



**BUFFALO**  
**FIELD CAMPAIGN**

**FREEDOM OF INFORMATION ACT APPEAL**

February 20, 2024

*DOI FOIA/Privacy Act Appeals Office*  
Department of the Interior  
Office of the Solicitor  
1849 C Street, N.W.  
MS-6556 MIB  
Washington, D.C. 20240  
Attn: FOIA/Privacy Act Appeals Office  
Telephone: (202) 208-5339  
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**Re: Buffalo Field Campaign Freedom of Information Act request (December 7, 2023)**  
**FOIA control number DOI-NPS-2024-000297**

Dear FOIA Appeals Officer,

This document constitutes Buffalo Field Campaign's appeal of records and information withheld by Yellowstone National Park in response to our Freedom of Information Act (FOIA) request DOI-NPS-2024-000297.

Specifically, Buffalo Field Campaign appeals the National Park Service's unlawful use of Exemption (b)(5), the FOIA's deliberative privilege exemption, to withhold 2 documents totaling 153 pages in their entirety, and to withhold information in 8 documents totaling 61 pages.

Additionally, Buffalo Field Campaign is cognizant of at least 1 record that the National Park Service failed to include in the agency's responses (IDENTIFYING STRUCTURE OF THE YELLOWSTONE BISON POPULATION, March 20, 2023). In this final federal performance report, Yellowstone National Park biologist Chris Geremia PhD is one of two co-authors investigating the structure of the Yellowstone bison population "to determine the number of breeding herds in the Yellowstone bison population and characterize their genetic makeup . . . to evaluate whether management removals that occur when bison migrate out of the park differentially affect breeding herd units." The National Park Service failed to conduct a "reasonably adequate search for responsive records" as requested. It should do so again and release any and all records that are the subject of our FOIA request.

*"Protecting the Last Wild Bison"*

A copy of all correspondence and responses generated in our FOIA request are included in our appeal.

Darrell Geist, habitat coordinator, is handling Buffalo Field Campaign's appeal.

### **FACTUAL BACKGROUND**

On December 7, 2023 Buffalo Field Campaign requested all records from the Office of the Superintendent, Yellowstone National Park concerning the following subject matter:

1. Briefing Statements on Yellowstone bison from January 1, 2019 – current.
2. Wallen et al. 2013 and Wallen et al. 2013 updated. These unpublished papers are referenced in Ch. 8, *Yellowstone Bison: Conserving an American Icon in Modern Society* (2015). Wallen, R. L., F. M. Gardipee, G. Luikart, and P. J. White. 2013. Population substructure in Yellowstone bison. Yellowstone National Park, Mammoth, Wyoming.
3. Papers, reports, studies, and surveys on Yellowstone bison genetics from January 1, 2019 – current.
4. Records transmitted between Yellowstone National Park and the U.S. Fish & Wildlife Service on Yellowstone bison from January 1, 2018 – current.

“Yellowstone National Park” refers to the Superintendent, Office of the Superintendent staff and personnel acting under the authority or on behalf of the Superintendent such as the Yellowstone Center for Resources.

“All records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

On January 24, 2024, the National Park Service provided an initial response to Buffalo Field Campaign's habitat coordinator releasing 18 documents totaling 135 pages in their entirety.

On January 29, 2024, the National Park Service provided a final response to Buffalo Field Campaign's habitat coordinator withholding 2 documents totaling 153 pages in their entirety, and withholding information in 8 documents totaling 61 pages.

### **I. THE FREEDOM OF INFORMATION ACT IS DESIGNED TO REQUIRE DISCLOSURE OF AGENCY RECORDS.**

The purpose of the FOIA “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted). The U.S. Congress designed the FOIA to “pierce the veil of administrative secrecy

and to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Accordingly, the FOIA requires that federal government agencies disclose to the public any requested documents. 5 U.S.C. § 552(a). As the Supreme Court has declared: “FOIA is often explained as a means for citizens to know what ‘their Government is up to.’” *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that “[t]his phrase should not be dismissed as a convenient formalism.” *Id.* at 171-72. Rather, “[i]t defines a structural necessity in a real democracy.” *Id.* at 172. “As a general rule, if the information is subject to disclosure, it belongs to all.” *Id.*

The National Park Service may avoid disclosure only if it proves that the requested documents fall within one of the nine enumerated exemptions to the general disclosure requirement. 5 U.S.C. § 552(b)(1)–(9). Thus, the FOIA establishes a statutory right of access by any person to federal agency records. Consistent with encouraging disclosure, the exemptions under § 552(b) are discretionary, not mandatory. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). “Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency’s obligation to disclose; it does not foreclose disclosure.” *Id.* at 292.

