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Litigation Updates for the
October 2025 Meeting of the North Pacific Fishery Management Council

Oceana v. NMFS

Parties:

Plaintiff: Oceana, Inc.

Federal Defendants: National Marine Fisheries Service (NMFS).

Case Activity:

On December 19, 2024, Plaintiff filed a complaint in the United States District Court for the District of Alaska challenging NMFS's production and redaction of images requested by Plaintiff under the Freedom of Information Act (FOIA). Plaintiff's Complaint and NMFS's Answer are provided as attachments to the NOAA General Counsel B3 Litigation Report - Oceana v NMFS FOIA on the April 2025 Council agenda. More background on this case can be found in that same Litigation Report.

The parties have completed briefing. In briefing, Plaintiff asserted that NMFS redacted imagery that was required to be released under FOIA and that the photos should be released with redactions made only for names of people or vessels, faces, addresses, or distinctive features such as tattoos. Plaintiff requests that the District Court declare NMFS's redactions of the withheld information unlawful and order NMFS to provide the responsive records with all non-exempt information unredacted.

Status/Next Steps:

Parties may request oral argument, which would be scheduled later, or obtain a decision on the briefs.

Attached:
NMFS Opening Brief (Motion for Summary Judgment)
Oceana Response Brief (Opposition and Cross-Motion)
NMFS Reply Brief (Reply on Motion and Opposition to Cross-Motion)
Oceana Reply Brief (Reply on Cross-Motion)
Amicus Brief in Support of Oceana Cross-Motion (Organized Village of Kake, Hoonah Indian Association, and Organized Village of Kasaan)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

OCEANA, INC., Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, Defendants.	CASE NO. 3:24-cv-00279-SLG

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Oceana, Inc. ("Oceana") has sued the United States Department of Commerce ("DOC"), National Oceanic and Atmospheric Administration ("NOAA") and the National Marine Fisheries Service ("NMFS") (collectively "Defendants") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Defendants have properly discharged their FOIA obligations by performing a reasonable search for records, properly identifying responsive records, producing releasable documents or portions of

documents, and invoking proper legal authority when withholding documents or portions of documents that were otherwise responsive to Oceana's FOIA request. The government has properly discharged its duties under FOIA and now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

FACTUAL BACKGROUND

Plaintiff Oceana is an international nonprofit ocean conservation organization. Oceana brought this FOIA action to compel defendant National Marine Fisheries Service ("NMFS") to release agency records related to the take of marine mammals in North Pacific groundfish fisheries.[1] The present motion for summary judgment concerns that FOIA request.

I. PLAINTIFF'S FOIA REQUESTS

a. First Request - (DOC-NOAA-2021-001424)

Plaintiff submitted a FOIA request to NMFS dated April 30, 2021, seeking:

(1) Photos and/or video of the April 2020 incident of two orca whale takes in a North Pacific groundfish trawl fishery. Given the attention to this incident and the need to timely contribute to the public's understanding, we request the agency release these records as expeditiously as possible before beginning to search for and duplicate the records described below.

(2) Photos and/or videos of cold-water corals and sponge, king crab, tanner crab, halibut, sablefish, and king salmon taken as bycatch in the Gulf of Alaska (as defined by the fishery management plan area) during federally managed commercial trawl fisheries from 2010 to present. Our request includes photos and/or video that depict these species within the trawl net, in mixed-catches, on-deck, or in observer sampling baskets. Oceana requests photos and video be labeled with the name of the fishery, date, and finest-scale spatial location known.

[1] Dkt 1 at 1.

(3) Photos and/or video records of all documented human-caused serious injury or mortality of marine mammals in the federal North Pacific groundfish trawl fisheries from 2009 to present. We request photos be labeled or linked to the interactions described in the Appendix tables of published Technical Memorandums from 2009-2017, and for those not published, descriptions of unpublished interactions from 2018 to present. Oceana requests photos and video be labeled with the name of the fishery, date, and finest-scale spatial location known.

(4) Photos/and or video of federally managed commercial trawl fisheries interactions with walrus, polar bear, and sea otter from 2009 to present. Oceana requests photos and video be labeled with the name of the fishery, date, and finest-scale spatial location known.[2]

b. Second Request - DOC-NOAA-2024-000011

Plaintiff submitted a second FOIA request to NMFS on October 16, 2023, which sought:

(1) Records associated with the take of orcas in North Pacific ground fish fisheries from 2019 to present including the observer report, self-report, lat/long coordinates of the take, identification of the fishery involved in the take, and the date and time of the reported take.

(2) Records identifying the stock(s) of orcas for the above described takes, if known, or how the take will be assigned to stock(s) in the absence of identifying information.

(3) Records describing any genetic information collected that is related to the above described takes.[3]

c. Third Request - DOC-NOAA-2024-000025

Plaintiff submitted a similar, third FOIA request also on October 16, 2023, which requested:

[2] Exhibit 1 to the Declaration of Jennifer Ferdinand, Deputy Director of the Alaska Fisheries Science Center.
[3] Declaration, Exhibit 13.

(1) Any photos and/or videos of orca takes in Alaska groundfish fisheries from 2019 to present at the highest resolution available.

Our request includes photos and/or video that depict the animals in the water, within the trawl net or other gear, in mixed-catches, or on-deck with the background imagery visible so the viewer can determine the context and setting of the photo. Oceana requests photos and video be labeled with the name of the fishery, date, and finest-scale spatial location known including latitude and longitude.[4]

II. NOAA'S PROCESSING OF THE FOIA REQUEST

As explained in Deputy Director Ferdinand's Declaration, NOAA processed Plaintiff Oceana's FOIA requests through coordinated searches and reviews conducted within NMFS, primarily involving the Alaska Fisheries Science Center ("AFSC"), including its Fisheries Monitoring and Analysis Division. These offices were selected for their responsibility over data collected under the North Pacific Observer Program and for their specialized knowledge of the marine mammal interactions and bycatch events described in Plaintiff's FOIA requests. These offices were also the logical custodians of photo, video, and metadata records responsive to the subject matter of the requests.

The three requests at issue each sought visual and documentary records concerning marine mammal takes and bycatch in North Pacific groundfish fisheries. Following receipt of each request, NMFS engaged directly with Oceana to clarify scope and reduce burden, resulting in revised formulations that defined the media sought, applicable fisheries, and inclusion of identifying metadata.

[4] Declaration, Exhibit 14.

In response to Request 1, originally received on April 30, 2021, NMFS conducted a comprehensive review of archived images and data collected by fishery observers and electronic monitoring systems. The revised request ultimately sought 100 of the most recent photo or video records per bycatch species, with associated gear context and observer labels. NOAA identified and compiled responsive records, and conducted multiple levels of internal review to ensure compliance with applicable legal protections, particularly those mandated by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").[5]

NOAA ultimately released over 1,500 images across six interim and final productions. Images were reviewed and redacted as necessary under FOIA Exemption (b)(3), in accordance with the confidentiality provisions of the MSA. NOAA determined that redactions were necessary to avoid direct or indirect disclosure of confidential observer information or identifying features of fishing vessels. The redactions were implemented using Adobe Photoshop's pixelation tool, which permitted more precise visual separation of protected and releasable content than prior agency tools. The final production under Request 1 was provided to Plaintiff on September 16, 2022.[6]

On January 31, 2022, Plaintiff submitted a request for reconsideration of the redaction method and scope, asserting that certain images were overly distorted. NOAA reviewed the concerns and reaffirmed the necessity of the redactions. On September 27,

[5] Declaration at ¶ 33-35.
[6] Declaration, Exhibit 10.

