its geopolitical interests in this subject do not equate to commercial pecuniary gain. Aplt. App. at 63, ¶ 3. The Alliance is not a commercial actor within the meaning of FOIA.<sup>20</sup> Aplt. App. at 394.

Moreover, Courts have held that even where the party requesting records under FOIA had an interest in publishing publicly valuable information in a book sold for profit, that party's interest was at most "quasi-commercial." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C.Cir.1998). Even a quasi-commercial interest is not disqualifying for the purpose of awarding attorney fees and costs. *Davy*, 550 F.3d at 1161 (D.C. Cir. 2008). If the Alliance had indirectly received some commercial benefit from procuring the FOIA Request information, such benefit would be attenuated, negligible, and certainly not disqualifying. *Id.*

Where, as here, the Alliance clearly demonstrated that it did not benefit commercially from the FOIA Request records, this factor weighs in favor of an award of attorney fees and costs. The District Court abused its discretion by finding against the Alliance on this factor.

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<sup>20</sup> Western Energy Alliance Information, <http://westernenergyalliance.org/employsamerica>; <http://www.westernenergyalliance.org/why-western-oil-natural-gas/powering-america/manufacturing> (last visited Dec. 1, 2014).

### 3. Informational Nature of The Alliance's Interest

The District Court found that the nature of the Alliance was one of “private self-interest.” Order and Decree on Appeal at 3.

Even if the majority of the Alliance's members originate from the private business sector of the American economy, that does not indicate that the Alliance's core interest is self-serving. The Alliance's ultimate goal in procuring the FOIA Request documents was to ensure that federal agencies are using sound, peer-reviewed science to make decisions related to land use on some 186 million acres throughout the West.<sup>21</sup> As mentioned, the FWS will use the COT Report to help make its listing determination and to provide guidance to other federal and state agencies on the GRSG. These decisions will have profound implications for individuals, local and state governments, and stakeholders, including agricultural, mining, utilities, water and recreational interests across the West.

Simply because the Alliance is a trade association does not mean the Alliance is not entitled to responsiveness by the FWS, or attorney fees and costs where the agency failed to comply with FOIA. Congress did not limit the recovery

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<sup>21</sup> See Western Energy Alliance Sage Grouse Information, <http://www.westernenergyalliance.org/knowledge-center/wildlife/greater-sage-grouse> (last visited Dec. 1, 2014); see also Ayesha Rascoe, Reuters, *U.S. Spending Bill Blocks Potential Protections for Sage-Grouse*, <http://www.reuters.com/article/2014/12/10/us-usa-energy-sagegrouse-idUSKBN0JO2FI20141210> (posted Dec. 10, 2014 at 5:07 PM) (last visited Dec. 12, 2014 at 11:34 AM).

of attorney fees and costs under FOIA to nonprofits that advocate against private property rights, a free-market economy, or public use of public lands.

Where the Alliance clearly demonstrated that it was a nonprofit, this factor weighs in favor of an award of attorney fees and costs. The District Court abused its discretion by finding against the Alliance on this factor.

#### **4. The FWS Had No Reasonable Basis for Withholding Records**

The District Court correctly found that it was “difficult to divine a reasonable basis in law that could support the government’s delay,” because the FWS did not respond to the Alliance’s request until litigation had commenced. Order and Decree on Appeal at 5.

This Circuit has held that “FOIA is to be broadly construed in favor of disclosure, and its exemptions are to be narrowly construed.” *Casad v. U.S. Dep’t of Health & Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002). Moreover, where an agency has been sued for refusing to release documents, “the agency bears the burden of justifying nondisclosure.” *Id.* This requires the government to satisfy the summary judgment standard by showing that there are no genuine issues of material fact in dispute and that the government was justified as a matter of law in refusing the plaintiff’s FOIA Request. *Brayton*, 641 F.3d at 526 (D.C. Cir. 2011). If the government cannot carry this burden, a substantially prevailing FOIA plaintiff may receive fee awards as long as his claim was “not insubstantial.” *Id.*

