

12 September 2009

USDA Forest Service, Chief's Office  
1400 Independence Avenue, SW  
Mail Stop: 1143  
Washington, DC 20250-1143

**FREEDOM OF INFORMATION ACT APPEAL:**

Attn: FOIA Officer

**FOIA Control No. 338, USFS Region 3**

To Those Concerned:

This is an administrative Appeal under the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A), related to the above-cited FOIA Request filed with the Santa Fe National Forest on 17 June 2009 – hereinafter termed "FOIA #338", as designated by the USFS Region 3 office.

The agency's 'final determination' (dated 7/29/09) and responsive documents were received by U.S. mail on 4 August 2009, and the last 'denial' of records came by email on 11 August 2009, so this Appeal is timely, within the 45-day limit prescribed in the Act.

It is submitted in parallel with a separate Appeal on "FOIA #516", filed on 24 June 2009, concerning the same event and related questions. Communications with FOIA staff dealt with both Requests in common, and they were linked in most procedures. ***[FOIA-I, FOIA-II]***

Thus the Requests, Responses, and correspondences are attached as a combined administrative record, for the sake of brevity, and itemized in an Index preceding the documents. The statements and positions set forth in the prior record are included and reaffirmed herein by reference.

The combined record of these tandem FOIA cases may also be viewed on-line:

<http://www.free-assembly.org/gather/campaigns/foia-nm/>

This Appeal engages issues of FOIA procedure, as well as significant exclusions in the content of cumulative Responses. The Request concerned a public assembly in-progress, and exigent facts affecting the legal standing and expressive interests of those taking part; therefore agency actions and disclosures are subject to First Amendment standards of performance and review. These are addressed in turn, in two sections below... specifically, the following deficiencies are disputed:

**A. ERRORS OF FOIA PROCEDURE ~**

USFS officials delayed and obstructed public information relevant to First Amendment exercise, in a sequence of FOIA actions:

- 1) *A waiver of FOIA fees was denied on contrived claims, disregarding our record and clear public interests, to deter the Request and sidetrack proceedings.*

The first official response was the 6/25/09 letter from the Forest Supervisor, denying the requested waiver of FOIA fees. His answer stepped around the obvious public interests in these disclosures, and the known record of our organization, exempted from fees by the Forest Service in prior FOIA proceedings. Upon no basis, he even alleged "commercial" purposes in the Request, and

that it was "not likely to contribute significantly to a public understanding of the operations or activities of the government" – which was entirely its point and effect. **[corr02]**

The fee waiver denial, *per se*, is not appealed here: In reply, we established that the Request was narrow, and responsive records current, locally available and well within limits for free duplication, so the fee exemption was moot. In this way the tests for waiver were deferred, with our eligibility reserved, and we avoided weeks of delays tied up in this procedural challenge. The agency then produced a small file of records at no cost, so there is no controversy on this. **[corr07]**

But regardless of how we defused this problem, creating it was a misuse of agency discretion. The fee waiver denial was a waste of time, and procedural obstacle by design – ignoring clear public interest purposes under FOIA, and posing an undue burden of proof as a precondition of disclosures. Such action is subject to procedural review on FOIA appeal, in light of its chilling effects on public information, and the emergent First Amendment event at focus in the Request.

2) The agency's refusal of "expedited processing" was groundless, and impeded timely disclosures on policy actions affecting ongoing First Amendment activities.

The 6/17 Request dealt with a current event – the annual 'Rainbow Gathering' then just convening in Santa Fe National Forest, on a site selected days before. It was sent by Fax for the agency's immediate notice, calling for "expedited Response as soon as possible", by return Fax, email, and/or personal conveyance at USFS offices in New Mexico, to avoid postal delays. It was specific to the 'special use' authorization just granted, and related submittals & correspondences – matters of current business, minimal in responsive documents required, locally available and reasonably within means of expedited processing. Due to the Gathering's known short duration of a few weeks, and immediate policy actions decisive in its course, affecting all participants on-site and expected to arrive, the public urgency and "timely nature of this information" were self-evident.

