

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR	)	
ENVIRONMENTAL RESPONSIBILITY,	)	
	)	
Plaintiff,	)	Civil Action # 1:14-cv-010001-RJL
	)	
v.	)	
	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
BUREAU OF LAND MANAGEMENT	)	
	)	
Defendant.	)	

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**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Public Employees for Environmental Responsibility hereby moves this Court for summary judgment on all issues raised in its June 12, 2014 Complaint on the grounds that there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law.

This Motion is based upon the admissions in Defendant Bureau of Land Management’s Answer filed on January 15, 2015 and upon the Declaration of Jeff Ruch. Pursuant to Local Civil Rules 7 and 56.1, Plaintiff submits herewith a Memorandum of Points and Authorities and a Proposed Order.

Respectfully submitted this 9<sup>th</sup> day of April, 2015.

/s/ Paula Dinerstein  
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*Attorney for Plaintiff*

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**PLAINTIFF’S STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. Plaintiff sent a FOIA request to Defendant via U.S. mail, fax, and email on April 18, 2014 seeking records related to BLM’s attempt to round up and impound cattle owned by rancher Cliven Bundy after Bundy failed to abide by a court order to remove them from BLM land for failure to pay grazing fees. Aff. of Jeff Ruch 1.
  
2. Plaintiff requested (1) all documents related to the decision to call off the roundup of Mr. Bundy’s trespassing cattle, (2) documents describing the disposition of cattle collected by BLM in that removal action, (3) any directives issued after April 1, 2014 by BLM to its subunits concerning protocols or advisories for handling similar incidents of armed resistance to lawful orders or other livestock trespass situations, and (4) any cautions or advisories issued to BLM employees since April 1, 2014 concerning personal safety. *Id.*
  
3. Defendant admits that it has not provided any documents responsive to this request and that over 20 days have passed since it received the request. Def.’s Answer 4, paragraphs 35 - 36.

4. Although counsel for Defendant has represented on several occasions since the filing of Defendant's answer that Defendant plans to provide responsive documents, Defendant has not done so to date. Aff. of Jeff Ruch 1.

Respectfully submitted this 9<sup>th</sup> day of April, 2015.

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**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff Public Employees for Environmental Responsibility (“Plaintiff”) seeks declaratory and injunctive relief against Defendant Bureau of Land Management, (“BLM,” or “Defendant”) for its failure to comply with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended. This lawsuit involves two requests.<sup>1</sup> The second request has been pending for almost eleven months with no response. At this time, Plaintiff is entitled to judgment as a matter of law that Defendant has violated the FOIA with respect to Plaintiff’s request by failing to provide responsive records within the time limits mandated by Congress.

***STATEMENT OF FACTS***

Plaintiff hereby incorporates its “Statement of Undisputed Material Facts” and declaration of Plaintiff’s Executive Director, Jeff Ruch, both filed contemporaneously with the motion for summary judgment and this supporting memorandum.

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<sup>1</sup> The first, related to the incidence of threats and violence against BLM employees is no longer at issue, as Defendant has provided adequate responsive documents since the initiation of this lawsuit.

## ***ARGUMENT***

“It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). The FOIA, enacted in 1966, is a vital part of American democracy, providing any person a right, enforceable in court, to view federal agency records, subject to discrete exceptions. 5 U.S.C. § 552, *et seq.* The FOIA requires agencies to make a determination on requests within twenty working days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). Although a “determination” does not require simultaneous production of the records to the requester, *see Spannaus v. DOJ*, 824 F.2d 52, 59 (D.C. Cir. 1987), the FOIA requires the agency to make the records “promptly available.” 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i). As the District of Columbia U.S. Circuit Court has observed, this “typically would mean within days or a few weeks of a ‘determination,’ *not months or years.*” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (2013) (emphasis added).

In a January 21, 2009 memo, President Barack Obama declared the following policy for the Executive Branch:

“The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. . . The presumption of disclosure should be applied to all decisions involving FOIA.”

Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009). As an agency of the U.S. Department of the Interior (“DOI”), BLM is subject to the regulations that DOI has promulgated under the FOIA. These regulations provide a 20 working day deadline for responding to requests, and specifically note that consultations or referrals do not restart the statutory time limit for responding to a request. *See* 43 C.F.R. § 2.16.