2022, NOAA issued a formal response denying the request for reconsideration, explaining that its redactions were narrowly tailored and necessary under the MSA. On December 22, 2022, Plaintiff submitted an administrative appeal to DOC. On October 4, 2023, DOC issued a final decision denying Plaintiff's appeal, affirming NOAA's redactions and the use of pixelation to comply with Exemption 3.

Requests 2 and 3 were received on October 16, 2023. In response, NOAA again consulted with Oceana to revise and clarify the scope of each request. Request 2 sought documentary records related to killer whale takes and genetic stock identification; Request 3 sought corresponding photo and video documentation. NOAA confirmed with Plaintiff that redactions would again be applied consistent with those used in response to Request 1. Searches were conducted by knowledgeable AFSC staff using source materials submitted through the North Pacific Observer Program and associated metadata repositories.

For Request 2, NOAA released 37 documents, including one document withheld in full under FOIA Exemption (b)(7)(A), which protects records compiled for law enforcement purposes. For Request 3, NOAA released 15 documents containing 119 images, with redactions applied pursuant to FOIA Exemption (b)(3) and the MSA. No further responsive documents were located. Appeals concerning both Requests 2 and 3 were filed by Plaintiff on May 29, 2024, and July 15, 2024, respectively. As of the date of this filing, no final determination has been issued by the DOC on either appeal.

Across all three FOIA requests, NOAA located and released a total of 1,248 responsive documents. Of these, only one document was withheld in full.[7] NOAA applied redactions only where necessary to comply with statutory mandates, and all records were reviewed by multiple agency staff, including Deputy Director Ferdinand. NOAA has confirmed that all reasonably segregable non-exempt information was released to Plaintiff.

III. JUSTIFICATION FOR WITHHOLDING OF DOCUMENTS FOIA EXEMPTIONS

FOIA Exemption 3 permits the withholding of records that are "specifically exempted from disclosure by statute," provided that the statute either requires withholding without discretion or establishes particular criteria for withholding. 5 U.S.C. § 552(b)(3). NOAA withheld certain images and portions of images responsive to Plaintiff's FOIA requests pursuant to Exemption 3, in conjunction with the confidentiality provisions set forth in the MSA, 16 U.S.C. § 1881a(b).

The MSA mandates that NOAA maintain the confidentiality of information submitted to the agency under MSA requirements and prohibits the disclosure of any such information that would "directly or indirectly disclose the identity or business of any person who submits such information," unless one of the limited statutory exceptions applies. This includes "observer information" as defined at 16 U.S.C. § 1802(32).

[7] Declaration at ¶ 32.

Application of the MSA Confidentiality Provisions

Pursuant to the MSA and FOIA Exemption 3, NMFS withheld identifying or potentially identifying portions of images and documents that, if disclosed, could directly or indirectly reveal confidential information about fishing vessels, observer activity, or business operations. This included visual information such as:

- Vessel configuration and gear layout;
- Deck and factory areas;
- Observer sampling stations;
- Fishing operations in progress;
- Vessel crew or observers.

NOAA determined that such visual information, especially when released in image form with associated metadata (such as time, fishery, and location), posed a foreseeable risk of indirectly identifying the submitting party—particularly given the small number of vessels operating in specific fisheries and the rapidly evolving capabilities of public technology, artificial intelligence, and online tools.

Method of Redaction and Review

As explained in Deputy Director Ferdinand's Declaration, redactions were applied manually using Adobe Photoshop's "lasso" and pixelation tools. This method allowed NOAA to precisely separate exempt and non-exempt content and reduce the risk of over-redaction. This pixelation method replaced the use of the black rectangular redaction tool

previously used in the agency's document management system, which had led to less precise results and unnecessary obscuring of non-exempt image elements. NOAA staff reviewed each image individually and evaluated the appropriate redaction zone based on risk of disclosure and context.

All image redactions were reviewed by multiple NOAA staff, and Deputy Director Ferdinand personally reviewed the redacted images to ensure compliance with applicable confidentiality standards. NOAA confirmed that all reasonably segregable, non-exempt information was produced.

Segregability

In accordance with FOIA's segregability requirements, NOAA conducted a careful, line-by-line and image-by-image review of each responsive record to determine whether non-exempt information could be separated and released. The agency's approach was informed by its obligation to release the maximum amount of non-exempt information without compromising confidential data protected by statute.

For example, NOAA declined to redact the marine mammals themselves, even where some background redactions were necessary.[8] When background elements could not be isolated from the animal without compromising confidentiality, NOAA pixelated only the necessary portions, leaving the subject animal visible and identifiable to the greatest extent possible.

[8] Declaration at ¶ 16.

Description of Withholdings

NOAA applied Exemption 3 to the following categories of material across the three FOIA requests:

- **Marine Mammal Imagery**: Pixelation of background elements on deck, including gear, observers, crew members, or factory operations that could identify specific vessels or fisheries.
- **Coral and Bycatch Images**: Partial redactions of identifying visual features associated with confidential sources under the MSA.
- **Law Enforcement Record**: One document was withheld in full under FOIA Exemption 7(A), but this record also contained portions that were exempt pursuant to Exemption 3.[9]
- **Metadata**: Redactions were also applied to metadata embedded in image files where such data could include identifying vessel or observer information.

NOAA released a total of 1,248 responsive documents, including over 1,500 images, and applied redactions only where required to prevent the disclosure of MSA-protected information. Only a single document was withheld in full (under Exemption 7(A)), and all remaining redactions were partial.

[9] Declaration at ¶ 27.

NOAA properly invoked FOIA Exemption 3 in conjunction with the confidentiality provisions of the MSA to withhold information that, if disclosed, could reasonably be expected to directly or indirectly reveal the identity, operations, or business practices of persons who submitted data under the MSA. NOAA's redaction method ensured that all non-exempt information was reasonably segregated and disclosed, consistent with FOIA's purpose and statutory mandates.

LEGAL BACKGROUND

I. FOIA BACKGROUND

"The basic purpose of 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." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Accordingly, FOIA generally requires the disclosure of agency records upon the request of any person. 5 U.S.C. § 552(a)(3)(A).

The right to access agency records is not unlimited: FOIA includes nine statutory exemptions to the general disclosure obligation. 5 U.S.C. § 552(b)(1)-(9). These exemptions reflect Congress's decision "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423); *accord Pickard v. Dep't of Justice*, 653 F.3d 782, 790 (9th Cir. 2011) (Wallace, J., concurring) ("'Congress

established FOIA' to strike a balance between the public's interest in knowing 'what [its] government is up to' and the 'legitimate governmental or private interests' in withholding documents subject to FOIA's exemptions." (quoting *Boyd v. Criminal Div. of the U.S. Dep't of Justice,* 475 F.3d 381, 385 (D.C. Cir. 2007))). Although the nine FOIA exemptions should be "narrowly construed," *FBI v. Abramson,* 456 U.S. 615, 630 (1982), the Supreme Court has made clear that they must be given "meaningful reach and application," *John Doe Agency,* 493 U.S. at 152.

