

PCU /\ Free Assembly Project

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~ an Association of Volunteers

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. 516, USFS Region 3

~ Request filed via FAX: 24 June 2009

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 24 June 2009 – hereinafter termed "FOIA #516", as designated by the USFS Region 3 office. **[FOIA-II]**

This is submitted in parallel with a separate Appeal on "FOIA #338"; that Request was filed on 17 June 2009, concerning the same event and related policy matters. **[FOIA-I]**

The two FOIA cases were linked from the outset in staff communications, and they were handled together in most procedures. Accordingly the combined administrative record is presented here, and referenced by both Appeals: The original Requests, correspondences, and Response items are attached as required, and itemized in an "Index" preceding the documents. The statements and positions set forth in that 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/>

The agency's 'final determination' letter (dated 7/27/09) and last responsive documents arrived by U.S. mail on 4 August 2009, and the last denial of related records came by email on 11 August 2009, so this Appeal is timely, within the 45-day limit prescribed in the Act.

This Appeal engages some issues of FOIA procedure in common with the parallel Appeal, and a more serious challenge on responsive documents excluded and denied. Again, the Request concerned a public assembly in-progress, and exigent facts affecting the legal interests and expressive rights of those taking part; therefore agency actions and disclosures are subject to First Amendment standards of performance and review.

The deficiencies are set forth in two sections below:

A. ERRORS OF FOIA PROCEDURE ~

The stated facts and positions in the appended FOIA #338 Appeal, in Sections A.2 and A.3, are incorporated here by reference and reaffirmed in this Appeal.

In common proceedings with FOIA #338, this Request was also subjected to arbitrary denial of expedited processing, and unwarranted delays that protracted responses well-past the duration of the Rainbow Gathering. Timely disclosures are essential where applied policy actions affect ongoing

expressive activities, and immediate legal and constitutional interests of those taking part... and there is need for speedy transparency in light of core public interests in First Amendment rights.

The contents of this Request bear a direct nexus to these interests: It concerns altered Federal authorities in the National Forests – by Delegation of administrative powers to law enforcement agents, known and unknown – as a recurrent Federal policy when expressive gatherings occur there. It goes to the additive jurisdictions under "Incident Command", the underlying decision that such a delegation would take place, and the factual & legal grounds which have never been disclosed.

Thus there was clear 'compelling need' for these records under FOIA, and for timely responses. By rule, the 10-day limit for expedited processing on Request @516 expired on or about 9 July 2009. Instead, final responses were delayed until after attendees had left the site and region. The effect was to disable potential claims and defenses arising from this event, and related to these actions.

The Regional Forester's denial of "expedited processing" was issued on 6/25/09, and conveyed by email the next day. We responded on 6/28/09 with a "*Rejoinder on Expedited Responses*", challenging the decision and stating the issues, seeking immediate remedies but deferring appeal on this point. It was necessary to evade this procedural obstacle, and to work with FOIA staff, with focus on actually obtaining time-sensitive information as fast as possible. **[corr06, corr08]**

That decision, *per se*, is still subject to Appeal, since Final Responses on both Requests were not received until 8/4/09, nor confirmed until the final 'Denial' of documents on 8/11/09. Only then could the scope and extent of delayed Responses be known for purposes of this full Appeal.

B. SUBSTANTIAL FOIA FACTS WITHHELD ~

The Agency produced one (1) document, responsive to the first of three line-items in this Request, and disclaimed or denied further disclosures:

- 1) *The Supervisor's 'Delegation of Authority' to an "Incident Commander", for administration of Forest Service and other federal policies during the course of this event in June-July 2008.*

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A single document was requested, and conveyed in-person on 7/2/09, in a meeting with USFS FOIA staff at the Southwest Region headquarters in Albuquerque. They provided a faint copy of the "Delegation of Authority" in Santa Fe National Forest, dated 14 June 2009 and signed by Deputy Supervisor Erin Connelly. **[doc II-1]**

This document was itemized in a "partial determination" letter dated 7/1/09, also conveyed at that meeting, and again in a similar "partial response" letter dated 7/16/09, sent by email and postal mail the next day. **[corr09(b), corr10]**

No further responsive records were provided on this FOIA Request.