The FOIA’s exemptions are to be construed “as narrowly as consistent with efficient Government operation.” *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89 (1973) (citing Senate and House Reports on exemption 5). This includes the deliberative process exemption: “It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (citation omitted). “[W]hen material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Inf. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (citation omitted). “To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.” *Coastal States Gas Corp.*, 617 F.2d at 866.

The FOIA is to be broadly construed in favor of disclosure.

FOIA generally provides that the public has a right of access, enforceable in court, to federal agency records. *See Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 941 (10th Cir. 1990). FOIA is to be broadly construed in favor of disclosure, and its exemptions are to be narrowly construed. *Id.* The federal agency resisting disclosure bears the burden of justifying nondisclosure. *Id.*

*Audubon Society v. U.S. Forest Service*, 104 F.3d 1201, 1203 (10th Cir. 1997).

Given the public disclosure policy favored in the FOIA, federal courts have consistently refused to allow agencies to meet their burden of proving the requested documents fall within one of the FOIA’s exemptions by making conclusory and generalized allegations of confidentiality. “We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases.” *Coastal States*, 617 F.2d at 861. *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) (“agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and

reviewed by the courts.”). “We remind the agencies, once again, that the burden is on them to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct.” *Coastal States*, 617 F.2d at 861. *Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 941 (10th Cir. 1990) (“The district court must determine whether all of the requested materials fall within an exemption to the FOIA and may not simply conclude that an entire file or body of information is protected without consideration of the component parts.”) (citation omitted).

## **II. THE NATIONAL PARK SERVICE DID NOT PROVIDE THE NECESSARY PROOF AND DETAILED SPECIFICITY FOR WITHHOLDING RECORDS AND INFORMATION FROM THE PUBLIC UNDER THE “DELIBERATIVE PROCESS” CLAIM.**

The National Park Service’s response letter (January 29, 2024) does not provide the necessary detail, particular justification, and proof for withholding records and information from the public under the “deliberative process” exemption.

Courts employ a two-part test to examine an agency’s withholding deliberative information under Exemption 5: (1) the document must be either inter-agency or intra-agency; and (2) the document must be both predecisional and part of the agency’s deliberative or decisionmaking process. *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). Factors to consider in determining whether a document falls within the deliberative process privilege include whether the document (1) “is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency”; (2) “is recommendatory in nature or is a draft of what will become a final document”; and (3) “weigh[s] the pros and cons of agency adoption of one viewpoint or another”; however, even if the document was predecisional at the time it was prepared, it is not exempt from disclosure if it has been “adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The exemption applies only to federal government agencies:

[T]he communication must be “inter-agency or intra-agency.” 5 U.S.C. § 552(b)(5). Statutory definitions underscore the apparent plainness of this text. With exceptions not relevant here, “agency” means “each authority of the Government of the United States,” § 551(1), and “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ..., or any independent regulatory agency,” § 552(f).

*Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001). “If a document is neither inter- nor intra-agency, then an agency may not withhold it, regardless of whether or not it reflects the deliberative process of the agency, attorney work product, or is an attorney-client communication. See *Klamath*, 532 U.S. at 12, 121 S.Ct. 1060.” *Center for Biological Diversity v. Office of the U.S. Trade Rep.*, 450 Fed. Appx. 605, 608 (9th Cir. 2011).