II. SUMMARY JUDGMENT IN FOIA LAWSUITS

A court reviews an agency's response to a FOIA request de novo. 5 U.S.C. § 552(a)(4)(B). Under 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has "(1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). Agency records are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *DOJ v. Tax Analysts,* 492 U.S. 136, 144-45 (1989). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Because facts in FOIA cases are rarely in dispute, "[m]ost FOIA cases are resolved by the district court on summary judgment." *Animal Legal Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016); *accord Lawyers' Comm. for Civil Rights v. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) ("As a general rule,

all FOIA determinations should be resolved on summary judgment."). Discovery is seldom necessary or appropriate. *See Lane v. Dep't of the Interior*, 523 F.3d 1128, 1134-35 (9th Cir. 2008).

An agency bears the burden of justifying the assertion of FOIA exemptions to redact or withhold documents. 5 U.S.C. § 552(a)(4)(B). To meet these burdens, an agency may rely upon reasonably detailed, non-conclusory affidavits. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Zemansky*, 767 F.2d at 571. An affidavit that "identif[ies] the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption" is "commonly referred to as a '*Vaughn* index.'" *Lion Raisins Inc. v. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (citing *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973)), *overruled on other grounds by Animal Legal Defense Fund*, 836 F.3d 987 (9th Cir. 2016).

Affidavits submitted by an agency are entitled to a "presumption of good faith." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Moreover, courts "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citing *Hunt v. CIA*, 981 F.2d 1116, 1119-20 (9th Cir. 1992)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (citation omitted).

A. Withholding of Records under FOIA

In response to a FOIA request for records, an agency must withhold records where their disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A).

Exemption 3

As mentioned above, Exemption 3 protects records exempt from disclosure pursuant to a separate statute. 5 U.S.C. § 552(b)(3). Analyzing the use of Exemption 3 involves a two-step inquiry: 1) whether the statute identified by the agency is a statute of exemption within the meaning of Exemption 3, and 2) whether the withheld records satisfy the criteria of the exemption statute. *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 776 (9th Cir. 2015). In this case, NMFS invoked Exemption 3 in conjunction with the confidentiality provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1881a(b).

The MSA requires that "any information submitted to the Secretary under the requirements of this chapter shall be confidential and shall not be disclosed," subject only to narrow exceptions. 16 U.S.C. § 1881a(b)(1). This includes "observer information," which is broadly defined to encompass records collected by onboard observers, such as images, videos, or reports that may contain identifying details of the vessels, gear, catch, or personnel. *See* 16 U.S.C. § 1802(32). The statute further prohibits disclosure of any information that would "directly or indirectly disclose the identity or business of any person who submits such information." 16 U.S.C. § 1881a(b)(3).

To invoke Exemption 3, the agency "need only show . . . that the withheld material falls within" a statute meeting the exemption's conditions. *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009). Thus, [i]f an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Id.*

Exemption 7(A)

Exemption 7(A) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information… could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The exemption requires a two-step showing: (1) that the information was compiled for law enforcement purposes, and (2) that disclosure could reasonably be expected to interfere with enforcement proceedings. *See Robbins Tire & Rubber Co.*, 437 U.S. at 224-5.

Courts have consistently held that the exemption applies not only to criminal investigations, but also to civil and administrative enforcement proceedings, including regulatory compliance actions. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). The burden is not onerous; an agency need only establish that "disclosure (1) could reasonably be expected to interfere (2) with enforcement proceedings that are (3)

pending or reasonably anticipated." *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 746 F.3d 1082, 1098 (D.C. Cir. 2014), *see also Maydak v. U.S. Dep't of Just.*, 218 F.3d 760, 766 (D.C. Cir. 2000) (noting that the burden of proof for the government's invocation of 7(A) can be satisfied "through generic, categorical showings" alone).

B. Segregability

The Freedom of Information Act requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). This provision imposes an affirmative duty on agencies to conduct a careful, document-by-document review to determine whether non-exempt information can be reasonably separated from exempt material and disclosed. *See Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 18 (D.D.C. 2004). An agency's segregability analysis must be thorough, and courts will not accept conclusory or perfunctory assertions that no such information exists. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). However, disclosure is not required where the non-exempt portions "are inextricably intertwined with exempt portions." *Id.* at 260.

As explained in Deputy Director Ferdinand's Declaration, NMFS conducted a line-by-line and image-by-image review of each record responsive to Plaintiff Oceana's FOIA requests to assess whether non-exempt portions could be reasonably segregated

and released.[10] For each image, NOAA evaluated whether any portion of the photo, metadata, or contextual labeling could be disclosed without violating the confidentiality requirements of the Magnuson-Stevens Act (MSA), as incorporated under FOIA Exemption 3. Again, this included reviewing imagery for gear, deck layouts, observers, vessel features, and any visual or embedded data that might directly or indirectly disclose confidential information.

Wherever possible, NMFS used targeted redactions to pixelate only the portions of images that posed a disclosure risk. Unlike prior FOIA responses that relied on rectangular blackout tools which often obscured broader portions of an image, the pixelation technique—implemented manually using Adobe Photoshop—allowed NOAA to shield only those features that implicated confidentiality concerns while leaving the primary subject matter (typically a marine mammal or bycatch species) fully visible and intelligible. The record demonstrates that this approach was adopted specifically to improve segregability and preserve as much responsive information as possible.[11]

Deputy Director Ferdinand personally reviewed all redacted images and affirmed that all reasonably segregable, non-exempt portions of responsive records were disclosed. For instance, marine mammals were never themselves redacted unless directly necessary to protect nearby confidential content, and all images were stripped of embedded metadata that could reveal vessel identification. For the one document withheld in full,

[10] Declaration at ¶ 44.
[11] Declaration at ¶ 41.

again that withholding was made pursuant to Exemption 7(A) and not because of non-segregable content.

Courts have held that an agency's representations in a sworn declaration, made in good faith and demonstrating a detailed segregability analysis, are entitled to a presumption of regularity. *See Johnson v. Exec. Off. for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002). Moreover, while a detailed justification for non-segregability must be provided, "the agency is not required to provide so much detail that the exempt material would be effectively disclosed." *Id.* Here, NOAA's declaration provides a robust and credible basis to conclude that the agency satisfied its segregability obligations. There is no indication of bad faith, over-redaction, or failure to consider the potential release of non-exempt material.

ARGUMENT

Based upon the above facts and law, the Defendants have discharged their obligations under FOIA by (1) invoking proper legal authority when withholding documents or portions of documents that were otherwise responsive to Oceana's FOIA requests and (2) segregating and releasing reasonably non-exempt material.

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

A. Defendants Properly Invoked FOIA Exemptions

In this case, NOAA applied Exemption 3 to withhold or redact portions of images and metadata that could directly or indirectly reveal the identity of fishing vessels or operations, such as photos showing the layout of factory trawlers, observer sampling

stations, fishing gear configurations, or individuals on board. As Deputy Director Ferdinand's declaration illustrates, technological advances—especially in publicly available AI-assisted image matching tools—heighten the risk of reverse-engineering vessel identity from seemingly innocuous visual cues.[12]

NOAA's redaction method (using pixelation instead of crude blackout boxes) was designed to preserve the visibility of marine mammals while shielding identifying features, and it was narrowly tailored to meet the confidentiality mandates of the MSA. As such, the information withheld squarely falls within the scope of Exemption 3, as interpreted through the strict nondisclosure obligations imposed by the MSA.