Outside of simply confirming receipt of the Requests, the Alliance was met by a five-month period of noncompliance from the FWS. The FWS did not request an extension for “unusual circumstances” pursuant to 5 U.S.C § 552(a)(6)(B), or extend the courtesy of an explanation for its failure to address the Alliance’s FOIA Request. The FWS’s failure to comply with FOIA was allegedly attributable to multiple oversights and an employee’s vacation. Aplt. App. at 107, ¶¶ 4-8. However, the Alliance has found this to be a familiar pattern among agencies within the Department of the Interior, as evidenced in the related cases the Alliance had to file against the Bureau of Land Management (“BLM”), and the United States Geological Survey (“USGS”). Aplt. Opening Brief at v.

Where, as here, nondisclosure was patently unjustified, failing to grant an award of attorney fees and costs would, in effect, condone supreme agency inefficiency and neglect of the Alliance’s reasonable FOIA Request for information. The Alliance should not be penalized, nor can the FWS be excused, for unresponsive behavior by the FWS. The Alliance made every attempt, in accordance with the FWS’ own instructions, to submit its FOIA Request with the correct entity. By its own admission, FWS did not appropriately handle the Alliance’s initial or renewed FOIA requests. *Id.* The Alliance incurred reasonable attorney fees and costs as a direct result of FWS’ inefficiency and negligent management of its duties.

The twenty (20) day deadline for review of FOIA Requests is not a lax suggestion for governmental agencies, but a statutory deadline the FWS was mandated to comply with, barring rare or unpredictable circumstances. The FOIA coordinator for Region 6 going on vacation does not fall within the purview of a rare or unpredictable incident which would grant FWS some leniency. Order and Decree on Appeal at 4.

The District Court did not err in finding for the Alliance on this factor.

### **5. Government Obduracy or Recalcitrance**

The fee shifting provision under FOIA exists to encourage transparency and governmental compliance with private party requests for information.

Consequently, a finding of government obduracy or recalcitrance may tip the balance in favor of awarding fees, even when all other factors do not support a fee award. *Fraternal Order*, 52 A.3d at 835 (D.C. 2012) (emphasis added) (*citing Seegull Mfg. Co. v. Nat'l Labor Relations Bd.*, 741 F.2d 882, 886 (6th Cir.1984) (where there was no public benefit other than vindication of the general objectives of FOIA, fees still awarded because of government obduracy)); *Read v. F.A.A.*, 252 F.Supp.2d 1108, 1112 (W.D.Wash.2003) (“the government's obduracy ... permits a court to ignore factors that weigh against an award of attorney’s fees.”); *Horsehead Indus., Inc. v. United States E.P.A.*, 999 F.Supp. 59, 69 (D.D.C.1998) (sufficiently “mulish” behavior may “require slapping on [the government] the

costs of [the plaintiff's] attorneys' fees without consideration of the other factors”); *Wheeler v. I.R.S.*, 37 F.Supp.2d 407, 414 (W.D.Pa.1998) (obduracy “can make the last factor dispositive without consideration of any of the other factors.... [I]t is this type of behavior that can allow a court to overlook a complete lack of public benefit.”). The legislative history of the four-factor test for the award of attorney’s fees supports such an approach. *See Fraternal Order*, 52 A.3d at 835 (D.C. 2012).

Even if this Court finds an absence of Government obduracy, Congress “enacted the fee-shifting provision of FOIA to reward plaintiffs whose filing of lawsuits alters the government’s slowness and brings about disclosure.” *Terris, Pravlik & Millian, LLP v. Centers for Medicare & Medicaid Services*, 794 F. Supp. 2d 29, 38 (D.D.C. 2011).

The FWS’ egregious neglect of its duties supports an award of attorney fees and costs to the Alliance.

