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5  
6 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

7  
8 FRIENDS OF TOPPENISH CREEK, a  
Washington Non-Profit Corporation,  
9 Plaintiff,

v.

10 DEPARTMENT OF HEALTH &  
HUMAN SERVICES; THE INDIAN  
11 HEALTH SERVICE,

12 Defendant.

Case No.

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

FREEDOM OF INFORMATION ACT &  
ADMINISTRATIVE PROCEDURE ACT

13  
14  
15 Plaintiff, Friends of Toppenish Creek (“Friends”), hereby alleges as follows:

16 **INTRODUCTION**

17 1. This action is premised upon, and consequent to, violations of the Freedom  
18 of Information Act (the “FOIA”), 5 U.S.C. § 552 *et seq.*, and the Administrative  
19 Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* It challenges the unlawful failure  
20 of the Defendant, the Indian Health Service (“IHS” or “Agency”), to abide by the

1 statutory requirements of the FOIA and the APA.

2 2. In particular, IHS has violated the FOIA and the APA by: (1) failing to  
3 provide a legally adequate determination resolving Friends' FOIA request within  
4 the time limits prescribed by law; (2) failing to abide by statutory and regulatory  
5 procedures in responding to and processing Friends' FOIA request; and (3)  
6 unlawfully withholding from public disclosure information sought by Friends,  
7 information to which it is entitled and for which no valid disclosure exemption  
8 applies.

9 3. Friends seeks declaratory relief establishing that IHS has violated the FOIA  
10 and the APA. Friends also seeks injunctive relief directing IHS to promptly  
11 provide the requested material. Finally, Friends requests that the Court award  
12 Plaintiff its reasonable attorneys fees and costs incurred in bringing this action.

13 **JURISDICTION**

14 4. The Court has subject matter jurisdiction over this lawsuit pursuant to 5  
15 U.S.C. § 552(a)(4)(B) because Friends both resides and has its principal place of  
16 business in White Swan, Washington which is within the Eastern District of  
17 Washington.

18 5. The Court also has federal question jurisdiction pursuant to 28 U.S.C. §  
19 1331 because this action arises under the FOIA, the APA, and the Declaratory  
20 Judgment Act, 28 U.S.C. § 2201, *et seq.*

1 VENUE

2 6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B)  
3 because Friends both resides and has its principal place of business in the Eastern  
4 District of Washington.

5 PARTIES

6 7. Plaintiff Friends is a non-profit 501(c)(3) corporation organized under the  
7 laws of the State of Washington. Friends’ principal office is located in Toppenish,  
8 Washington.

9 8. Friends is dedicated to protecting the rights of rural communities and  
10 improving oversight of industrial agriculture. Friends operates under the simple  
11 principle that all people deserve clean air, clean water and protection from abuse  
12 that results when profit is favored over people. Friends works through public  
13 education, citizen investigations, research, legislation, special events, and direct  
14 action. Friends routinely disseminates the information it obtains to the community  
15 through a variety of means, with a focus on scientific studies, literature and data, so  
16 that the public is informed about the public health risks due to pollution from  
17 industrial agricultural operations in the Lower Yakima Valley.

18 9. IHS is an agency of the executive branch of the United States government  
19 which is within the U.S. Department of Health and Human Services (“HHS”). IHS  
20 is in possession and control of the records sought by Friends, and as such, it is

1 subject to the FOIA pursuant to 5 U.S.C. § 552(f).

2 **LEGAL FRAMEWORK**

3 10. The FOIA requires U.S. government agencies to promptly make public  
4 records available to any person who makes a request which (1) reasonably  
5 describes the records sought and (2) complies with any applicable agency rules for  
6 making such a request. 5 U.S.C. § 552(a)(3)(A).

7 11. The FOIA obligates federal agencies to issue a final determination on any  
8 such information request within twenty business days from the date of its receipt.  
9 5 U.S.C. § 552(a)(6)(A)(i). In issuing a final determination, an agency is required  
10 to inform the requester of three things: (1) the agency's determination of whether  
11 or not to comply with the request; (2) the reasons for its decision; and (3) notice of  
12 the right of the requester to appeal to the head of the agency. *Id.*

13 12. HHS regulations provide that decisions whether to release records will be  
14 made "within 10 working days after your request reaches the appropriate FOI  
15 office." 45 C.F.R. § 5.35(b)(1).