- 2) *Plans, directives, and/or memoranda which (a) identify all Federal, State, and local agencies on the "National Incident Management Team" ("NIMT"), and those representing member agencies in their official capacities; and which (b) define the respective missions and responsibilities of member agencies under federal authorities.*

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2.1 The Agency denied that a NIMT was in-place for this event, and provided no records on the known participation of USDA personnel and other agencies in the "Incident" regime.
[no documents]

In the "final determination" letter dated 7/27/09, the Agency states:

"... A two page document responsive to item 1 was provided to you on July 1 by the Santa Fe National Forest (NF). A National Incident Management Team was not utilized for this year's Rainbow Gathering. ..." **[corr11(b)]**

The document provided (on July 2) was the Delegation of Authority: It expressly names the "Incident Management Team", and references the "Team" three more times in its instructions. It is demonstrably "National" in nature and origin, has been called such in the past, and clearly was "utilized" for the Gathering in New Mexico.

It is well-known that the Incident Team was mainly staffed and run by USFS Law Enforcement and Investigations, a separate agency with its own chain of command, with personnel from around the country. It is also known that specialized Forest Service personnel were brought in from elsewhere, and that other Federal and local agencies participated in its operations. Its creation and composition are significant facts of public information, where the separate authorities of agencies involved are combined by proxy under the powers of the Incident Commander, superceding Forest Service authorities mandated by Congress.

It is secondary whether the "Team" was comprised formally for this event, or informally upon prior directives or agreements. In fact and effect, by interagency participation an "Incident Management Team" was emplaced as the instrument of Federal authority and applied policy for the Rainbow Gathering in New Mexico. Because these altered powers bear upon basic First Amendment interests, fast and full disclosures were imperative. In the stalled "final determination", the Regional Forester was transparently deceptive about its very existence, and his denial of responsive records was a serious FOIA violation.

3) *Any prior action or determination by USFS or other officials that the 2009 'Rainbow Gathering' in New Mexico was deemed an "Incident", such that a Delegation of Authority was mandated in advance, and the findings of fact which supported this decision. These or related documents should state federal authorities for such action, and cite to the regulations & standards applied.*

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3.1 The Agency evaded the question, denying all disclosures on the "Incident" designation, and the prior findings, decisions, and law mandating the Delegation of Authority.
[no documents]

The "final determination" letter also states:

"You clarified on July 2 for item 3 that you are requesting the records that show who made the determination to designate the gathering as an "incident."

.....The event was not designated as an "incident." It was designated as a non-natural disaster emergency for purposes of funding. We therefore do not have records responsive to items 2 and 3." **[corr11(b)]**

First, my July 2 clarification with FOIA staff went beyond "*who made the determination*": It refocused on responsive documents to be found only in the Forest and Regional offices in New Mexico, in conjunction with the Gathering there, and readily available as items of current agency business. Further it noted that these decisions may have come down from the Washington Office, with no local "findings of fact" specific to this event – so possibly no responsive documents would be found on these points, and this was an acceptable answer. The intent was to narrow the Request to relevant policy directives received locally by Forest and Regional officials, and thereby (hopefully) to simplify and speed responses.

Then, to waffle on the semantics of the "incident" designation is totally disingenuous: This FOIA Request was made because the authorities, grounds, actions and terms underlying the Delegation of Authority have never been revealed, and remain unknown. It is reasonable to infer that an "Incident" was designated, based on the common and official use of this term, and fair that predicate policy language and decisions be disclosed in accord. It is nonsense to invoke the arcane 'bureau-speak' first seen in the 7/27 letter – "*non-natural disaster emergency*" – and to deny responses because this term was unknown.

It is understood that a Delegation of Authority does not happen *de novo*, of its own accord, but requires an event's prior designation and related agency decisions to be enabled – as a matter of administrative law and practice. On information and belief, the USDA Forest Service has made such designations and decisions for every Rainbow Gathering, or for all of them collectively, since 1998. In effect this has triggered 'Incident Command' powers and funding as a standing policy toward these public assemblies, and this First Amendment creed – yet the predicate agency actions have been conducted out of public view to date.

Thus there are compelling interests in these records, and the Request sent to Santa Fe National Forest and Region 3 was narrow and fitting to its purpose. Bluntly, it is not credible for the agency to quibble obscure terms and disclaim their existence, and it is a capricious violation under FOIA to deny such records in response.

In closing, we recall the President's Order of January 21, 2009:

"All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA."

Let this Appeal proceed in that spirit... please send thoughtful reply to the undersigned address.

*I certify the foregoing statements to be true and correct,
to the best of my knowledge and belief. 28 U.S.C. 1746*

Respectfully,

scottie addison, Coordinator

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