### **III. Reasonableness of Attorney Fees and Costs**

The District Court found that the attorney fee amount may have been unreasonable based on the fact that the case was resolved relatively quickly, and much of the sum was traceable to briefing the attorney fee issue. Order and Decree on Appeal at 5. The speedy resolution of the dispute is predominantly attributable to the Plaintiff’s Counsel’s diligence. The Alliance submitted a FOIA Request to the FWS on May 2, 2013, and it would be over eighteen (18) weeks before FWS

Region 6 Management Analyst, Ms. Cathey Willis, would contact responsible employees on September 9, 2013, to request responsive documents for the Alliance's FOIA Request. Aplt. App. at 107, ¶8.

During those five (5) months of noncompliance, Counsel for the Alliance performed work and incurred costs attempting to resolve the matter. Additionally, Counsel for the Alliance provided a detailed account of the work performed, and costs incurred, including billing statements and supporting affidavits from attorneys engaged in similar legal work. Such attorney fees and costs were reasonable in light of the FWS' failure to cooperate or perform their designated duties.

### **CONCLUSION**

The FWS improperly and inexcusably failed to comply with the requirements of FOIA, causing the Alliance to incur attorney fees and costs as a direct result. The District Court abused its discretion in denying the Alliance's Motion for Attorney Fees and Costs, because the FOIA Request records served to benefit the public, did not provide a commercial benefit to the Alliance, the Alliance's interest in the records was substantially informational, and the FWS lacked a reasonable basis in law for withholding the records.

FOIA “does not provide ... for an automatic award of attorney fees to every successful FOIA plaintiff,” but rather “contemplates a reasoned exercise of the courts’ discretion.” *Fraternal Order*, 52 A.3d at 828 (D.C. 2012) (citing *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 705 (D.C.Cir. 1977)). By denying the Alliance’s Motion for Attorney Fees and Costs, the District Court abused its discretion by failing to evaluate evidence presented by the Alliance and misapprehending the underlying substantive law. *Brayton*, 641 F.3d at 524 (D.C. Cir. 2011) (citing *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C.Cir.1995)).

The Appellant respectfully submits its Opening Brief and requests that this honorable Court enter judgment in favor of the Appellant, the Alliance, in awarding its attorney fees and costs against the Defendant, the FWS.

**ORAL ARGUMENT REQUESTED**

Appellant requests oral argument in order to clarify the issues in this appeal and respond to questions presented by this appeal. Appellant submits that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

Respectfully submitted this 15th day of December, 2014,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2014, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

Zeyen J. Wu  
Zeyen.wu@usdoj.gov

Date: 12/15/2014

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## CERTIFICATE OF COMPLIANCE

I hereby certify that with respect to the foregoing:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,798 words excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font.

Date: 12/15/2014

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

1. all required privacy redactions have been made per 10th Cir. R. 25.5;
2. the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and
3. the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Security Essentials, Version 4.6.305.0, last updated December 15, 2014, and according to the program, is free of viruses.

Date: 12/15/2014

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Marcia S. Krieger**

**Civil Action No. 13-cv-02811-MSK**

**WESTERN ENERGY ALLIANCE,**

**Plaintiff,**

**v.**

**U.S. FISH AND WILDLIFE SERVICE,**

**Defendant.**

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**OPINION AND ORDER DENYING MOTION FOR ATTORNEY FEES**

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**THIS MATTER** comes before the Court pursuant to the Motion for Attorney Fees and Costs (# 13) by Plaintiff Western Energy Alliance (“WEA”), to which Defendant U.S. Fish and Wildlife Service (“FWS”) responded (# 14), and WEA replied (# 35).

WEA initiated this action under the Freedom of Information Act (“FOIA”) seeking disclosure of documents related to the peer review of the Greater Sage-grouse Conservation Objectives Final Report. FWS concedes that it did not respond to WEA’s request until litigation commenced, but the parties stipulated to the dismissal of the case (# 10) on January 22, 2014, having “come to an agreement concerning” the FOIA request without the Court entering a single order in the case and only shortly after FWS’s answer was filed.