16 13. The FOIA allows an agency to extend the twenty-day determination  
17 deadline by up to ten business days when "unusual circumstances" exist and when  
18 the agency so notifies a requester in writing. 5 U.S.C. § 552(a)(6)(B). An agency  
19 is entitled to one ten-business day extension. *Id.* The written notice provided to  
20 the requester must specify the unusual circumstances justifying the extension and

1 the date on which a final determination is expected to be dispatched. *Id.*

2 14. In some circumstances, the FOIA allows an agency to invoke an extension  
3 beyond ten days. To invoke a longer extension, the FOIA requires an agency to  
4 provide written notification to the requester that (1) offers the requester an  
5 opportunity to limit the scope of the request so that it may be processed within the  
6 FOIA's original time limits, or (2) offers the requester an opportunity to arrange  
7 with the agency an alternative time frame for processing the request. 5 U.S.C. §  
8 552(a)(6)(B)(ii). The agency must also make available to the requester its FOIA  
9 public liaison, who is tasked with resolving any dispute between the requester and  
10 the agency. *Id.* When invoking a longer extension, an agency must still notify the  
11 requester of the expected date on which a final determination will be dispatched. 5  
12 U.S.C. § 552(a)(6)(B)(i).

13 15. If an agency fails to provide a final determination on a FOIA request within  
14 the statutory timeframe, the requester is deemed to have exhausted its  
15 administrative remedies and may immediately file suit against the agency. 5  
16 U.S.C. § 552(a)(6)(C)(i).

17 16. HHS regulations also provide that, “[i]f [the agency] fails to meet the  
18 deadlines, you may proceed as if we had denied your request or your appeal.” 45  
19 C.F.R. § 5.35(a).

20 17. If an agency issues some type of adverse determination on a FOIA request,

1 the requester may administratively appeal that determination in writing to the head  
2 of the agency. 45 C.F.R. § 5.34. The statute and HHS regulations afford IHS  
3 twenty business days to make a determination on any such appeal. 5 U.S.C.  
4 § 552(a)(6)(A)(ii); 45 C.F.R. § 5.35(b)(2).

5 18. If an agency does not issue a determination on an administrative appeal  
6 within the twenty-day timeframe, then the requester is deemed to have exhausted  
7 its administrative remedies and may immediately file suit against the agency. 5  
8 U.S.C. § 552(a)(6)(C)(i); 45 C.F.R. § 5.35(a).

9 19. The FOIA requires federal agencies to promptly disclose all records  
10 responsive to a FOIA request unless one of nine statutory exemptions applies. One  
11 of those exemptions allows agencies to withhold from public disclosure “inter-  
12 agency or intra-agency memorandums or letters which would not be available by  
13 law to a party other than an agency in litigation with the agency.” 5 U.S.C. §  
14 552(b)(5).

15 20. Another disclosure exemption allows agencies to withhold “personnel and  
16 medical files and similar files the disclosure of which would constitute a clearly  
17 unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

18 21. Even if a record is deemed by an agency to be exempt from disclosure,  
19 “[a]ny reasonably segregable portion of a record shall be provided to any person  
20 requesting such record after deletion of the portions which are exempt[.]” 5 U.S.C.

1 § 552(b).

2 **FACTS**

3 22. On December 22, 2008, the Yakama Indian Nation requested assistance  
4 from the IHS regarding concerns with nitrate contamination of groundwater on the  
5 Yakama Indian Reservation.

6 23. Sometime thereafter, one of Friends' members discovered an IHS agency  
7 document dated June 1, 2009, that referenced the request by the Yakama Indian  
8 Nation to IHS "to develop and implement a study to determine the number of  
9 potentially affected existing tribal member's wells for nitrate contamination on the  
10 reservation." A copy of the June 1, 2009 document is attached hereto as Exhibit 1.