If the record is found to be inter- or intra-agency, it must also satisfy the “deliberative process” prong of the exemption. The Ninth Circuit explained the “deliberative process” privilege in *National Wildlife Federation v. U.S. Forest Service*, stating that to qualify for Exemption 5, the document must be “both (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and (2) ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are formulated.’” 861 F.2d

1114, 1117 (9th Cir. 1988) (citation omitted). The policy for protecting such records “is to enhance ‘the quality of agency decisions’ . . . by protecting open and frank discussion.” *Klamath*, 532 U.S. at 9 (citation omitted).

Two prerequisites are required to properly apply the deliberative process privilege:

In deciding whether a document should be protected by the privilege we look to whether the document is “predecisional”—whether it was generated *before* the adoption of an agency policy—and whether the document is “deliberative”—whether it reflects the give-and-take of the consultative process.

*Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987)(citations omitted). “Accordingly, to approve exemption of a document as predecisional, a court must be able ‘to pinpoint an agency decision or policy to which the document contributed.’ *Paisley*, 712 F.2d at 698.”

Documents that contain technical discussions by agency staff are not considered “deliberative” of policy determinations. Such records are “primarily reportorial and expository, not deliberative.” *In re Franklin Nat. Bank Securities Litigation*, 478 F. Supp. 577, 585 (E.D. N.Y. 1979). *See also Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986) (“expert interpretations of facts” are not deliberative); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (documents which are “simply straightforward explanations of agency regulations in specific factual situations” are not deliberative, but are “more akin to a ‘resource’ opinion about the applicability of *existing policy* to a certain state of facts.”) (emphasis added).

“[F]actual material that does not reveal the deliberative process is not protected by this exemption.” *National Wildlife*, 861 F.2d at 1117 (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)). “[D]ocuments containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure,” as would factual materials “to the extent that they reveal the mental processes of decisionmakers.” *Id.* at 1119 (citation omitted). However, “‘memoranda consisting *only* of compiled factual material or *purely* factual material contained in deliberative memoranda and severable from its context would generally be available’ for inspection by the public.” *Id.* at 1118 (citations omitted).

“Under the deliberative process privilege, factual information generally must be disclosed.” *Petroleum Inf. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). “[T]he privilege applies only to the ‘opinion’ or ‘recommendatory’ portion of the report, not to factual information which is contained in the document.” *Coastal States*, 617 F.2d at 867. “The exemption does not protect ‘purely factual material appearing in . . . documents in a form that is severable without compromising the private remainder of the documents.’” *Playboy Enterprises, Inc. v. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (citing *EPA v. Mink*, 410 U.S. at 91).

Thus, any record, or portion thereof, that does not qualify for the privilege must be disclosed.

Here, Buffalo Field Campaign takes exception with the National Park Service’s use of the deliberative process exemption. In particular:

- The National Park Service did not “narrowly” interpret or construe its privilege to withhold information from the public. Instead, it appears the National Park Service

used an arbitrary approach in deciding what records and information the agency withheld.

- The National Park Service did not point to any specific or particular agency decision or policy that is “predecisional” for each record it withheld in its’ entirety, and for each record it withheld information. From our review, there does not appear to be any particular discussions between a subordinate and supervisor discussing the formation of agency policy or law.
- The National Park Service did not identify the role each redacted Briefing Statement had in any deliberative process underway or in the formulation of policy it has not already adopted. Bison management policies as presented and summarized in the Briefing Statements have been in place for years.
- Briefing Statements do not meet the criteria of being predecisional (‘antecedent to the adoption of agency policy’) *and* deliberative (“meaning it must actually be related to the process by which policies are formulated”). *National Wildlife* 861 F.2d at 1117. Instead, these records are reportorial, in that they present information and updated information regarding an existing agency decision or policy.

For example, 2022-4-27 YELL\_Bison\_Combined\_Briefs\_April\_2022 is reportorial as the information withheld under “Current Status” presents the Governor’s position.

Additionally, 2020-2-19 YELL\_TreatyHuntingRights is also reportorial as the information withheld under “Current Status” is not weighing differing takes on agency policy or law. The withheld information simply appears to be what the current law is on treaty hunting rights.

- Briefing Statements are akin to memoranda, factual material or reports compiled by the National Park Service to explain the basis for its’ policy to the public.