A district court may, in its discretion, award attorney fees under FOIA. *See* 5 U.S.C. § 552(a)(4)(E)(i); *Anderson v. Sec’y of Health & Human Servs.*, 80 F.3d 1500, 1504 (10th Cir. 1996). To make the determination, a court first considers whether the complainant has established that it is eligible for an award under the statute and, second, whether a fee award is

otherwise justified. *See Anderson*, 80 F.3d at 1504. A complainant is eligible for an award of reasonable attorney fees and other litigation costs if the complainant has “substantially prevailed.” *See* § 552(a)(4)(E)(i). A complainant has “substantially prevailed” if he or she has obtained relief through either (i) a judicial order (or enforceable written agreement or consent decree); or (ii) a voluntary or unilateral change in position by the agency, where the complainant’s claim was not insubstantial. § 552(a)(4)(E)(ii). Determination of whether an award is otherwise justified involves consideration of four factors: (1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant’s interest in the records sought; and (4) whether the government’s withholding of the records had a reasonable basis in law. *Anderson*, 80 F.3d at 1504. WEA bears the burden of establishing entitlement to an award of attorney fees. *Id.*

FWS does not contest WEA’s eligibility for an award of attorney fees, but nonetheless argues that none of the four factors support the WEA. FWS additionally challenges WEA’s billing records and contends that the fees claimed are excessive. WEA asserts that all of the factors support an award of attorney fees.

The test for the first factor, public benefit, is whether the information that was disclosed assists the public in making an informed judgment as to governmental operations. *See Aviation Data Serv. v. Fed. Aviation Admin.*, 687 F.2d 1319, 1323 (10th Cir. 1982). In weighing this factor, a court takes into consideration the degree of dissemination and likely public impact from the disclosure. *See id.* (quoting *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978)). “The test . . . is whether the disclosure will assist the citizenry generally in making an informed judgment as to governmental operations.” *Id.* WEA, in its motion, asserts that the information was shared “with its members and other stakeholder groups,” and “referenced” in

lobbying activities. WEA, in its reply, also suggests that its use of the material has been somewhat successful in attracting the attention of policy makers. Although WEA nakedly alleges that its use of the material will benefit the public, there is no demonstration that the documents were disseminated for the benefit of the “public” as opposed to the benefit of only WEA’s dues-paying members. The purpose of FOIA is to provide the public with information that sheds light on the government’s performance of its duties. *See Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1217 (10th Cir. 2005). Even assuming that the limited materials that WEA obtained would be of substantial public interest – it appears the final version of the report was already public – WEA has used the material exclusively for the benefit of its members and failed to disseminate it to the public. Thus, the first factor weighs against an award of attorney fees.

WEA’s use of the material also informs the Court’s analysis of the second and third factors, the commercial benefit to the complainant and the nature of the complainant’s interest in the records sought. These factors “assess whether a plaintiff has ‘sufficient private incentive to seek disclosure’ without attorney’s fees.” *Davy v. C.I.A.*, 550 F.3d 1155, 1160 (D.C. Cir. 2008). The U.S. Court of Appeals for the District of Columbia Circuit has stated that “FOIA’s attorney’s fees provision . . . was designed to lower the often insurmountable barriers presented by court costs and attorney fees to the average person requesting information under the FOIA” and, therefore, “when a litigant seeks disclosure for a commercial benefit or out of other personal motives, an award of attorney’s fees is generally inappropriate.” *Tax Analysts v. U.S. Dep’t of Justice*, 965 F.2d 1092, 1095 (D.C. Cir. 1992) (quotation and ellipses omitted), *superseded by statute on other grounds as recognized in Summers v. Dep’t of Justice*, 569 F.3d 500, 502 (D.C. Cir. 2009). WEA achieves a benefit for its members by obtaining the FOIA materials and has

used the information exclusively to support the limited interests that make up its membership, without demonstrating that it has added the materials “to the fund of information that citizens may use in making vital political choices.”<sup>1</sup> *Aviation Data Serv.*, 687 F.2d at 1323 (quoting *Blue*, 570 F.2d at 534). This suggests that WEA’s “private self-interest motive” is “sufficient to insure the vindication of the rights given in the FOIA,” and there is “no need to award attorney’s fees to insure that the action will be brought.” *Id.* at 1322 (quoting *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979)).