11 24. The June 1, 2009 document states that "IHS coordinated with multiple  
12 Yakama Nation agencies [Tribal Water & Sewer, Water Resources, Water Code,  
13 and Environmental programs]" and that "the focus of the nitrate contamination  
14 study was the Satus Area based on previous studies that showed the area had a high  
15 propensity for nitrate groundwater contamination." *Id.* The document then  
16 provided a summary of "previous sampling studies results," some of which  
17 indicated a significant number of drinking water wells that exceeded the Nitrate  
18 maximum contaminant limit ("MCL") of 10 parts per million ("ppm").

1 25. On May 6, 2015, Friends<sup>1</sup> submitted a FOIA Request (“Request”) to IHS for  
2 all “records, data, studies, reports and communications” related to the nitrate  
3 contamination study referenced in the June 1, 2009 document. The FOIA Request  
4 specifically referenced the June 1, 2009 document and attached the letter as an  
5 exhibit to the FOIA Request. The FOIA Request also sought all documents  
6 concerning nitrate contamination of drinking water on or around the Yakama  
7 Indian Reservation as well as documents regarding the impacts of Concentrated  
8 Animal Feeding Operations on and around the Yakama Indian Reservation. Per  
9 instructions on the IHS website, the request was submitted via electronic mail to  
10 Shirina Grimaldi, IHS Area FOIA Coordinator and a copy of the original FOIA  
11 Request is attached hereto as Exhibit 2.

12 26. The FOIA Request indicated that Friends was a public interest organization  
13 that represents community members with a record of disseminating information for  
14 public safety and education. For that reason, the Request asked for a fee waiver  
15 required under FOIA for public interest groups.

16 27. The same day that the FOIA Request was submitted to IHS, May 6, 2015,  
17 Counsel for Friends received a telephone call from an IHS employee requesting a  
18 business address as well as the June 2, 2009 document that was inadvertently

19 \_\_\_\_\_  
20 <sup>1</sup> The original FOIA request was submitted on behalf of two nonprofit organizations, Friends and Concerned Citizens of the Yakama Indian Reservation. Only Friends is a Plaintiff in this cause of action.



1 omitted as an attachment to the FOIA request. The Request was given the  
2 designation FOIA Case 15-090.

3 28. Also the same day, counsel for Friends received an email from Eris Pinto,  
4 IHS Office Automation Clerk, requesting a business street address “to send [] an  
5 acknowledgement letter for your FOIA Case.” Counsel for Friends immediately  
6 responded to Mr. Pinto’s email and provided the business address along with the  
7 FOIA Request and the June 1, 2009 document.

8 29. On June 4, 2015, the twentieth business day after the FOIA Request was  
9 received by IHS, Friends emailed another letter to Ms. Grimaldi, IHS Area FOIA  
10 Coordinator, and Mr. Pinto, informing them that Friends had not received any  
11 response regarding the FOIA Request since the May 6, 2015 telephone  
12 conversation and email exchange with Mr. Pinto. This June 4, 2015 letter is  
13 attached hereto as Exhibit 3.

14 30. The June 4, 2015 letter informed IHS that the agency had failed to comply  
15 with the 20-day FOIA response deadline set by statute and the 10-day  
16 determination deadline established by HHS regulations. In the letter, Friends  
17 requested a timely determination on their FOIA request within five business days.

18 31. Mr. Pinto sent an email on June 4, 2015 stating, “[p]ardon for the wait I am  
19 sending over the acknowledgement letter right away.”

20 32. On or about June 8, 2015, Friends’ counsel received an “interim response”

1 letter postmarked June 5, 2015, but dated May 6, 2015, acknowledging the receipt  
2 of the Request. The Acknowledgment Letter was sent by Janet Ingersoll (IHS  
3 FOIA Officer, Division of Regulatory & Legal Affairs) and informed Friends that  
4 they had been categorized as a “Commercial Use Requester” and would be charged  
5 for duplication, editing, search time, and review. The letter did not state the reasons  
6 supporting their decision to categorize Friends as a commercial use requester nor  
7 did it contain a substantive response to Friends’ FOIA Request. A copy of the  
8 acknowledgement letter is attached as Exhibit 4.

