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Sent by Electronic Mail

Michael Ambri
Civil Chief
United States Attorney's Office
District of Arizona
405 W. Congress Suite 4800
Tucson, AZ 85701-5040

Re: *Center for Biological Diversity v. USFWS*
Case No. 21-CV-00465 (D. AZ)

Dear Mike:

This letter responds to a letter you sent my co-counsel, Tanya Sanerib, on March 18, 2022, concerning the inadvertent release by the Fish and Wildlife Service (FWS) of certain information at issue in the above referenced case under the Freedom of Information Act (FOIA). That letter explained that on February 28, 2022 when the agency provided Plaintiff Center for Biological Diversity (Center) a partial release of the information at issue here—i.e., information maintained in the agency's Law Enforcement Management Information Systems (LEMIS) database—the agency “inadvertently included many items for which Exemption 4 applies in each of the 10 files” provided to the Center. Letter from Mike Ambri to Tanya Sanerib (March 18, 2022). In that letter, you also stated that “FWS will upload corrected files as soon as possible,” and you further requested that the Center “promptly return, sequester, or destroy the files identified above and any and all copies of these pages in [the] organization's possession, custody, or control.” *Id.*

As we have informed you, as soon as you notified Ms. Sanerib by phone on March 16, 2022, that the agency had discovered that it inadvertently disclosed some of this information, the Center immediately removed from its website all of the LEMIS data it received from the agency on February 28, 2022, and ceased disseminating any such information. However, the agency still has not informed the Center as to what precisely was inadvertently released, nor provided the Center with a corrected version of the information. Accordingly, as of today—more than three weeks after you first notified the Center of the agency's error—the Center still has not been able to use *any* of the LEMIS data that was disclosed to it on February 28, 2022 pursuant to a Stipulation approved by the Court, ECF Nos. 13 and 14, including all of the data that the agency

concedes is *not* covered by any FOIA exemption, and hence must be publicly disclosed. *See* March 18 Letter at 2 (noting that only “some” of the information provided is exempt from disclosure). Accordingly, until the agency identifies precisely which information was inadvertently disclosed, the Center is not willing to “return” or “destroy” *all* of the LEMIS data the agency provided it. *See, e.g., Hersh & Hersh v. Dep’t of Health and Human Services*, 2008 WL 901539 (N.D. Cal. 2008) (ordering the return of inadvertently released information under FOIA only *after* the government had provided a second corrected production specifically identifying which information should be returned).

Again, as we have already informed you, the Center did promptly “sequester” all of the LEMIS data that was provided by FWS on February 28, 2022—as you requested in your March 18 Letter—and it is willing to keep all such data sequestered until the FWS informs us as to the precise information that it asserts was inadvertently released. However, the Center is not willing to comply with the additional request in your letter to “notify” FWS of the identities and “contact information” of “anyone outside of [the Center]” to whom the information was or may have been disseminated. This would require the Center to undertake an enormous administrative burden in attempting to track down all such individuals and organizations that may have accessed the information before the agency requested its return on March 18. For example, on May 14, 2022—*before the agency requested the return of the information*—the Center published on its website a press release announcing the release of the LEMIS data that the FWS provided it on February 28, 2022, as well as a link to the Center’s website where such data could be found and downloaded. *See* <https://biologicaldiversity.org/w/news/press-releases/new-wildlife-data-reveals-disturbing-us-trophy-trade-trends-2022-03-14/>. In addition, on March 15, 2022—again, *before* you informed us of the agency’s inadvertent release of some of the data—the Center also made all of that data available to all members of the Species Survival Network—an international coalition of over eighty non-governmental organizations committed to the promotion, enhancement, and strict enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Therefore, before the agency informed the Center of its inadvertent release of data, the information that had been provided by the FWS was already widely disclosed to reporters, as well as individuals and organizations *throughout the world*. Furthermore, the Center has no idea to whom any of those individuals and organizations may have further disseminated the information. Indeed, we note that there were several news stories published about the release of the LEMIS data—again, *before* we were informed about the agency’s error. *See, e.g.,* <https://www.eenews.net/articles/fed-data-shows-big-jump-in-trump-era-hunting-trophy-imports/>; <https://www.nationofchange.org/2022/03/15/new-data-reveals-annual-increase-in-us-trophy-trade-trends-between-2016-and-2020/>; <https://thehill.com/changing-america/sustainability/environment/598127-us-hunters-imported-more-than-700k-trophies-in/>. Accordingly, it would be burdensome in the extreme for the Center to spend time and resources trying to identify every reporter, individual, and organization that may have downloaded this information.

We further object to any notion that either we or the FWS should be contacting each of these reporters, individuals, and organizations and providing their contact information to the FWS, or insisting that they return or destroy this information. That request violates the Center’s First Amendment rights of free speech and association. *See, e.g., National Ass’n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 461 (1958).