Additionally, NOAA properly invoked Exemption 7(A) to withhold one document in full in response to Request 2. According to Deputy Director Ferdinand's Declaration, the withheld record was not a marine mammal image but was a document compiled during the course of a law enforcement investigation. The ongoing nature of the investigative or enforcement process posed a risk that release of the document could reasonably be expected to interfere with the agency's ability to complete its enforcement functions.[13]In line with established precedent, NOAA's withholding under Exemption 7(A) was proper.

[12] Declaration at ¶ 38.
[13] Declaration, Exhibit 27.

B. Defendants Properly Segregated Non-Exempt Material

NOAA fulfilled FOIA's segregability requirement by conducting a meticulous, record-by-record review of all responsive documents and applying redactions only to the extent necessary to protect exempt information under the Magnuson-Stevens Act and other applicable laws. NOAA's use of precise, image-specific redaction techniques, along along with its thorough internal and supervisory review, ensured that all reasonably segregable, non-exempt information was disclosed to Plaintiff. Accordingly, NOAA's withholdings were narrowly tailored, lawful, and fully compliant with FOIA's mandate.

CONCLUSION

Defendants have discharged their obligations under FOIA by responding to Oceana's FOIA requests and producing all responsive documents to which Oceana is entitled. As such, Defendants are entitled to summary judgment.

RESPECTFULLY SUBMITTED this 12th day of June 2025, in Anchorage, Alaska.

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CERTIFICATE OF SERVICE
I hereby certify that on June 12, 2025,
a true and correct copy of the foregoing
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC., *Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE, *Defendant*.	Case No. 3:24-cv-00279-SLG

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act (FOIA) action, 5 U.S.C. § 552, Plaintiff Oceana, Inc. (Oceana) seeks photos and other records held by Defendant National Marine Fisheries Service (the Service) that would shed light on commercial groundfish fisheries' take[1] of federally protected marine mammals in the North Pacific. These fisheries, managed by the Service, routinely capture marine mammals as bycatch[2] in their nets and fishing gear. A majority of these entangled animals die or suffer serious injury as a result, putting the survival and recovery of these species, as well as the health of ocean ecosystems and our public marine resources, at risk. Oceana plans to use the requested records to educate the public about the harmful effects of specific fishing gear and to advocate for sound fisheries management and stronger marine mammal protections.

In response to Oceana's requests, the Service released photos that were so heavily redacted that the marine mammal bycatch depicted was virtually unrecognizable. These redactions removed all information that would help viewers understand the relationship between the bycatch and the fishing operations that caused the bycatch, thereby stripping the records of their effectiveness in Oceana's education and advocacy efforts. The Service also redacted key information from other records, such as locations of the take, depriving Oceana of the facts and details necessary to understand where and how marine mammal bycatch occurs, thereby undermining Oceana's efforts to address this problem.

[1] "Take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).
[2] "Bycatch" refers to the catch of marine mammals, as well as catch of other animals not targeted by the fishery, during fishing operations.

The Service fails to meet its burden under FOIA to show that its extensive redactions and withholdings comport with the statute. Oceana is not seeking disclosure of vessel names or persons' names, faces, and addresses. The Service has not submitted the detailed justification required under FOIA to establish that any of the other information withheld by the agency is exempt from disclosure. The one conclusory declaration the Service has submitted fails to show that the agency's claimed FOIA exemptions, Exemptions 3 and 7(A), apply to the records. Indeed, Exemption 3 cannot exempt the records because neither the Marine Mammal Protection Act (MMPA)—which is the governing statute here—or the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (assuming it is even applicable) specifically prohibits release of these records. The Service also has not shown that all reasonably segregable portions of the records have been released.

The Court should therefore grant Oceana's cross-motion for summary judgment and order the Service to immediately disclose the requested information; to the extent the Service withholds vessel names or persons' names, faces, and addresses, it should be required to file a *Vaughn* index for those withholdings. In the alternative, the Court should review the records *in camera* to determine whether they may be released and order the Service to file a *Vaughn* index and adequate justifications for any withholdings.

LEGAL BACKGROUND

I. The Freedom of Information Act

FOIA protects "the citizens' right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749,

773 (1989) (internal quotations omitted). "The basic purpose of 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." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted).

FOIA requires agencies to make records "promptly available to any person" upon receipt of a request, unless certain narrow exemptions to disclosure apply. 5 U.S.C. § 552(a)(3)(A); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989) (exemptions are to be "narrowly construed" (citation omitted)). Under the FOIA Improvement Act of 2016, even where an exemption applies, agencies may withhold information only when (1) the agency reasonably foresees that disclosure would harm an interest protected by an exemption or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i). The agency has the burden of demonstrating that any withholdings are lawful. *Id.* § 552(a)(4)(B).

Exemption 3 authorizes an agency to withhold information if another statute specifically prohibits its disclosure. *Id.* § 552(b)(3). For statutes enacted before the OPEN FOIA Act of 2009, Exemption 3 only applies if the other statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3)(A). Exemption 7(A) authorizes the withholding of information compiled for "law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." *Id.* § 552(b)(7)(A).

When a portion of a requested record contains exempt information, FOIA requires all non-exempt "reasonably segregable" portions to be released. *Id.* § 552(b).

II. The Marine Mammal Protection Act

Congress enacted the MMPA to address the concern that "certain species and population stocks[3] of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities" and to help "protect[] and encourage[]" marine mammals "to develop to the greatest extent feasible." 16 U.S.C. § 1361(1), (6). To further these objectives, the MMPA prohibits the taking of marine mammals, except in specified limited circumstances. *Id.* § 1371(a). The Service is responsible under the MMPA for protecting cetaceans and pinnipeds other than walruses.

The MMPA requires regulated fisheries to report all incidental mortality and injury of marine mammals, including the species killed or injured and the date, time, and geographic location of such occurrence. *Id.* § 1387(e). Nothing in the MMPA prohibits the agency from releasing this information to the public. *See id.* § 1387.

The MMPA also authorizes the Service to deploy observers and collect observer information on marine mammal take. *Id.* § 1387(d). Only "proprietary information" collected by observers is confidential under the MMPA. *Id.* § 1387(d)(8).[4] The MMPA

[3] The term "stock" means "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. § 1362(11).

[4] The MMPA does not define the phrase "proprietary information." Black's Law Dictionary defines "proprietary information" as "[i]nformation to which the owner has a protectable interest." Proprietary Information, Black's Law Dictionary (12th ed. 2024). The Service's regulations define "[p]roprietary information" to "include[] information, the unauthorized disclosure of which could be prejudicial or harmful, such as information or data that are identifiable with an individual fisher." 50 C.F.R. § 229.11(a). But "information or data that are identifiable with an individual fisher" is not necessarily a protectable property interest; thus, this definition appears to be overbroad and inconsistent with the plain meaning of "proprietary information."

requires the Service to "release or make public upon request any such [proprietary observer] information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person." *Id.* § 1387(d)(9).