9 33. That acknowledgment letter did not indicate whether the requested  
10 documents would be released to Friends, the reasons for the decision, or whether  
11 Friends had a right to appeal the determination that Friends was categorized as a  
12 commercial use requester.

13 34. On June 11, 2015, twenty-four business days after the original FOIA  
14 Request was received by IHS, Friends’ counsel filed an administrative appeal via  
15 electronic mail and certified mail, return receipt requested, challenging IHS’  
16 decision to categorize Friends as a Commercial Use Requester. Even though IHS  
17 never said as much, Friends interpreted this designation as a denial of their request  
18 for a fee waiver that was included in the original FOIA Request. The  
19 administrative appeal letter reiterated the factual and legal reasons Friends  
20 qualifies for a fee waiver under FOIA. The letter demanded an actual, substantive

1 determination for the FOIA request within five days. The June 11, 2015

2 Administrative Appeal is attached hereto as Exhibit 5.

3 35. In a letter dated June 15, 2015, postmarked June 16, and received sometime  
4 thereafter, Carl Mitchell, Acting Director, Division of Regulatory Affairs & Acting  
5 FOIA Officer, provided the agency's first substantive response to the FOIA  
6 Request. Mr. Mitchell stated that IHS was providing "some of the records that you  
7 have requested" and that processing fees had been waived. The letter stated that  
8 "[s]ome information has been withheld, as required by the Department's  
9 Regulations, because release of this information would allow insight into this  
10 Agency's deliberative process. Finally, any information that would be an invasion  
11 of the personal privacy of others (names, addresses) is also being removed. As  
12 such, this information is withheld based upon the FOIA, 5 U.S.C. §§ 552(b), (5)  
13 and (6), and the Department's implementing Freedom of Information Act  
14 Regulations. 45 C.F.R. §§ 5.66, and 5.67." A copy of the June 15, 2015 letter is  
15 attached hereto as Exhibit 6.

16 36. The June 15, 2105 letter did not describe the documents that were being  
17 claimed as exempt from disclosure pursuant to 5 U.S.C. § 552(b) (5) and (6), nor  
18 did it provide any reasonably segregable or redacted portions of the withheld  
19 records, as the FOIA requires. 5 U.S.C. § 552(b). The letter did not contain a  
20 response to Friends' administrative appeal of the fee waiver constructive denial,

1 but stated “[f]ees for processing your request are minimal and they have been  
2 waived. However, you may be charged for future requests.”

3 37. The documents provided with the June 15, 2015 letter included: (1) an  
4 Engineering Report for project PO-08-B04A, which appears to be unrelated to  
5 Friends’ FOIA request; (2) an unsigned letter from the Yakima Indian health  
6 Service to an individual whose name was redacted under “exemption 6” regarding  
7 a well water sample that was analyzed for total nitrates; (3) a U.S. EPA Consumer  
8 Factsheet on: Nitrates/Nitrites; and (4) several pages of “nitrate test results,” with  
9 names and addresses redacted pursuant to exemption six. No further responsive  
10 information was provided.

11 38. The June 15, 2015 letter informed Friends that they have a right to appeal  
12 the decision and “apologize[d] for the delay in responding to your request.”

13 39. On June 23, 2015, Friends’ counsel contacted Sandra Maclin (IHS FOIA  
14 Officer) by telephone regarding the FOIA Request and IHS’ failure to produce the  
15 requested documents in a timely manner. After a brief telephone conversation, Ms.  
16 Maclin said that she would call Friends’ counsel back with more information  
17 regarding the FOIA Request.

18 40. After not receiving a call back from Ms. Maclin, Friends’ counsel again  
19 contacted Ms. Maclin by telephone on July 8, 2015. Ms. Maclin stated IHS would  
20 be releasing more documents, but was unsure if they had already been sent. In the

1 telephone conversation, Ms. Maclin cited the deliberative process exception under  
2 5 U.S.C. § 552(b)(5), but was unable to explain how the exception applied to the  
3 documents that were requested but withheld. Ms. Maclin stated she believed that  
4 the documents requested and withheld were shown to agency leadership, which  
5 somehow implicated the deliberative process exemption, but she was unable to  
6 explain why the scientific information and data requested would be subject to this  
7 exemption. At the end of the conversation, Ms. Maclin stated that more documents  
8 would be released at an unspecified date.

