USING FREEDOM OF INFORMATION LAWS IN WILDLIFE ADVOCACY

By: Laura Nirenberg and Trevor DeSane

Introduction

Wildlife habitats are routinely carved up into ever-smaller partitions by highways and suburban development and appropriated for countless human uses. As cities and suburbs sprawl outward, wildlife space becomes shared space; animals are increasingly considered a nuisance and an impediment to a variety of human activities. Communities in this shared space feel compelled to intervene. Current controversies demonstrate a growing mentality that wild animal populations posing even a trivial inconvenience to human activities must be killed or otherwise permanently "managed" through shooting, trapping, gassing, netting, or poisoning. On rare occasions, a non-lethal intervention such as sterilization or immunocontraception is employed.

Some recognize the short-sightedness, ignorance, flawed science, and fear-mongering[1] that are often the impetus for mass slaughter in the name of "wildlife management." For those who favor safe, rational, and ethical approaches to resolving perceived wildlife conflicts, there are often high-leverage opportunities to hold public officials accountable, while encouraging the pursuit and adoption of non-lethal methods of reducing human-wildlife conflict.

Understanding federal and state Freedom of Information (FOI) laws, and knowing how to leverage their potential effectively, can prove immensely useful in advocating for animals, educating the public, and potentially averting a needless mass-killing operation. This article provides a brief overview of federal and state Freedom of Information laws, discusses a recent case study in which FOI was instrumental in advocating for animals, and provides tips for utilizing FOI in animal cases.

Freedom of Information

The U.S. Freedom of Information Act (FOIA) was signed into law in 1966[2] to replace Section 3 of the Administrative Procedure Act (APA), the statute which was previously the primary mechanism allowing public access to the operation of federal agencies.[3] FOIA represented a drastic improvement over the APA, in terms of its overall practicability and effectiveness in promoting open government. One crucial innovation under FOIA is the judicial review provision, stating that district courts would have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[4] Further, whereas the APA imposed a standing requirement for those seeking access to agency records, FOIA eliminated the requirement and provided that records shall be released to "any person." FOIA also shifted the burden of proof from the party requesting information to the agency. While the APA required the requester to demonstrate her entitlement to the information sought, FOIA creates a presumption in favor of disclosure, requiring the agency in possession of the information sought to release it or legally justify its decision to withhold it. Thus, under FOIA, the records of federal agencies are accessible to any person requesting them. Agencies subject to FOIA include any executive branch entity, military department or "independent regulatory agency."[5] FOIA does not apply to the records of Congress or the federal judiciary, nor does it apply to state records.

Each state and the District of Columbia have enacted their own FOI laws and access to the records of state agencies can be obtained under that state's FOI law. While many state FOI laws were modeled on federal FOIA, their provisions are not identical and state courts

have interpreted similar language of their respective FOI laws differently than federal courts. While there are similarities in federal FOIA and state FOI laws, it is important to familiarize yourself with the unique FOI rules in your jurisdiction.

One important similarity in state and federal FOI laws is the exemption of certain categories of records from disclosure. Under federal FOIA, nine exemptions exist, including classified documents, certain documents compiled for law enforcement purposes,[6] personnel and medical files, interagency and intra-agency records, trade secrets, and more.[7] In circumstances where an exemption applies, an agency is still obligated to release "any reasonably segregable portion"[8] if the portion of the record that is exempt can be removed or redacted by the agency.

Case Study—Cayuga Heights: FOIL Exposes Government Deception

In the Village of Cayuga Heights, a small but densely populated bedroom community for Cornell University in Ithaca, New York, the Mayor and Board of Trustees have spent years pushing population control plans based on the net-and-bolt[9] or bait-and-shoot killing of white-tailed deer. New York State's Freedom of Information Law (FOIL) has been instrumental in a local group's efforts to protect the deer from mass slaughter.

In the fall of 2012, Cayuga Heights officials mailed "landowner consent forms" to all Village residences, seeking permission to carry out various deer management activities (e.g., shooting, baiting, and carcass removal) on or near their properties. In accordance with state law,[10] Village officials sought permission to discharge firearms within 500 feet of residents' homes. Viable shooting sites would be determined based on obtaining the permission of enough consenting landowners with adjacent properties. Since the law requires explicit permission, landowners who failed to return consent forms were, in essence, denying such permission.[11]

In November of 2012, the Mayor and Village Attorney publicly stated[12] that only a small minority of landowners were holding up the killing program by denying the Village permission to discharge weapons within 500 feet of their homes. Their statements indicated that 10% of landowners had denied permission to kill deer on or near their properties, and that the distribution of this small number of properties of the minority opposition just happened to preclude shooting activities across the entire Village, due to the requirements of the 500 foot rule.