The MMPA also requires public involvement in marine mammal protection processes mandated by the statute. For example, take reduction teams are required to meet in public to develop take reduction plans. *Id.* § 1387(f)(6)(D); *see also id.* § 1387(f)(1), (f)(7)(B) (requiring notice and opportunity for public review and comment of take reduction plans). Because the information these teams need to develop such plans is often available only through data collected by observers, this observer information must be made publicly available to comply with the MMPA's public involvement requirements. As the Service has long recognized, this observer information is not confidential under the MMPA. *See, e.g.*, 77 Fed. Reg. 30486, 30491–92 (May 23, 2012).

III. The Magnuson-Stevens Fishery Conservation and Management Act

The MSA governs the conservation and management of fisheries in U.S. territorial waters and in the exclusive economic zone. 16 U.S.C. §§ 1801(b)(1), 1802(11). The Service is responsible for implementing and administering the MSA.

The MSA is built on the principle that the public must be able to participate meaningfully in fisheries management. *Id.* § 1801(b)(5) (purpose of the MSA includes enabling "consumer and environmental organizations, and other interested persons to participate in, and advise on," fisheries conservation and management processes), (c)(3) (policy of the MSA includes assuring that the fishery conservation and management program "involves, and is responsive to the needs of, interested and affected …

citizens"). The MSA recognizes that fisheries information is "essential" for conservation and management. *Id.* § 1801(a)(8). The MSA also requires fishery management plans and regulations to be consistent with other applicable laws. *Id.* § 1854(a)(1), (b)(1), (c)(1).

The MSA sets forth confidentiality requirements for (1) information submitted to the Service by persons in compliance with requirements under the statute, *id.* § 1881a(b)(1), and (2) observer information collected pursuant to the statute, *id.* § 1881a(b)(2). But the MSA provides a variety of exceptions to these confidentiality requirements. For example, the MSA provides that information submitted by any person in compliance with MSA requirements is not confidential if the submitter consents to its release. *Id.* § 1881a(b)(1)(F). Observer information is also not confidential if the submitter of the observer information consents to its release. *Id.* § 1881a(b)(1)(F), (b)(2).[5]

The MSA also authorizes the Service to disclose otherwise confidential information in "any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information." 16 U.S.C. § 1881a(b)(3).

[5] For information submitted to the Service pursuant to MSA requirements, the submitting party is the vessel permit holder. But permit holders do not "submit" observer information to the agency. Rather, "observer information" is "any information collected, observed, retrieved, or created by *an observer or electronic monitoring system* pursuant to authorization by the Secretary, or collected as part of a cooperative research initiative." *Id.* § 1802 (emphasis added). Consistent with this statutory text and the purpose of observer programs to collect independent information on the Service's behalf for conservation and management, *see id.* §§ 1802(31), 1853(b)(8), the Service's longstanding interpretation had been that observer information is not submitted by permit holders, *see* National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-100 § 6.04.a.1.(d). This makes sense: it would have been duplicative and unnecessary for Congress to separately address permit holders' submitted information under 16 U.S.C. § 1881a(b)(1) and observer information under *id.* § 1881a(b)(2), if permit holders submit both. The agency's recently issued regulations seemingly attempt to allow permit holders to control the release of observer information by newly subjecting its release to the consent of a person "subject to a [MSA] information submission requirement." 50 C.F.R. § 600.420(f) (Jan. 16, 2025). This novel interpretation does not apply to the responses at issue here and, more importantly, contradicts the plain language and intent of the MSA.

Because most information related to marine mammal take is non-confidential under the MMPA, *see supra* pp. 4–5, such information is also not confidential under the MSA. The Service has long recognized this to be the case.[6]

FACTUAL AND PROCEDURAL BACKGROUND

I. Marine Mammal Bycatch in North Pacific Groundfish Fisheries

The North Pacific groundfish fishery—operating in the Bering Sea and Aleutian Islands and the Gulf of Alaska—is one of the largest fisheries in the world.[7] From 2019 to 2023, more than 600 vessels operated in this fishery per year.[8] Of these vessels, between 188 and 211 vessels with trawl gear caught groundfish in the North Pacific annually from 2019 to 2023.[9]

North Pacific groundfish fisheries catch a significant number of marine mammals in the course of their fishing operations. Between 2016 and 2020, almost 750 Alaska marine mammals experienced human-caused mortality or serious injury (i.e., any injury that will likely result in mortality).[10] Fishing gear caused around 60% of these deaths and

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[6] *See, e.g.*, 50 C.F.R. § 600.10 (Jan. 16, 2025) ("[c]onfidential information [under the MSA] does not include observer information related to interactions with species protected under the [MMPA]: the date, time, and location of interactions, the type of species, and the fishing practices and gear involved provided that information regarding fishing practices and gear would not constitute a trade secret under [FOIA], 5 U.S.C. 552(b)(4)"); Email from Ned Cyr, Dir., Off. of Sci. & Tech., to Serv. Science Directors et al., Re: Data Aggregation and Summarization Guidelines (July 2, 2009) (Roy Decl., Ex. 1) [hereinafter, Cyr Email] (agency guidance directing staff to apply presumption that "the release of the following information associated with incidental takes of marine mammals or [Endangered Species Act (ESA)]-listed species will not disclose the identity or business of any person: the name and description of the fishery; the species of each marine mammal or ESA-listed species incidentally killed or injured; the date, time, and geographic location of the take; and non-proprietary information regarding gear used in the take," if there are at least three participants in the fishery).

[7] *See, e.g.*, Serv., *Groundfish Research In Alaska* (last updated Aug. 1, 2023) (Roy Decl., Ex. 2).

[8] Anna Abelman et al., *Stock Assessment and Fishery Evaluation Report for the Groundfish Fisheries of the Gulf of Alaska and Bering Sea/Aleutian Islands Area: Economic Status of the Groundfish Fisheries Off Alaska, 2023*, at 50 (Dec. 2, 2024) (Roy Decl., Ex. 3).

[9] *Id.* at 88, 124.

[10] J.C. Freed et al., *Human-Caused Mortality and Injury of NMFS-managed Alaska Marine Mammal Stocks, 2016-2020*, at 6–7, NOAA Tech. Mem. NMFS-AFSC-442 (Aug. 2022) (Roy Decl., Ex. 4).

serious injuries.[11] Observers reported 327 takes of Alaska marine mammals—82% of which resulted in death of the animal—in the North Pacific and West Coast groundfish fisheries from 2016 to 2020.[12]

Of the groundfish fisheries operating in the North Pacific, trawl fisheries are particularly harmful. Trawling—a non-selective fishing technique in which large boats drag enormous nets on or near the ocean floor, scooping up almost everything they encounter—is one of the most damaging and least sustainable fishing methods. The Service has designated groundfish trawl fisheries in the Bering Sea and Aleutian Islands as Category II fisheries under the MMPA, meaning that the agency has determined these fisheries cause occasional death or serious injury to marine mammals.[13] 16 U.S.C. § 1387(c)(1). These groundfish trawl fisheries have killed and injured humpback whales, gray whales, orcas, harbor porpoises, Pacific white-sided dolphins, bearded seals, harbor seals, Northern fur seals, ringed seals, ribbon seals, spotted seals, Steller sea lions, and walruses.[14] Many of these species, such as Steller sea lions, humpback whales, bearded seals, and ringed seals, are also listed as endangered or threatened under the ESA.