9 41. In a letter dated July 22, 2015, but not received until several days thereafter,  
10 Mr. Mitchell sent a “second response” to Friends containing additional documents.  
11 The July 22, 2015 letter stated that “[a]fter further review, we are sending  
12 additional records that you have requested.” The letter did not identify which FOIA  
13 exemption applied, instead stating “[a]lthough the requested information is exempt  
14 from disclosure under the FOIA, we are exercising our discretion to release the  
15 information.” The letter again stated that the fees were minimal and were waived,  
16 but that Friends “may be charged for future requests.” A copy of the July 22, 2015  
17 letter is attached hereto as Exhibit 7.

18 42. The documents produced along with the July 22, 2015 letter did not include  
19 all of the documents requested in the original FOIA Request. In fact, the  
20 documents produced indicated that there were indeed several other related

1 documents that were being withheld from Friends, for no apparent reason. For  
2 example, one of the documents produced stated that “[t]he Yakama Field Office  
3 (YFO) has been conducting screening of total nitrates in drink [sic] water wells  
4 since the Yakama Nation requested help in a letter addressed to CDR Patrick  
5 Craney, December 22, 2008.” To date, no documents (including studies, data,  
6 correspondence, etc.) relating to these screening efforts have been produced, even  
7 though they were explicitly requested in the original FOIA Request.

8 43. The July 22, 2015 letter did not inform Friends what documents were being  
9 claimed as exempt from disclosure pursuant to 5 U.S.C. § 552(b), nor did it  
10 provide any reasonably segregable or redacted portions of the withheld records, as  
11 the FOIA requires. 5 U.S.C. § 552(b).

12 44. Because it was unclear from the July 22, 2015 letter whether IHS had denied  
13 Friends’ FOIA Request and if so, for what reason the denial was made, Friends’  
14 counsel sent another letter dated August 7, 2015 via electronic mail and certified  
15 mail, return receipt requested.

16 45. In the August 7, 2015 letter, Friends informed IHS that “there are several  
17 documents that [Friends] requested that have not been provided . . . .” The letter  
18 identified documents previously produced that showed IHS had not released the all  
19 of the information. The letter also stated that the decision to deny access to  
20 withheld documents was not supported by reasons or explanations, thereby

1 rendering it difficult to file an administrative appeal. Finally, the letter reiterated  
2 the documents that were requested as part of the original FOIA Request. A copy of  
3 the August 7, 2015 letter is attached hereby as Exhibit 8.

4 46. After receiving Friends' August 7, 2015 letter, FOIA Officer Ms. Ingersoll  
5 telephoned counsel for Friends and left a voicemail message on August 14, 2015.

6 47. In a telephone conversation on August 17, 2015, Ms. Ingersoll referenced  
7 FOIA exceptions under 5 U.S.C. § 552(b)(5) and (6) that were listed in earlier  
8 correspondence by IHS, but could not explain if and how they applied to the  
9 documents that were requested. Ms. Ingersoll stated that the documents requested  
10 were in the regional office, that she would refer the matter to their attorney, and  
11 that either she or someone else at IHS would be getting back to Friends' Counsel  
12 regarding the FOIA Request.

13 48. After reasonably relying upon Ms. Ingersoll's statement that IHS would be  
14 following up with additional information regarding the FOIA Request, Friends'  
15 Council waited to see if more information was forthcoming. However, it became  
16 apparent that IHS would not be providing additional information or rendering a  
17 final determination on the FOIA Request.

18 49. For that reason, Friends filed another administrative appeal on September 7,  
19 2015, a true and correct copy of which is attached hereto as Exhibit 9.

20 50. Because IHS had refused to release the requested documents, gave no

1 apparent reason for the denial, failed to identify which documents IHS was  
2 withholding, and failed to follow through with additional information as promised,  
3 Friends came to interpret IHS' inaction as a constructive denial of their FOIA  
4 Request.