To gain a more complete understanding of the Village residents' support for, or opposition to, the backyard shooting plan, the advocacy group CayugaDeer.org submitted a FOIL request for all completed landowner consent forms submitted to the Village. The Mayor denied this simple request, alleging that the forms were "compiled for law enforcement purposes"[13] and if disclosed "could endanger the life or safety of persons." The Village attempted to invoke the law enforcement exemption to disclosure under New York FOIL, presumably because property owners were directed to return their landowner consent forms to the Village Chief of Police. However, it should be noted that merely diverting documents through the local police department rather than a municipal clerk's office or other entity does not, by itself, qualify those documents as being "compiled for law enforcement purposes." In Cayuga Heights, the documents pertained to deer management activities and had no relation to any law enforcement matter whatsoever. If simply routing documents through the police department were a sound strategy for shielding them from disclosure under FOIL, surely every agency with an interest in keeping information out of the public eye would do this. Moreover, even if the information sought were related to a law enforcement matter, other criteria must be met if that information is to be withheld under FOIL.

While this attempt to invoke the FOIL's law enforcement exemption was without merit, and no credible evidence was offered to justify the endangerment of persons exemption, the petitioner offered to accept copies of the requested forms with residents' identifying information redacted. The Village flatly denied this request, offering no explanation for how redacted (and therefore, completely anonymous) forms could identify, much less endanger any individual. CayugaDeer.org was forced to petition the New York State Supreme Court to compel their release.[14]

Although overcoming the Village's refusal to release the records took eight months, the deer advocates prevailed and the Court ordered the Village to comply with FOIL. Moreover, since the Court found that the Village "lacked a reasonable basis" for withholding the requested documents and that the deer advocates had "substantially prevailed," the payment of legal fees was imposed on the Village.[15]

However, the judgment did not resolve the matter. The forms released by the Village, which Village Mayor Kate Supron insisted on personally redacting,

contained numerous significant irregularities, including inexplicable duplicate consent forms. While duplicates can sometimes be introduced into the set of documents due to a photocopying error, in this case, several of the duplicates featured redaction marks that were not identical, indicating that they were redacted *after* the duplicates were added. Additionally, several forms included redactions of content that was clearly outside the scope of the judge's order[16] (dates, for instance) and identical signatures of the Village Police Chief in different positions on otherwise identical forms. After CayugaDeer.org reported the irregularities, the Village produced another set of forms, this time without the duplicates but with 76 new consent forms that, inexplicably, had not been produced in the original set.

Although dealing with this potential document tampering by Village officials and the delay it caused was frustrating, what the deer advocates discovered was worth the wait. Contrary to the Village officials' claims that only a 10% minority of landowners refused to allow deer to be shot near their properties (a claim that was propagated by these officials at Village meetings and in numerous local media reports[17]) the documents released under FOIL proved that consent forms for about 60% of the properties had not even been returned, and in total, 701 of 933 total landowners in the Village had withheld permission for shooting. So contrary to the elected officials' repeated public claims, residents who did not consent to killing in their backyards actually amounted to a robust majority of over 75%. The elaborate deception used by Village officials to grossly distort the public perception of support for their controversial agenda would not have been discovered without the use of FOIL in Cayuga Heights. In this longstanding public policy controversy, this discovery represented a game-changing moment, when those choosing not to participate in the mass slaughter of wild deer realized that they were being duped by their own public officials.

Using Freedom of Information Laws in Your Wildlife Advocacy

Freedom of Information laws offer significant utility for concerned citizens and advocates. FOI can be used to hold public officials accountable, to maintain access to government decision-making processes, to reveal information being deliberately hidden from public view, to assess public opinion as illustrated in correspondence between officials and the public, and to expose engagement in conflict of interest activities and other financial improprieties. The following are suggestions for harnessing the power of FOI laws to benefit wildlife populations at risk:

- Identify the main stakeholders and decision-makers and the roles these individuals, agencies, and groups are playing in the decision-making process; use FOIL for correspondence between the various parties that could clarify the motives for the actions pursued. Keep in mind that members of the public are interested parties as well, and their communication with agencies and elected officials may indicate the level of community support or opposition to the form of management proposed.
- Craft the request so it focuses on gaps in the public's understanding of the data and information, and administrative imperatives driving policy.
- Fact-check claims propagated by government officials. Request any reports generated by municipal employees, paid consultants, and state or federal agencies to refute or verify local officials' claims.
- If procedural irregularities, conflicts of interest, or other ethical lapses on the part of elected officials or other involved parties are suspected, carefully craft FOI requests to expose the truth.
- Target documentation used to gain authorization for killing, such as materials related to Environmental Impact Statements, applications for "scientific collector's" permits, "take permits" or other trapping, shooting, or sterilization permits along with authorizations and other communications from the state or federal agencies. Search for inconsistencies between local officials' public statements and what is documented in their communications with the state or federal governments.[18]
- "Follow the money" by requesting copies of contracts and/or memoranda of understanding with wildlife management contractors, consultants, and Natural Resources departments at local land-grant universities, and all other identified stakeholders. Be mindful of any proposed tax increases or other fiscal impacts necessary to facilitate wildlife management policies.
- Request copies of any communications to/from elected officials pertaining to the animal

issue of interest. Where applicable, request materials covering potential violations of relevant anti-cruelty statutes, public safety risks associated with shooting, trapping, or poisoning, psychological risks to residents and their children associated with witnessing violence against animals, legal liability for injuries, accidents or property damage that may be attributed to killing activities, etc.