Moreover, at a meeting we had with you and Brett Myrick of the Department of the Interior’s Solicitor’s Office on March 28, 2022 concerning this matter, Mr. Myrick informed us that not only had the agency not yet told the business submitters that any of this information had been inadvertently disclosed on February 28, but that some of the submitters had already found out “on their own” that the information had been included in the LEMIS data provided to the Center. Thus, apparently, members of the business community—perhaps the very competitors from whom such information is purportedly kept confidential—also already have access to this information. Indeed, this may be how the FWS first found out that the information had been inadvertently disclosed. Regardless, this highlights not only how widely the information had already been disseminated before the agency notified us of the problem, but also how unfair it is for the agency to now ask our client to return or destroy all of this information. In other words, our client, the requester of the data, is now being asked to return and destroy this information, when it has already been widely distributed throughout the world, *including potentially to competitors of the very companies that submitted the information to the agency to begin with.*

It is well established that there is no “claw back” provision in FOIA. *See, e.g., Sierra Club v. U.S. Environmental Protection Agency*, 505 F. Supp. 2d at 982, 988 (N.D. Ca. 2020) (noting that “FOIA does not specifically provide for the return or destruction of inadvertently produced documents”). Moreover, while courts have recognized that they have inherent authority to require the return of sensitive information under certain circumstances, the courts that have considered this issue take into account certain factors—each of which weighs *against* the Center returning or destroying the inadvertently released information at this juncture.

First, when the information has already been widely disseminated, as is the case here, the court simply is not in a position to remedy the agency’s error. *See, e.g., Sierra Club, supra*, 505 F. Supp. 2d at 991 (noting that invocation of the court’s inherent authority in that case would not be a “reasonable response to the problems and needs that provoke it” because the information at issue “has already been disseminated to multiple people”). Indeed, in *Sierra Club*, the information had only been disseminated to a few people within the requester organization. In sharp contrast, here—as discussed above—the information was widely distributed, throughout *the world*, and to other business entities, before the agency requested its return. Based on these facts, we do not believe it would be appropriate for the Court in this case to require the Center to do anything more than it has already done, and which it has committed to continue to do at this juncture—i.e., keep the information “sequestered” as you alternatively requested in your March 18 Letter until this issue can be resolved.

Second, even with regard to information that is allegedly “privileged”—a claim that does not apply to the Exemption 4 material withheld here, not as “trade secrets,” but simply as “confidential commercial information”—courts look to whether the holder of the privilege “took reasonable steps to prevent disclosure.” *See, e.g., Ecological Rights Foundation v. Federal Emergency Management Agency*, 2017 WL 24859 (N.D. Ca. 2017), at * 7. Here, based on the information you provided in your March 18 letter and the additional information you conveyed at the meeting on March 28, it does not appear that the agency took such “reasonable steps” to prevent disclosure. Indeed, as noted in your March 18 letter, one of the principal reasons information was inadvertently disclosed was that the agency failed to “remove entries for the submitters when they used names that were slightly different than the official spelling of the submitter’s name.” March 18 Letter at 1. Thus, as the agency further explained:

For example, while Worldwide Primates, Inc. properly submitted a response to FWS's Exemption 4 notice, and information related to "Worldwide Primates, Inc." was properly removed from the nine files in question, those files still contain sensitive information from Worldwide Primates when the name differs slightly, for example "World wide Primates, Inc."

Id. However, the difference between "Worldwide Primates" and "World wide Primates" is so slight, it is difficult to conclude that the agency took "reasonable steps" to prevent the disclosure of the information the agency now contends is extremely sensitive—and we believe the agency would be hard-pressed to make such a showing to the Court. In this regard, we had no difficulty searching the database for all information provided by Worldwide Primates, regardless of minor differences in the name of the entity.

Notwithstanding the above, the Center remains willing to keep all of the information you provided on February 28, 2022 "sequestered," as you requested in your March 18 letter, until the agency informs us as to precisely which information was inadvertently disclosed—assuming that happens in the near future. Again, because the agency has not yet identified *which* information was inadvertently disclosed—as distinguished from the information the agency concedes is *not* exempt from disclosure under FOIA—the Center, because of its willingness to address the agency's concern, has not been able to use or further disseminate *any* of the data that was disclosed to it well over a month ago, including any of the *non-exempt* information. Depending on the extent and nature of the information the agency identifies as inadvertently disclosed, the Center will let you know if it continues to contest the agency's position on this issue. In that event, if the agency still insists that all such information be returned, destroyed, or sequestered by the Center, the parties can discuss how best to present this issue for resolution by the Court.

However, in light of all that is set forth above, the Center is not willing to destroy or return this information, nor is it willing to identify persons or organizations who may have accessed the data, nor to contact all such individuals or organizations to request that the information be retrieved, returned, or destroyed. As explained above, not only would such an effort be far too burdensome at this point, but those communications and affiliations are protected by the Center's First Amendment rights.

We hope we have made our position on this matter clear. However, if you have any questions about any of this, please let us know. Please be sure to direct your communications to me as the Center's lead attorney for this case.

Sincerely,



Katherine A. Meyer