For example, 2023-2-01 YELL\_Bison is a Briefing Statement Yellowstone National Park prepared for several members of the U.S. Congress on its’ compliance with environmental procedure (NEPA). It is not seeking input from members of Congress. As such, it is a record “used in interactions with the public.” *Buffalo Field Campaign v. U.S. Dept. of the Interior*, No. 19–165–M–DWM at 10 (D. Mont. July 7, 2020) citing *Mayer*, 537 F. Supp. 2d at 139. It is also not an inter- or intra-agency record.

Additionally, 2023-11-30 YELL\_Bison\_FAQ\_Final appears to be a final version of frequently asked questions about Yellowstone bison as it addresses: “What are the Politics Currently?” and “What are the Successes and Challenges?”. If the withheld information were deliberative it would address: “What will the Policy be in the Future?”. The same information is withheld in 2023-5-01 NPS\_Bison\_Secretary\_Meeting\_Briefing\_Memo - final to DOI.

- The National Park Service has not demonstrated that any of the information withheld in the Briefing Statements is within “the frank exchange of ideas on legal or policy matters” that permit the (b)(5) exemption.

- The National Park Service has also not demonstrated that any of the information withheld in the Briefing Statements are part of the “give-and-take of the consultative process” or contain “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States*, 617 F.2d at 866.
- The National Park Service has previously disclosed Briefing Statements in their entirety on the [ibmp.info](http://ibmp.info) web site covering the same and similar bison management topics. For example:

Adaptive Management Criteria in the federal and state IBMP Records of Decision (Aug. 28, 2008) available at [ibmp.info/Library/20080828/Briefing%20-%20YNP%20ROD.pdf](http://ibmp.info/Library/20080828/Briefing%20-%20YNP%20ROD.pdf).

NPS Management Recommendation Winter 2021-2022 (Aug. 7, 2008) available at [ibmp.info/Library/20211201/NPS%20Management%20Recommendation%20Winter%202021-2022.pdf](http://ibmp.info/Library/20211201/NPS%20Management%20Recommendation%20Winter%202021-2022.pdf).

Transfer of Surplus Bison under the IBMP (Aug. 11, 2009) available at [ibmp.info/Library/20090811/IBMP\\_TransferSurplusBison\\_Brief.pdf](http://ibmp.info/Library/20090811/IBMP_TransferSurplusBison_Brief.pdf).

Interagency Bison Management Plan 2015 Operations (April 23, 2015) available at [ibmp.info/Library/20150423/01\\_PJWhite\\_IBMP\\_Operations\\_Apr2015\\_PJW.pdf](http://ibmp.info/Library/20150423/01_PJWhite_IBMP_Operations_Apr2015_PJW.pdf).

- The National Park Service withheld information in the Briefing Statements that appear to be updates on bison management policies long in place i.e., quarantine (now called a transfer program), treaty hunting rights, current management and compliance with environmental procedure (NEPA), and more recently, release of the Draft Environmental Impact Statement to update its’ more than two decades-old Yellowstone bison management plan. It is difficult to understand how these can be both “predecisional” and “deliberative” when they discuss decisions and deliberations that have already been concluded, or in the case of the Draft Environmental Impact Statement, publicly released.

For example, 2023-7-10 YELL briefing - Bison conservation transfer program is about the Yellowstone National Park’s 50-year quarantine program. It appears all of the information the National Park Service withheld concerns “Shortening Timelines” for the transfer of Yellowstone bison out of quarantine. An article on reducing the amount of time Yellowstone bison spend in quarantine from 900 to 300 days was published by several authors including Yellowstone National Park biologist Chris Geremia, PhD. in *JAVMA, Bayesian latent-class modelling of quarantine testing procedures for American Bison (Bison bison) in the Greater Yellowstone Area to determine Brucella abortus freedom* (Jan. 27, 2023). Yellowstone National Park’s program to trap bison for quarantine was decided years ago. It is difficult to justify how “Shortening Timelines” for bison in quarantine meets all of the criteria in exemption 5 to be properly withheld from the public.