5 51. The September 7, 2015 letter stated that Friends did not dispute the need to  
6 redact names and addresses under 5 U.S.C. § 552(b)(6). However, Friends  
7 disagreed that this exception justified a wholesale denial of entire categories of  
8 documents that were withheld.

9 52. This letter emphasized that Friends were seeking "factual, investigative  
10 materials" that would not be exempt from release under 5 U.S.C. § 552(b)(5).  
11 Furthermore, the nature of the requested material (factual information regarding  
12 scientific data collected by or on behalf of IHS) did not involve deliberative  
13 documents. If there were deliberative documents involved in the request, those  
14 documents could have been redacted or reasonably segregated.

15 53. Friends requested an index describing what documents were withheld and  
16 the reasons why withholding was appropriate under the FOIA and HHS  
17 Regulations.

18 54. On September 8, 2015, counsel for Friends received an email from Ms.  
19 Grimaldi saying, "I have received your appeal and have forwarded it to the IHS  
20 FOIA office for their response." The same day, counsel for Friends received



1 another email from Ms. Ingersoll who stated that the Program Support Center “will  
2 respond to [the] status of your appeal. Once you appeal and send it to PSC it is out  
3 of our hands and to another agency, PSC.”

4 55. Since the filing of the administrative appeal, IHS has not made contact with  
5 Friends or made a determination under the FOIA, 5 U.S.C. § 552(a)(6)(A).

6 56. IHS has not released the records that were requested as part of the original  
7 FOIA Request.

## 8 CAUSES OF ACTION

### 9 COUNT I

#### 10 **FAILURE TO PROVIDE TIMELY & LEGALLY ADEQUATE** 11 **DETERMINATION ON FOIA REQUEST**

12 57. The allegations made in all preceding paragraphs are realleged and  
13 incorporated by reference herein.

14 58. Friends has a statutory right to have IHS process its FOIA requests in a  
15 manner which complies with the FOIA. Plaintiff’s rights in this regard were  
16 violated when IHS unlawfully delayed informing Friends of its final determination  
17 on its FOIA beyond the twenty-day determination deadline imposed by the FOIA.  
18 5 U.S.C. § 552(a)(6)(A)(i).

19 59. In issuing a determination under the FOIA, IHS was required to inform  
20 Friends of three things: (1) the Agency’s determination of whether or not it intends  
to fulfill with the Request; (2) the reasons for its decision; and (3) notice of the

1 right of Friends to appeal the Agency's decision. 5 U.S.C. § 552(a)(6)(A)(i).

2 60. Under FOIA, the twenty-day determination deadline for the FOIA Request  
3 was June 4, 2015.

4 61. Under HHS Regulations, the ten-day determination deadline for the FOIA  
5 Request was May 20, 2015.

6 62. IHS did not provide Friends with a determination on its FOIA Request by  
7 either date.

8 63. IHS' June 15 and July 22, 2015 letters also did not provide Friends with a  
9 determination resolving the FOIA Request as required by 5 U.S.C. § 552(a)(6)(A).

10 64. To date, Friends has not received a timely or legally adequate determination  
11 resolving its FOIA Request under the FOIA.

12 65. Based on the nature of Friends' organizational activities, Friends will  
13 continue to employ the FOIA's provisions in information requests to IHS in the  
14 foreseeable future. These activities will be adversely affected if IHS is allowed to  
15 continue violating FOIA's response deadlines.

16 66. Unless enjoined and made subject to a declaration of Plaintiff's legal rights  
17 by this Court, IHS will continue to violate the rights of Plaintiff to receive public  
18 records under the FOIA.

19 67. IHS' failure to make a final determination on Friends' FOIA Request within  
20 the statutory timeframe has prejudiced Plaintiff's ability to timely obtain public

1 records.

2 68. IHS' failure to issue a timely and legally adequate determination on Friends'  
3 FOIA Request within the statutory timeframe means that Friends has actually and  
4 constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

5 **COUNT II**

6 **UNLAWFUL WITHHOLDING OF RECORDS RESPONSIVE TO THE**  
7 **FOIA REQUEST UNDER 5 U.S.C. § 552(B)(5) & (6)**

8 69. The allegations made in all preceding paragraphs are realleged and  
9 incorporated by reference herein.