In recent years, North Pacific groundfish trawl fisheries have caught an alarming number of orcas. Trawl gear entanglements account for most of the reported orca entanglements in Alaska, and captured orcas have a very low chance of survival.[15] The

[11] *Id.*
[12] *Id.*
[13] Serv., *List of Fisheries Summary Tables* (May 19, 2025) (Roy Decl., Ex. 5).
[14] *Id.*
[15] Serv., *Killer Whale Entanglements in Alaska Summary Report: 1991-2022*, at 14, NOAA Tech. Mem. NMFS-F/AKR-32 (Dec. 2023) (Roy Decl., Ex. 6).

Service reported that trawl fisheries in the Bering Sea caught eight orcas from 2020 to 2022.[16] All but one of the orcas were dead, and the only one released was seriously injured (and thus likely to die). In 2023, the Service reported that groundfish trawl fisheries in the Bering Sea and Aleutian Islands caught 10 orcas within the span of only four months.[17] Nine of the orcas were dead, six of which were determined to have been killed by fishing gear; the only one released alive was seriously injured.[18] This far exceeds the Service's outdated assumption that the trawl fisheries in the Bering Sea and Aleutian Islands take 0.6 orcas per year.[19] Trawler crews have reported increases in orcas present near their boats, suggesting that orca bycatch in these fisheries may continue.[20]

II. Oceana's FOIA Requests

Oceana submitted three FOIA requests to the Service seeking records related to North Pacific marine mammal bycatch. These records would allow Oceana and the public to understand how, why, and where bycatch occurs, as well as the severity of resulting injuries, and to help develop solutions to this problem. *See* Decl. of Tara Brock, ¶¶ 18–24.

A. April 2021 Request No. DOC-NOAA-2021-001424 (Request 1)

In April 2021, Oceana submitted a FOIA request to the Service, seeking, among other things, "[p]hotos … of all documented human-caused serious injury or mortality of

[16] *Id.* at 16.
[17] Serv., *Cause of Death Determined for 11 Killer Whales Incidentally Caught in Fishing Gear in Alaska in 2023* (Dec. 1, 2023) (Roy Decl., Ex. 7) [hereinafter Serv., *Cause of Death Determined*]; Serv., *Response to Recent Reports of Killer Whale Incidental Catches in Alaska* (Sept. 21, 2023) (Roy Decl., Ex. 8).
[18] Serv., *Cause of Death Determined*.
[19] Serv., *Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement:Final Supplemental Information Report*, at 3.8-71 (Nov. 2015) (Roy Decl., Ex. 9).
[20] Groundfish Forum, *Statement on Unintentional Killer Whale Interactions* (Roy Decl., Ex. 10).

marine mammals in the federal North Pacific groundfish trawl fisheries from 2009 to present." Decl. of Jennifer Ferdinand, Ex. 1, ECF No. 24-2.

The Service sent an initial response that included previously released photos of orca bycatch. The photos included some redactions using black-out polygons, a redaction method that the agency had often used in previous years to redact claimed exempt information from photos of bycatch. *See* Figure 1. This level of redaction allowed Oceana to view the image of the animal in the context of industrial fishing operations.

After several meetings, Oceana and the Service agreed to a revised scope for the request. The Service stated that "[i]mages, including metadata, will be reviewed for confidential information (e.g., vessel name, crewmember faces, etc.) before being released." Ferdinand Decl., Ex. 4, ECF No. 24-5.

Subsequently, the Service made six releases of responsive records. These releases included many unredacted photos, *see* Figure 2, and photos minimally redacted using the black-out polygon method. But these releases also included numerous heavily redacted photos using a new pixelation redaction method (at times, the same PDF file included both redacted and unredacted images of the same animal). Brock Decl., ¶¶ 4–9. The new method removed far more information than was typically redacted when using the black-out polygon method. In many instances, the Service pixelated everything in the photo except the animal, meaning that all information necessary for viewers to understand the relationship between the animal becoming entangled, injured, and/or killed and the fishing operations that caused that harm were removed. Information about the gear that the animal was tangled in or injured by was removed. In several images, the pixelation

method distorted the image such that the animal shown was practically unrecognizable. *See* Figures 3–6. The Service invoked Exemption 3 on the asserted basis that the MSA prohibited the information from being released.

Oceana requested that the agency reconsider these redactions and provided the agency with examples of overly redacted photos. The Service denied the reconsideration request. The Service again invoked Exemption 3 and the MSA. But, to justify the use of the new pixelation method, the Service claimed that "the size and scope" of Oceana's FOIA request "required" the agency to "take a new approach to redaction by pixelating the background of the original images." Ferdinand Decl., Ex. 11, ECF No. 24-12; *see also* Ferdinand Decl. ¶¶ 40–41 (noting that pixelation "allowed a large savings of time").

Oceana timely administratively appealed the Service's determination regarding all responsive records where photos were released with pixelated backgrounds. More than nine months later, the Department of Commerce denied the appeal.

Figure 1. Photo released under Request 1, showing an orca on the deck of a vessel in mixed catch with black-out polygon method redactions.

Figure 2. Photo released under Request 1, showing a bearded seal on the deck of a vessel with fishing gear. The Service made no redactions to this photo.

Figures 3 to 6. Photos released under Request 1, showing various marine mammals with all additional information and background redacted using a pixelation method.

B. October 2023 FOIA Request No. DOC-NOAA-2024-000011 (Request 2)

In October 2023, Oceana submitted a FOIA request seeking: (1) records associated with the take of orcas in North Pacific groundfish fisheries from 2019 to present including the observer report, self-report, latitude/longitude coordinates of the take, identification of the fishery involved in the take, and the date and time of the reported take; (2) records identifying the stock(s) of orcas for the above described takes, if known, or how the take will be assigned to stock(s) in the absence of identifying information; and (3) records describing any genetic information collected that is related to the above described takes. Brock Decl., Ex. 8.

In response, the Service produced 37 records. The release included (1) several heavily pixelated photos and (2) spreadsheets with information such as location data, haul data, specimen numbers, and other data on fisheries' marine mammal take redacted. The Service again invoked Exemption 3 and the MSA.[21] Other photos in the release, however, were released without redaction. The release also included a fully redacted PDF file with 11 blacked-out pages, for which the Service asserted Exemption 7(A) but provided no description of the document or justification for invoking the exemption.

Oceana timely administratively appealed the Service's FOIA determination regarding the redacted and withheld records. To date, the Department of Commerce has not issued a determination on this appeal.

Figure 7. Photo released under Request 2, showing an orca with all additional information and background redacted using a pixelation method.