Additionally, 2022-9-03 YELL\_Brief\_BisonMgmtPlanEIS was prepared in September 2022 yet the National Park Service withheld information on the Draft Environmental Impact Statement which was publicly released in August 2023. It does not appear the agency made an attempt to identify and release what it publicly disclosed in August 2023 from what it withheld in the record identified above.

Nearly all of the information on the Draft Environmental Impact Statement Superintendent Cam Sholly presented in a memorandum to the Secretary (Chuck Sams, Shannon Estenoz) was released in 2023-5-01 NPS Bison\_ Secretary Meeting Briefing Memo - final to DOI. From our review, it appears the National Park Service withheld the same or similar information in one record and released it in another.

Accordingly, Buffalo Field Campaign requests that the records be released in their entirety.

Additionally, Buffalo Field Campaign takes issue with the National Park Service's withholding "Information for the Species Status Assessment on Yellowstone Bison" in a memorandum sent to the U.S. Fish & Wildlife Service (July 3, 2023) (2023-7-03 InfoYellBison\_USFWS\_SSA). The redactions should be removed, because the memorandum is not the formulation of National Park Service policy or law, is not deliberative, and is not predecisional. In particular:

- The memorandum is a biologist's presentation of facts and science for a technical assessment – not a decision – on the viability of Yellowstone bison.
- While the National Park Service may withhold opinions solicited by its' sister agency in the deliberation of a decision, it cannot withhold factual material and scientific information under exemption (b)(5).

As stated in 2023-7-03 InfoYellBison\_USFWS\_SSA, the U.S. Fish & Wildlife Service's species status assessment for Yellowstone bison:

begins with the compilation of information, including species' natural history, ecological needs, abundance, distribution, demographics, condition of habitats, and genetic diversity. The assessment then forecasts the viability of the species given various scenarios of future environmental conditions and conservation efforts (USDI, USFWS 2016). The species status assessment is not a decision document; rather it provides biological information, analyses, and predictions to support decisions pursuant to the Endangered Species Act of 1973 (16 USC 1531 *et. seq.*). The species status assessment for Yellowstone bison is scheduled for completion in 2026 (USDI, USFWS 2023).

This document provides relevant information for the status review of Yellowstone bison by the USFWS and a subsequent determination of whether these bison are a distinct population segment, whether they are threatened or endangered, and the extent of their resiliency, redundancy, and representation.

At minimum, all of the factual material, scientific information and analysis contained in the memorandum should be released. Given the purpose of the memorandum, to share "biological information, analyses, and predictions" on the viability of Yellowstone bison, the record should be released in full.

The National Park Service is well aware of the intense public interest in Yellowstone bison. The public wants to know “what their Government is up to.” *U.S. Dept of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 773 (1989). “Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.” *Id.* In the case of the memorandum, the National Park Service is clearly blocking the public’s view of what the government is doing in withholding biological and scientific information on the persistence of Yellowstone bison. To be sure, there is a decision to be made down the road by the U.S. Fish & Wildlife Service, but the assessment is a standalone analysis of the science on the biological status of Yellowstone bison, and the ability of the population to adapt and survive in the wild.

The National Park Service used to have a track record of publishing and updating Briefing Statements to share with the public facts and information about its’ bison management policies on the web site [ibmp.info](http://ibmp.info). The National Park Service’s Briefing Statements are an important way for the public, including Buffalo Field Campaign, to obtain factual information and updates on how the agency is carrying out its’ bison management policies that have been in place for over two decades. Unfortunately, the public must now send Freedom of Information Act requests to get basic information surmised in the Briefing Statements it once made available online without withholding relevant information.

The National Park Service has not met its burden to withhold records and information from Buffalo Field Campaign. It did not “narrowly” identify and construe its privilege to exempt records from disclosure to the public. Instead, the agency broadly construed and applied a standard that arbitrarily kept from the public information it needs to know what “their Government is up to.”

### **The National Park Service’s Conclusory Statements Do Not Justify Nondisclosure**

As noted above, the federal courts have repeatedly held that “conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases.” *Coastal States*, 617 F.2d at 861. *See also Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) (“agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.”). Unsupported or conclusory justifications for nondisclosure “are unacceptable and cannot support an agency’s decision to withhold requested documents.” *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citation omitted).