Various United States District Courts have enforced time limits. See, e.g., *Info. Network for Responsible Mining v. BLM*, 611 F Supp 2d 1178 (D. Colo, 2009) (ruling in favor of FOIA requestor on a motion for summary judgment because BLM's response, filed months after the statutory deadline and only after plaintiff commenced a lawsuit, violated the FOIA and resulted in improper withholding under the FOIA); *Natural Desert Ass'n v. Gutierrez*, 409 F Supp 2d 1237 (D. Or. 2006) (environmental group was entitled to summary judgment in action claiming violation of the FOIA where agency failed to make determination within statutory time limit; untimely response violated the FOIA regardless of outcome of request).

When deciding a motion for summary judgment, this Court must “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” F.R.C.P. 56(a). Here, there is no genuine dispute as to any material fact. Defendant admits that it has provided no documents responsive to Plaintiff's April 18, 2014 FOIA request. Although Defendant has been claiming for months that documents will be forthcoming, there is no dispute that Defendant has produced no documents to date.

Further, Plaintiff is entitled to judgment as a matter of law. Congress spoke with plain language in the FOIA, which does not allow unfettered agency discretion in responding to requests. Defendant's failure to make records promptly available as mandated by Congress is wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and BLM's own regulations promulgated thereunder, 43 C.F.R. § 2.1 *et seq.* Defendants' continuing failure to provide documents almost a year after Plaintiff's request also exceeds the time period that the District of Columbia U.S. Circuit Court characterized as acceptable in *Citizens for Responsibility & Ethics*, 711 F.3d at 188.

Defendant's withholding of information has practical ramifications as well as legal ones. Defendant made a decision on a nationally prominent resource enforcement action, and is now shielding that decision from public scrutiny using dilatory tactics that contravene democratic open government principles of our nation, enshrined in the FOIA. The public deserves to understand – in a timely fashion – how Defendant protects its public resource employees from violence and intimidation and how it executes its statutory duty to manage public land in charged situations such as the Bundy incident. Congress designed the FOIA to allow timely public scrutiny of, and debate about, important agency decisions like this one.

Indeed, as the U.S. Court of Appeals for the District of Columbia has warned, the FOIA does not countenance a system that allows agencies to “keep FOIA requests bottled up in limbo for months or years on end.” *Citizens for Responsibility & Ethics*, 711 F.3d at 187.<sup>2</sup> In the instant case, Plaintiff has been waiting nearly a year for record production on a matter of great public interest.

### ***CONCLUSION***

Therefore, Plaintiff requests that this Court grant the relief articulated in its Complaint.

Respectfully submitted this 9<sup>th</sup> day of April, 2015.

/s/ Paula Dinerstein

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<sup>2</sup> In that case, the agency responded to a FOIA request within the 20 day deadline but did not provide information necessary for the requestor to appeal administratively. *Id.*, at 186. Under the agency's argument, the requestor, having failed to exhaust administrative remedies, could not seek redress in court. *Id.* Although exhaustion of remedies is not at issue in the instant case, BLM has employed a similar strategy to keep this FOIA request bottled up, continuing to claim that records will be forthcoming, without providing further specific information.

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**PROPOSED ORDER**

On March 12, 2015, Plaintiff moved this Court for an order granting summary judgment in this Freedom of Information Act (FOIA) case for Defendant’s failure to produce documents responsive to Plaintiff’s April 18, 2014 FOIA request. In support of its motion, Plaintiff submitted a Statement of Undisputed Material Facts, properly supported by responses in Defendant’s answer and an affidavit from Plaintiff’s Executive Director, along with a Memorandum of Points and Authorities. In its response, Defendant has not indicated any disagreement with those facts or suggested any other adjudicative facts that support its position. Accordingly, the Court concludes that the case may be decided on summary judgment.

THEREFORE on this \_\_\_\_ day of \_\_\_\_\_, 2015, this Court hereby:

**GRANTS** Plaintiff’s motion for summary judgment, having found that Defendant wrongfully withheld the requested agency records;

**ORDERS** that Defendant shall be subject to a permanent injunction to cease its wrongful withholding and disclose to Plaintiff all wrongfully withheld records within 20 business days;



**ORDERS** Defendant to pay Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

Plaintiff shall submit an application justifying the amount of fees and costs that it seeks.

This Court shall maintain jurisdiction over this action until Defendant is in compliance with the FOIA, the Administrative Procedure Act, and every order of this Court.

**SO ORDERED.**

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RICHARD J. LEON  
United States District Judge