C. October 2023 Request No. DOC-NOAA-2024-000025 (Request 3)

Oceana submitted another FOIA request in October 2023, seeking "the release of any photos … of orca takes in Alaska groundfish fisheries from 2019 to present at the

[21] For releases in response to Requests 2 and 3, the Service marked the redactions with claimed Exemption 3(B), as shown in Figures 7–11, but this cannot be accurate. Exemption 3(B) applies only where another statute was enacted after the OPEN FOIA Act of 2009 and that statute specifically cites to Exemption 3(B). 5 U.S.C. § 552(b)(3)(B). The MSA was enacted prior to the OPEN FOIA Act of 2009.

highest resolution available." Brock Decl., Ex. 10. The request asked the agency to include photos that show the animals in the water, within the trawl net or other gear, in mixed catches, or on-deck with the background imagery visible so the viewer can determine the context and setting of the photo; and that the photos be labeled with the name of the fishery, date, and finest-scale spatial location known including latitude and longitude.

In response, the Service produced 15 records but withheld most of the information in the records via its new pixelation method, again invoking Exemption 3 and the MSA. None of the photos were labeled with the name of the fishery, date, or location as requested.

Figures 8 to 11. Photos released under Request 3, showing various marine mammals with all additional information and background redacted using a pixelation method.

Oceana timely administratively appealed the Service's determination regarding all records where photos were released with pixelated backgrounds. To date, the Department

of Commerce has not issued a determination on this appeal.

STANDARD OF REVIEW

FOIA provides this Court with jurisdiction to enjoin federal agencies "from withholding agency records and to order the production of any agency records improperly withheld from" the requester. 5 U.S.C. § 552(a)(4)(B). Courts review agencies' responses to plaintiffs' FOIA requests de novo. *Id.* The agency bears the burden of establishing the applicability of any exemption as to each record for which the exemption is claimed, and of demonstrating reasonable segregability of non-exempt portions of each record. *See id.* § 552(a)(4)(B), (b); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009).

ARGUMENT

The Service does not meet its burden under FOIA to establish that its redactions and withholdings are lawful. First, as a threshold matter, the Service has not provided the requisite *Vaughn* index or non-conclusory agency declarations in support of its assertions that Exemption 3 and 7(A) apply to the requested records. Second, the Service fails to show that Exemption 3 applies to the redacted information. Both FOIA and the MMPA require disclosure because the agency has not established that the redacted information is "proprietary observer information" that cannot be released without directly or indirectly disclosing the identity or business of any person. Assuming the MSA is even applicable here, that statute also does not specifically prohibit disclosure of the redacted information because release of that information would not disclose the identity or business of any submitter, vessel, or crew. Indeed, the fact that the Service released unredacted or minimally redacted photos in response to these same FOIA requests undercuts the

agency's claim that the MSA requires extensive redactions in other substantially similar photos. Third, the Service fails to show that Exemption 7(A) applies to the withheld record. And fourth, even assuming that some information is properly exempt here, the Service fails to reasonably segregate all non-exempt information.

I. The Service Has Not Provided the Detail or Specificity Required to Meet Its Burden to Justify the Claimed Exemptions.

The Service has not provided the requisite justification to carry its burden of demonstrating that the redacted and withheld records are exempt under FOIA. First, the Service has provided no *Vaughn* index describing each redacted or withheld document and detailing why it is exempt. Second, the one declaration the Service has provided contains only conclusory and unsupported assertions and is therefore insufficient.

Because FOIA cases concern the issue of whether one party will disclose documents to the other, "only the party opposing disclosure will have access to all the facts." *Wiener v. F.B.I.*, 943 F.2d 972, 977 (9th Cir. 1991). Thus, "[g]overnment agencies seeking to withhold documents requested under the FOIA are required to supply the opposing party with a *Vaughn* index 'identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.'" *Kucernak v. F.B.I.*, 129 F.3d 126 (9th Cir. 1997) (citing *Wiener*, 943 F.2d at 977); *see King v. U.S. Dep't of Just.*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (*Vaughn* indexes "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."). The purpose of the *Vaughn*

index is to afford requesters a meaningful opportunity to intelligently contest agencies' withholding decisions and to give the court an adequate foundation to review the soundness of the withholdings. *Wiener*, 943 F.2d at 977. "Specificity is the defining requirement of the *Vaughn* index." *Id.* at 979 (quoting *King*, 830 F.2d at 219).

Despite acknowledging the importance of *Vaughn* indexes in FOIA cases, *see* Def's Mot. Summ. J. (Serv. Br.) 13, the Service did not submit such an index. Nowhere does the Service describe each redacted or withheld document or discuss, for each withholding, the consequences of disclosing the information. *See King*, 830 F.2d at 223. The Service has extensively redacted hundreds of photos and other records, and withheld one document in its entirety. For many of the photos, the Service pixelated everything in the photo except the animal.[22] The spreadsheets too redact various types of information. The Service's failure to provide a *Vaughn* index deprives Oceana of a meaningful opportunity to challenge these numerous withholdings and this Court of its ability to review the validity of the Service's claims.

In lieu of a *Vaughn* index, the Service submitted one agency declaration, which too is inadequate. An agency's declarations must describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see Perry v.*

[22] Although Oceana's challenge here focuses on photos that were heavily redacted via pixelation, the Service should also be required to provide *Vaughn* index explanations for photos redacted via the blackout polygon method.

Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (courts do not accept "glib government assertions" in declarations). The declarations "must not be conclusory," and must appear logical and plausible. *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 774 (9th Cir. 2015). Any "description and explanation the agency offers should reveal as much detail as possible as to the nature of the document," in order to provide "the requestor with a realistic opportunity to challenge the agency's decision." *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Declarations must be "detailed enough to allow the court to make an independent assessment of the government's claim." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008).

Only about three pages of the 12-page declaration discuss the Service's redactions and withholdings of hundreds of records, and only a few paragraphs even purport to advance any justifications for the exemptions the agency claimed. Ferdinand Decl. 9–12. As discussed below, the declaration contains only conclusory and unreasoned statements. Thus, the Service has not met its burden to establish that its claimed exemptions apply.

II. The Service Has Not Met Its Burden to Show That Exemption 3 Applies to the Redacted Information.

The Service fails to show that Exemption 3 applies to Oceana's requested records. FOIA allows agencies to exempt records that are "specifically exempted from disclosure by" another statute, if that statute requires matters be withheld in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3). For Exemption 3 to

apply, the agency must show that the requested information falls within the scope of the information specifically exempted from disclosure by the other statute. *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir. 2007). Courts do not defer to agencies in determining whether the requested information falls within the scope of the other statute. *Id.* at 1126–27; *see Lessner v. U.S. Dep't of Com.*, 827 F.2d 1333, 1335 (9th Cir. 1987) ("A basic policy of FOIA is to ensure that Congress and not administrative agencies determines what information is confidential. Given the court's responsibility to ensure that agencies do not interpret the exemptions too broadly, deference appears inappropriate in the FOIA context.").

Here, the redacted information in the photos, the photos' metadata, and the spreadsheets do not fall within the scope of the information that the MMPA (which is the governing statute here) deems confidential. The Service has not shown that the redacted information is confidential proprietary observer information or, even if it were, that disclosure has any reasonable or practical risk of revealing identities of vessels or persons. To the extent that the MSA is even relevant here, the Service has, for similar reasons, failed to meet its burden of showing that the redactions fall within the scope of information exempted by the statute. The Service's inconsistent invocation of Exemption 3 also undermines its claims.