10 70. Friends has a statutory right to have IHS process its FOIA request in a  
11 manner that complies with the FOIA. Friends' rights in this regard were violated  
12 when IHS withheld records responsive to its FOIA Request as being exempt from  
13 disclosure under 5 U.S.C. § 552(b)(5) and (6).

14 71. The FOIA requires federal agencies to promptly disclose all records  
15 responsive to a FOIA request unless one of nine statutory exemptions applies.  
16 These nine exemptions are narrowly construed, and it is the Agency's burden to  
17 show that they are properly applied to the withheld records.

18 72. One of the FOIA's exemptions allows agencies to withhold from disclosure  
19 "inter-agency or intra-agency memorandums or letters which would not be  
20 available by law to a party other than an agency in litigation with the agency." 5  
U.S.C. § 552(b)(5). Another FOIA exemption allows agencies to withhold from

1 disclosure “personnel and medical files and similar files the disclosure of which  
2 would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C.  
3 § 552(b)(6)

4 73. IHS withheld an unknown and unidentified number of documents responsive  
5 to the FOIA Request under 5 U.S.C. § 552(b)(5) and (6).

6 74. IHS’ withholding of responsive records under 5 U.S.C. § 552(b)(5) and (6)  
7 was unlawful.

8 75. Friends sought clarification to IHS’ statement that the deliberative process  
9 and personal privacy exemptions applied and also was forced to file an  
10 administrative appeal with IHS on this issue.

11 76. IHS received Friends’ second administrative appeal on September 7, 2015.

12 77. Under the FOIA, IHS had twenty business days to resolve Friends’ appeal.

13 78. IHS’ deadline for resolving Friends’ appeal was October 5, 2015.

14 79. IHS did not resolve Friends’ appeal on or before October 5, 2015 and to date  
15 has never responded to Friends’ appeal.

16 80. Under the FOIA, Friends has constructively exhausted its administrative  
17 remedies consequent to IHS’ failure to resolve Friends’ administrative appeal  
18 within the twenty-day deadline. 5 U.S.C. § 552(a)(6)(B)(ii).

19 81. Based on the nature of Friends’ organizational activities, Friends will  
20 continue to employ the FOIA’s provisions in information requests to IHS in the

1 foreseeable future. These activities will be adversely affected if IHS is allowed to  
2 continue violating the FOIA's disclosure exemptions.

3 82. Unless enjoined and made subject to a declaration of Plaintiff's legal rights  
4 by this Court, IHS will continue to violate the rights of Plaintiff to receive public  
5 records under the FOIA

6 **COUNT III**  
7 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**  
8 **DECISION DEADLINE VIOLATION**

9 83. The allegations made in all preceding paragraphs are realleged and  
10 incorporated by reference herein.

11 84. Plaintiff has a statutory right to have IHS process its FOIA appeal in  
12 compliance with FOIA. Plaintiff's rights in this regard were violated when IHS  
13 unlawfully failed to respond to Plaintiff's administrative appeals within the  
14 determination deadline imposed by the FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

15 85. Based on the nature of Friends' organizational activities, Friends will  
16 continue to employ the FOIA's provisions in information requests to IHS in the  
17 foreseeable future. These activities will be adversely affected if IHS is allowed to  
18 continue violating the FOIA's response deadlines as it has in this case.

19 86. Unless enjoined and made subject to a declaration of Plaintiff's legal rights  
20 by this Court, IHS will continue to violate the rights of Plaintiff to receive public  
records under the FOIA.

**COUNT IV**

**VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT**

1  
2  
3 87. The allegations made in all preceding paragraphs are realleged and  
4 incorporated by reference herein.

5 88. IHS has failed to act in an official capacity under color of legal authority by  
6 violating the requirements of the FOIA. In particular, IHS: (1) failed to issue a  
7 timely final determination on the FOIA Request; (2) failed to abide by statutory  
8 and regulatory procedures in responding to and processing Friends' Requests; (3)  
9 and unlawfully withheld records responsive to the FOIA Request under  
10 Exemptions 5 and 6 of the FOIA.