The Regional Forester personally intervened by letter on 6/25/09 to deny expedited processing. He did so on specious grounds, in disregard of the real situation and clear public interests under FOIA. His rationales were red-herring and absurd – stating caveats related to "news media" inquiries, and alleging that such facts were of narrow public interest, only "in a limited geographic area". The transparent intent was to withhold timely responses, and reserve an arbitrary power to throw up procedural obstacles. Because the Request addressed matters directly involving his own official actions, his interference in FOIA proceedings was an improper conflict of interest. **[corr06]**

It is significant that we had no effective recourse at that time, since an appeal on that decision alone would have exhausted the meaningful timeframe of the Gathering, and would become moot. §552(a)(6)(E). In the overriding need for fast disclosures, the only choice was to focus on cooperating with the designated FOIA officers, and getting information as soon as possible. By rule, the 10-day limit for expedited processing on Request @338 expired on or about July 1, 2009.

That decision is still appealable, since the Final Responses were not confirmed until 8/11/09: This date defines the extent to which Responses were delayed and "expedited processing" sacrificed, contrary to compelling needs and public interests. **[corr08]**

3) Subsequent agency actions broke agreements and stalled Responses past the critical timeframe of the event, in detriment to timely public information and personal rights.

Email and phone communications with USFS staff contact Sara Campney started up around 6/25/09. I apprised her that I would be in New Mexico the following week; in order to avoid delays

and simplify the process, it was agreed that I would receive responsive documents in-person at USFS offices there. On 7/2/09 I met with her and Paula Barnhill, Region 3 FOIA Liaison, at regional headquarters in Albuquerque, where they conveyed "Partial Determination" letters dated 7/1/09 on both Requests, and selected documents. *[corr09a-b; doc I-2, I-3, I-4, I-5, II-1]*

On 7/7/09 I called Ms. Campney to arrange to pick up remaining responses, and was told that they were "working on it". On 7/14 and 7/15 I called again... she said that responses were still under review by R-3 staff, and that they would not arrange for document pick-up or meet again as promised. On 7/17 I received an email with two more "partial determination" letters dated 7/16/09, concerning the same materials previously conveyed in Albuquerque – differing from the 7/1/09 letters only in the tally of pages then provided, and in "rerouting" inquiries to Ms. Barnhill. *[corr10]*

Letters of "final determination" on both Requests (#516, 7/27/09... #338, 7/29/09) came by postal mail on 8/4/09; 52 pages of further records on FOIA #338 were appended, but no further records were provided in response to FOIA No. 516. *[corr11a-b; doc I.6]*

USFS staff had agreed to provide Responses in digital format in addition to hard copy by mail, in light of the need to distribute this public information on-line. However their 7/30/09 email attached a PDF-bundle of "foia\_338\_responsive\_records" which was password-protected, encrypted, not openable with older software, and unusable in this purpose. We noted that no other USFS disclosures had been conveyed in this way, and asked Ms. Barnhill to provide the PDF file again in compatible, accessible form, but she arbitrarily refused to do so. *[corr12, \_13, \_14, \_15]*

The original Request was simple & narrow, the records were current & local, and the situation required responses right away. Instead the agency dragged its heels, inflated the job and protracted the process with redundant steps and internal reviews. The predictable effect was to delay responses past the meaningful timeframe of the event, and arguably this was the intent. As a result, we were unable to provide timely public information, and participants affected by the policy actions in question were compromised in collateral interests and rights.

## **B. PARTIAL RESPONSES, FOIA #338 ~**

Agency Responses and exclusions are challenged in light of the scope of the Request, as defined in its three component line-items:

- 1) *Noncommercial Group Use ("NGU") applications and signed permits for the intended gathering site, as received by the Forest Service on or after June 10, 2009. Copies provided should show names and addresses of presenting parties, and the date & time of receipt.*

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**1.1** The 'NGU' permit in effect was not disclosed to gathering participants or the public until the USFS web-link was conveyed by email on 6/26/09, in response to this Request.  
*[corr04; doc I-1, I-6a:(pp.12-16)]*

The 6/17/09 Request was motivated by reports that a permit for the Rainbow Gathering had been enacted days before, yet the signer and content were still unknown. By definition, the NGU permit is not a private bilateral compact: It is a legal instrument of public lands administration, binding attendees to third-party views, claims, terms & conditions, with broad public interests where First Amendment rights are affected. As such it must be transparent – immediately disclosed to on-site & intended participants, and made publicly available.

A copy held by a signer or "contact" person does not effect general Notice... the fact that reportedly three FOIA Requests were submitted is proof. In effect, the first and final permits were concealed for 13 days, until 6/26/09 when these Requests induced the agency to publish the amended version (only) on their website. In fact the NGU permit is a public document, *a priori*, and FOIA proceedings were improperly required to obtain it.