The spirit of state and federal Freedom of Information laws is that "government is the public's business."[19] FOI laws provide an invaluable vehicle for reducing the secrecy of government decision-making. This is especially true when government officials pursue wildlife killing plans, which tend to be divisive by their nature. When community controversy and ethical concerns surround a plan to exterminate a wild animal population, officials involved have clear incentives to avoid transparency in decision-making. If not for Freedom of Information and Open Meetings laws,[20] secrecy and confidentiality in government could easily prevent meaningful and informed community discourse on these important issues, resulting in the implementation of needlessly destructive and violent policies and significant damage to the community. ⚖

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1 *E.g.,* the work of writer and hunting enthusiast, Jim Sterba, an outspoken advocate for lethal wildlife management whose work demonizes wildlife and focuses on extreme examples or exaggerated threats to human safety or property, a common tactic used to gain support for wildlife killing plans. *See* Jim Sterba, Nature Wars: The Incredible Story of How Wildlife Comebacks Turned Backyards into Battlegrounds (2012); Jim Sterba, *America Gone Wild*, Wall St. J. , Nov. 2, 2012, *available at* http://online.wsj.com/article/SB10001424052970204846304578090753716856728.html.

2 5 U.S.C. § 552. *See* http://www.foia.gov/about.html.

3 *See* Act of June 11, 1946 ch. 324 §3, 60 Stat. 238 (codified at 5 U.S.C. § 552).

4 5 U.S.C. § 552(a)(4)(B).

5 5 U.S.C. § 552(f)(1).

6 Exempted are records or information meeting certain narrow criteria that are also "compiled for law enforcement purposes" 5 U.S.C. § 552(b)(7).

7 5 U.S.C. § 552(b).

8 *Id*.

9 Net-and-bolt is a cruel and controversial killing method that involves luring deer to bait sites underneath suspended nets. The nets are released when deer feed at the sites, typically capturing several deer at a time. A person called a "netter and bolter" drives a large steel bolt into the brain of each netted deer. Before their death, the deer inside the net are terrified and thrash violently, experiencing great psychological stress and often breaking limbs and antlers.

10 N.Y. Env. Law § 11-0931(4)(a)(2), § 11-0931(4)(b)(1).

11 In late 2012, due to widespread community opposition to a lethal approach, Village officials settled for a mass surgical sterilization operation instead of shooting. Although 95% of the does in the Village have been rendered incapable of producing offspring, officials plan to pursue backyard mass slaughter again in late 2013. For details on this puzzling reversal of policy, see http://cayugadeer.org/LettersFall2013.htm.

12 *See e.g.*, http://vimeo.com/68633647 *and* http://vimeo.com/68872753 for footage from Cayuga Heights Village Board of Trustees meetings in which officials cited the 10% figure. *See* http://www.cayugadeer.org/TenPercentPropagation.htm for local media reports on the Village's deer management efforts in which the 10% figure was propagated.

13 *See* N.Y. Public Officers Law § 87(2)(e).

14 More details on this lawsuit as well as litigation documents and video footage of relevant Village Board of Trustees meetings see http://cayugadeer.org/coverup.htm.

15 Fees awarded pursuant to N.Y. Public Officers Law § 89(4)(c).

16 The judge's order permitted the redaction of "names, addresses, and any other information that could allow the identification of a property owner or the location of deer management activities." *See* Stein v. Village Board of Trustees of the Village of Cayuga Heights, Index No. 2013-0151 (N.Y. Sup. Ct. Mar. 29, 2013), *available at* http://cayugadeer.org/pdfs/DecisionAndOrder_032913.pdf.

17 For local news reports citing the alleged 10% figure, *see* http://www.cayugadeer.org/TenPercentPropagation.htm.

18 *E.g.,* a FOIL request by the group CayugaDeer.org proved that village officials misled the public about their approach to deer management. While publicizing what they claimed was a "phased option approach" beginning with sterilization over a two year period, village officials were actually seeking DEC permission to kill deer "immediately" to reduce the herd size. CayugaDeer.org uncovered this deception by submitting a FOIL request to the state DEC for the Village's permit application. *See* http://www.cayugadeer.org/news.htm#10-4-11 for details.

19 In New York, this is, in fact, the letter of the law. N.Y. Public Officer's Law, art. 6, § 84.

20 State level open meetings laws are another crucial mechanism to protect the public's right to open and transparent government. *See e.g.* N.Y. Public Officers Law, art. 7. These laws require many state and local agencies to allow the public to attend, videotape and audiotape meetings and access the minutes of any open meeting. The laws typically stipulate a public notice requirement for any meeting of a public body and provide the rules for executive sessions, which are portions of a meeting closed to the public, if certain narrow criteria are met. Becoming familiar with your applicable open meetings law will almost certainly benefit any effort to advocate for wildlife.