11 89. IHS has unlawfully withheld agency action by failing to comply with the  
12 mandates of FOIA consequent to its failure and refusal to issue a timely final  
13 determination on the FOIA Request, failure to abide by statutory and regulatory  
14 procedures in responding to and processing Friends' Request, and unlawful  
15 withholding of records responsive to the FOIA Request under Exemptions 5 and 6  
16 of the FOIA.

17 90. Friends has been adversely affected and aggrieved by IHS' failure to comply  
18 with the mandates of the FOIA and the APA. IHS' failures have injured Plaintiff's  
19 interests in public oversight of governmental operations and constitute a violation  
20 of Defendant's statutory duties under the APA.

1 91. Friends has suffered a legal wrong as a result of IHS' failure to comply with  
2 the mandates of the FOIA. IHS' failures have injured Plaintiff's interests in public  
3 oversight of governmental operations and constitute a violation of Defendant's  
4 statutory duties under the APA.

5 92. IHS' failure and refusal to issue a timely final determination on the FOIA  
6 Request, failure to abide by statutory and regulatory procedures in responding to  
7 and processing Friends' Request, and unlawful withholding of records responsive  
8 to the FOIA Request under Exemptions 5 and 6 of the FOIA constitutes agency  
9 action unlawfully withheld and unreasonably delayed and is therefore actionable  
10 pursuant to the APA. 5 U.S.C. § 706(1).

11 93. Alternatively, IHS' failure and refusal to issue a timely final determination  
12 on the FOIA Request, failure to abide by statutory and regulatory procedures in  
13 responding to and processing Friends' Requests, and unlawful withholding of  
14 records responsive to the FOIA Request are in violation of the FOIA's statutory  
15 mandates and are therefore arbitrary, capricious, or an abuse of discretion and not  
16 in accordance with law and are therefore actionable pursuant to the APA, 5 U.S.C.  
17 § 706(2).

18 94. Friends is entitled to judicial review under the Administrative Procedure Act  
19 5 U.S.C. §§ 702, 706.

20 95. Friends is entitled to costs of disbursements and costs of litigation, including

1 reasonable attorney and expert witness fees, under the Equal Access to Justice Act,  
2 28 U.S.C. § 2412.

3 **RELIEF REQUESTED**

4 WHEREFORE, Plaintiff prays that this Court:

5 **1.** Order IHS to promptly provide Friends all of the information sought  
6 in this action and to immediately disclose the requested documents.

7 **2.** Declare IHS' failure to make a timely and legally adequate  
8 determination on the FOIA Request to be unlawful under the FOIA, 5 U.S.C. §  
9 552(a)(6)(A)(i), agency action unlawfully withheld and unreasonably delayed, 5  
10 U.S.C. § 706(1), and/or agency action that is arbitrary, capricious, an abuse of  
11 discretion, and not in accordance with law, 5 U.S.C. § 706(2).

12 **3.** Declare Defendant's failure to make a timely determination on  
13 Plaintiff's administrative appeal to be unlawful under FOIA, 5 U.S.C. §  
14 552(a)(6)(A)(ii);

15 **4.** Declare IHS' failure to abide by statutory and regulatory procedures  
16 in responding to and processing Friends' FOIA Request to be unlawful under the  
17 FOIA, agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. §  
18 706(1), and/or agency action that is arbitrary, capricious, an abuse of discretion,  
19 and not in accordance with law, 5 U.S.C. § 706(2).

20 **5.** Declare IHS' withholding of records responsive to the FOIA Request



1 to be unlawful under 5 U.S.C. § 552(b)(7)(A), agency action unlawfully withheld  
2 and unreasonably delayed, 5 U.S.C. § 706(1), and/or agency action that is  
3 arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5  
4 U.S.C. § 706(2).

5 **6.** Award Friends its reasonable attorneys fees and costs pursuant to 5  
6 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412.

7 **7.** Grant such other and further relief as the Court may deem just and  
8 proper.

9 Respectfully submitted this 26th day of January, 2016.

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