FOIA imposes on agencies the burden of establishing that information is exempt from release. 5 U.S.C. § 552(a)(4)(B). In order to meet their burden, courts have uniformly required agencies to compile a so-called “Vaughn Index” that identifies each document withheld and the statutory exemption claimed for each document, and sets forth “a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.” *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (citation omitted). *See also Animal Legal Defense Fund v. Dep’t of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (the government “must establish ‘what deliberative process is involved, and the role played by the documents in issue in the course of that process.’” (citation omitted); *King v. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (“specificity imposes on the agency the burden of demonstrating applicability of the exemptions invoked *as to each document or segment withheld* . . . and sets forth the exemption claimed and why that exemption is relevant.”) (emphasis in the original).

The National Park Service’s boilerplate claim for withholding records and information does not adequately state the particulars. While the agency identifies and explains the (b)(5) privilege, it

does not “set[] forth a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.” *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). Merely reciting the statutory language of exemption 5 evades the “particular” explanation or a statement of reasons for withholding a “particular” record or information sought under the FOIA.

### **III. THE NATIONAL PARK SERVICE FAILED TO PROVIDE “REASONABLY SEGREGABLE PORTIONS” OF THE RECORDS AND INFORMATION TO THE PUBLIC.**

Even if the National Park Service could prove that the records and information it withheld are exempt from release under the FOIA, only those specific portions of the records(s) that are legally exempt can be withheld. In this case, the National Park Service improperly withheld entire documents, instead of releasing “reasonably segregable portions” not fully protected from disclosure by exemption 5. 5 U.S.C. § 552(b).

The National Park Service did not even attempt to release “reasonably segregable portions” of the 2 documents withheld in their entirety: Yellowstone National Park Bison Simulation Examples (Oct. 20, 2023) totaling 14 pages, and Draft Status of the Yellowstone Bison Population (Nov. 3, 2023) totaling 139 pages. Even from the titles it is certain both withheld records contain science and factual material on the status of the Yellowstone bison and how management is influencing the population. It is difficult to believe that the National Park Service cannot readily segregate releasable information from either record.

“[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” *Arieff v. U.S. Dep’t of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983). “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 942 (10th Cir. 1990) (citation omitted).

Here, the National Park Service failed to describe the “mix of privileged and non-privileged information and explain[] why it would not be possible to simply redact the privileged materials.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (citation omitted). At minimum, the National Park Service must identify readily segregable portions of records that are purely factual for release.

In addition, as shown above, “[f]actual material that does not reveal the deliberative process is not protected by this exemption.” *National Wildlife*, 861 F.2d at 1117 (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)). “[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.” *EPA v. Mink*, 410 U.S. 73, 87–88 (1973) (footnote omitted).

The National Park Service must, at minimum, release factual information and science in the 2 documents withheld in their entirety.

The National Park Service failed to release such portions, or adequately justify at all why it has not done so. Any scientific information and factual material that can be reasonably segregable should be released.

## RELIEF SOUGHT

Based on the above, Buffalo Field Campaign requests that the National Park Service immediately release the requested records, and reasonably segregable, non-exempt portions thereof, that were improperly withheld, and to conduct a “reasonably adequate search for responsive records.” We ask for your final determination within 20 working days pursuant to the FOIA. It would be useful as we evaluate the need to seek judicial review of this matter if you were to provide us with a projected date-certain by which we could expect a determination of our appeal as required by the FOIA.

We reserve the right to seek immediate judicial review if our appeal is not satisfactorily resolved and the requested documents produced in the FOIA-mandated time deadlines.

Sincerely,

A handwritten signature in cursive script that reads "Darrell Geist".

Darrell Geist, habitat coordinator  
Buffalo Field Campaign  
PO Box 957  
West Yellowstone, MT 59758  
(406) 646-0070 phone  
(406) 646-0071 fax  
[habitat@buffalofieldcampaign.org](mailto:habitat@buffalofieldcampaign.org)