**1.2** Signers of 'NGU' applications and approved permits (6/13/09, superceded on 6/17/09) are shown in name only, with identifying addresses & other items redacted.  
**[corr05; doc I-1, I-6a:(pp.3-7),(pp.8-11),(pp.12-16)]**

Disclosure of permit documents is insufficient if the identities of parties are suppressed. For any legal purposes, personal identification of an acting 'agent' requires at least the full name and residence – without which no grant, contract, or permit can take effect. Nor can the full identity of an agent be shielded from those represented: In this circumstance, gathering participants are collaterally bound by the actions of a permit agent or signer, and have a direct and immediate legal interest in knowing who it is.

Forest Service responses repeatedly redact addresses, phone & email contacts, signatures, and other distinguishing information that might precisely identify permit proponents and make them accessible – citing FOIA exemptions under §(b)(6) and the Privacy Act. It is the burden of government to show that such basic facts "*would constitute a clearly unwarranted invasion of personal privacy*", but there is no such proof, nor even a reasonable assumption. In fact where certain parties stand as purported agents for an alleged "Group" – or for individual attendees in a public assembly, collectively – they have no presumption of privacy.

These documents are not at all "similar" to personnel or medical files that are intrinsically 'personal' in nature, so §(b)(6) and parallel exemptions in the Privacy Act are not applicable to these FOIA records. Moreover it is understood that an agency's use of these exemptions in response is discretionary, by law. To do so here upon no plausible grounds is a capricious abuse of discretion, curtailing public information in the face of known legal standards, personal rights, and compelling public interests.

2) *Forest Service letters of notification denying or granting such applications respectively, any processing documents or directives related to their screening or handling under agency review, and the NGU Permit as approved, with appended terms and 'Operation Plan'.*

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**2.1** In the 6/13/09 denial letter to Garrick Beck, the identifying address is again redacted, and the cc: conveyance to "Rainbow Attorney" is not included in responses.  
**[doc I-6a:(pp.1-2)]**

Re: §(b)(6) & P.A. redactions – the foregoing statements in Paragraph 1.2 are incorporated and adopted here by reference. The proponent's address is withheld predictably as above. More significant is that the denial letter was copied to a "Rainbow Attorney", in the title and capacities implied, and the name concealed. An applicant represented by counsel in the 'Rainbow' name affects the legal standing of participants; this requires transparency.

The conveyance to the lawyer was within the scope of this Request item. Its exclusion from responses was improper, and collusive in holding the lawyer anonymous.

2.2 Responses exclude any communications from USFS headquarters and affiliated Federal agencies concerning applied NGU policy and the permit for this event.

**[no documents]**

Historically before and during Rainbow Gatherings, local Forest and Regional offices have routinely received "directives" on NGU policies, from various internal and interagency sources. On information and belief, such communications also occurred for this event in New Mexico, and were withheld from FOIA disclosure... their exclusion is challenged here.

3) *Prior personal correspondences to and from the Offices of the Supervisor, Regional Forester, or authorized personnel – before June 10, 2009 and since July 2008 – concerning the 2009 Rainbow Gathering in New Mexico, the NGU permit rules, and related policies as applied.*

3.1 Most names and all identifying contact & other information are redacted from advance correspondences on the gathering and related issues, including offers to sign a permit.

**[doc 1-6a:(all), 1-6b:(all)]**

Re: §(b)(6) & P.A. redactions – the foregoing statements in Paragraph 1.2 are incorporated and adopted here by reference. They are significant in the timeframe before an expected gathering, where those who come forward or correspond personally about it are construed by USFS officials to be "*de facto agents*" on its behalf – or, they might be acting in that capacity on their own volition, not designated by any supposed 'Group'.

It is a core legal interest of participants to identify individuals who appear or claim to speak for them, as *de facto* or deliberate agents; it is a *compelling interest* where their personal standing in First Amendment exercise is at stake. In turn, officials cannot arbitrarily select preferred 'agents' for the gathering and hold them anonymous. Accordingly participants are affected by any *ex parte* communications and prior pacts on the 'Rainbow Permit', and it is improper to redact identifying information, and even the names of such parties.

It is notable that call notes and referenced memos are not provided, and that there is a seven-month gap in correspondences disclosed since September 2008. It is apparent that responsive records have been disregarded or withheld, and this is challenged on Appeal.

Thanks for your review and consideration; we look forward to fitting FOIA remedies.

*I declare under the penalties of perjury pursuant to 28 U.S.C. 1746 that the above statements are true.*

Respectfully,

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scottie addison, Coordinator

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