The fourth factor, whether the government had a reasonable basis in law for withholding the records, however, weighs for an award of attorney fees. FWS admits that it “did not respond to the request until litigation had commenced.” For the initial delay, it blames an internal processing error that resulted in the request not being “forwarded to the correct region within FWS for processing.” When the request was renewed, FWS merely states that it was forwarded to the appropriate region, but the relevant FOIA coordinator “was on vacation that week, and again the request was not appropriately handled.” Nearly three months later, an individual was

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<sup>1</sup> WEA seeks to draw analogies to other cases in which the plaintiff had a commercial interest or there was a limited audience for the materials that were obtained by FOIA, and in which attorney fees were nonetheless granted. The cases to which WEA refers, however, do not support it. In *Prison Legal News v. Executive Office for U.S. Attorneys*, No. 08–cv–01055–MSK–KLM, 2010 WL 3170824 (D. Colo. Aug. 10, 2010), this Court awarded attorney fees, stating that the relevant information would likely only be seen by a “relatively small” portion of the public. *Id.* at \*2. In that case, however, unlike in the present matter, the information was posted on the plaintiff’s website and at least theoretically available to the entire public. *Id.* Similarly, a private benefit was conferred in *Playboy Enterprises, Inc. v. U.S. Customs Service*, 959 F. Supp. 11 (D.D.C. 1997), but the court also stated its expectation that the case would result in the government agency making “prospective changes in its operations to prevent a recurrence” of the negative conduct at issue in that case, and the court concluded that, “[i]f this is not a public benefit then it would be difficult to discern what would meet that definition.” *Id.* at 17. Finally, in *American Small Business League v. U.S. Small Business Administration*, No. C 08-00829 MHP, 2009 WL 1011632 (N.D. Cal. Apr. 15, 2009), the court found that the plaintiff acted for the purpose of verifying the government’s allegation “for the public.” *Id.* at \*3. In the present matter, by contrast, WEA appears to act primarily for the commercial benefit of its members.

tasked with processing backlogged FOIA requests in the region, and she learned that the responsive documents were being reviewed by the Department of the Interior's Office of the Solicitor in conjunction with another FOIA request. No further action was taken until after WEA's lawsuit was filed. It is difficult to divine a "reasonable basis in law" that could support the government's delay.

Nonetheless, because three of the four factors weigh against an award, and FWS cooperated in resolving the matter quickly after litigation commenced, the Court finds that an award of attorney fees is not justified in this case. The Court does not find that the government acted in bad faith such as to overcome the balance of the other three factors. *See Aviation Data Serv.*, 687 F.2d at 1322.<sup>2</sup>

**IT IS THEREFORE ORDERED** that Plaintiff Western Energy Alliance's Motion for Attorney Fees and Costs (# 13) is **DENIED**.

Dated this 2nd day of September, 2014.

**BY THE COURT:**



Marcia S. Krieger  
United States District Judge

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<sup>2</sup> Additionally, the Court notes significant concerns regarding the accuracy and amount of WEA's motion for fees. At a minimum, the billing records reflect several hours of work that appear to have been on another matter. Moreover, WEA seeks a total award of fees and costs of \$37,061.52, of which substantially more than fifty percent was allegedly incurred drafting the motion for attorney fees and the reply (essentially "fees for fees"). In a case of similar complexity, the Court has concluded that "no more than five hours for briefing [was] reasonable to address the attorney fee issue." *Prison Legal News*, 2010 WL 3170824, at \*4.