A. FOIA and the MMPA Require Release of the Redacted Information.

As a threshold matter, the MMPA—not the MSA—is the relevant statute in this case. Oceana is solely challenging the Service's decision to redact and withhold photos and other records on *marine mammal take*. The MMPA governs these records: the

Service collects observer information on fisheries' marine mammal take pursuant to the MMPA, 16 U.S.C. § 1387(d), and the MMPA also requires fisheries to report all marine mammal incidental mortality and injury to the Service, *id.* § 1387(e). Despite this, the Service fails entirely to discuss the MMPA. The Service's claim to exemption focuses solely on the MSA, without explaining why the MSA is relevant here when the records concern marine mammal take governed by the MMPA. *Id.* § 1387(d), (e); *see Kamman v. U.S. I.R.S.*, 56 F.3d 46, 49 (9th Cir. 1995) (rejecting agency's conclusory and generalized assertion that requested documents fall within scope of information deemed confidential by statute prohibiting disclosure per FOIA Exemption 3).

The redacted information in the requested records is not exempt from disclosure under the MMPA. First, any withheld information regarding the fisheries' incidental mortality and injury of marine mammals, including the species killed or injured and the date, time, and geographic location of such occurrence, is non-confidential under the MMPA. 16 U.S.C. § 1387(e). Second, the MMPA designates only proprietary observer information as confidential, subject to certain exceptions. *Id.* § 1387(d)(8). The Service is *required* to "release or make public upon request" any such proprietary observer information "in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person." *Id.* § 1387(d)(9).

The Service has not met its burden to show that the redacted imagery and metadata in the photos and the redacted information in the spreadsheets constitute (1) proprietary observer information under the MMPA that (2) cannot be released in some form without directly or indirectly disclosing the identity or business of any person. Nothing in the

record suggests that the redacted information constitutes proprietary observer information—i.e., observer information that would disclose a permit holder's protected property interests. *See supra* n.4. But even assuming it did, the Service fails to meet its burden to show that this information cannot be released in some form without disclosing identities or businesses of persons.

1. Pixelated redactions in photos

The Service has not claimed nor shown that the information redacted via extensive pixelation in the photos constitutes proprietary observer information pursuant to the MMPA. To the extent that the redacted information identifies the fishery, the date and time and geographic location of the take, and the gear used, that information is not exempt from disclosure. 16 U.S.C. § 1387(e); *see, e.g.*, 50 C.F.R. § 600.10 (Jan. 16, 2025), Cyr Email.

But even assuming that photos contained proprietary observer information, the Service fails to show that disclosure would directly or indirectly disclose the identity or business of a person. Oceana is not seeking information in the photos that would reveal vessel names or persons' faces or names. Therefore, there is no risk of direct disclosure of identities or businesses of any person.

According to the Service, "[m]ost of the redactions applied were due to the indirect risk of … disclosure." Ferdinand Decl. ¶ 35. But the Service fails to meet its burden to establish that disclosure of the pixelated information would indirectly reveal identities. Courts reject agencies' assertions that disclosure would lead to indirect identification of persons or entities where the agency has not provided sufficient or non-

speculative evidence demonstrating the practical risk of such identification. *See, e.g.*, *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 868 (9th Cir. 1982) (in Exemption 3 case, finding agency's indirect identification claim to be "too speculative and not supported by facts" because, although agency's expert "testified that in certain circumstances a knowledgeable person in the industry might be able to identify" persons, "no specific evidence was given as to how often this danger of indirect identification might exist"); *Rosenfeld v. U.S. Dep't of Just.*, 57 F.3d 803, 813 (9th Cir. 1995) (in the context of Exemption 7's protection from unwarranted invasion of privacy, affirming district court's finding that disclosure of police officer's first name was "not likely to identify the party" because any search to identify the person from that information would be "impracticable"); *Scarlett v. Off. of Inspector Gen.*, No. 21-819, 2023 WL 2682259, at *11 (D.D.C. Mar. 29, 2023) (finding agency had not provided "a sufficiently detailed explanation" for risk of direct or indirect identification).

Here, the Service's claims regarding indirect disclosure from revealing the photos' background information are conclusory and implausible. *See, e.g.*, *Pac. Fisheries, Inc.*, 539 F.3d at 1148; *Hamdan*, 797 F.3d at 774; *see also Carlson*, 504 F.3d at 1126–27.

First, the agency declaration claims that "only a limited number of vessels would have been included in the search (particularly for Request 1), making any imagery supplied containing a higher risk of potentially revealing identities of vessels or people." Ferdinand Decl. ¶ 37. The Service provides no details regarding what "a limited number" of vessels means. "Limited" here could presumably mean one or two vessels, or possibly thousands of vessels. This is insufficient to establish risk of disclosure. *See, e.g.*,

Willamette, 689 F.2d at 868; *Forest Guardians v. U.S. Dep't of Interior*, No. 02-1003, 2004 WL 3426434, at *16 (D.N.M. Feb. 28, 2004) (agency did not meet burden of showing identification risk because agency failed to "state what minimal number of permittees in a field office—1, 2, 10, etc.—would make it possible for [plaintiff] to link an individual permittee with the disclosed information").

Moreover, according to the Service's own data, for each year from 2019 to 2023, there were more than 600 vessels catching groundfish in the North Pacific. *See supra* p. 7. Given this sheer number of vessels, it is highly speculative that background imagery depicting bits and pieces of a vessel or gear presents any risk of identifying the exact vessel, or exact persons on that vessel, among hundreds of vessels. Each of Oceana's requests also sought photos over multiple years (Request 1 sought photos from 2009 to 2021; Requests 2 and 3 sought records from 2019 to 2023), making identification even more unlikely because the search would have included not just the vessels fishing annually but all the vessels over the multiple-year periods.

It is also unclear why Request 1, which sought photos from North Pacific groundfish trawl fisheries from 2009 to 2021, would in particular implicate a limited number of vessels. Around 200 vessels catch groundfish in the North Pacific with trawl gear each year. *See supra* p. 7. Given this high number of vessels and the timeframe of the request (up to 12 years), the Service fails to show a practical risk of identification of any given vessel or person.

Second, the declaration claims with no evidence that the increasing capabilities of technologies, internet resources, and artificial intelligence (AI) mean that "a small release

of imagery showing a vessel's gear, structure, or features can be expected to provide sufficient information for the vessel to be identified, even by those without preexisting knowledge of the vessels, fleet, or industry." Ferdinand Decl. ¶ 38. The Service bears the burden to establish such technologies present disclosure risks, and has not done so here. *See, e.g.*, *Pac. Fisheries, Inc.*, 539 F.3d at 1148; *Hamdan*, 797 F.3d at 774. For example, the Service does not detail which existing technologies or AI capabilities would realistically allow members of the public to perform this re-identification exercise. The Service's suggestion that the potential for future increased capabilities and use of technologies warrant withholding of this information is even more speculative. The Service also has not asserted or shown that there are publicly available images of each of these vessels such that a member of the public would be able to re-identify the vessels. Nor does the Service assert or establish that each of these more than 600 vessels have such unique features that re-identification of individual vessels by comparing the requested photos with publicly available information would be possible.

Even where agencies have presented arguments detailing how re-identification from the withheld information would occur, courts reject such arguments if the risk is too speculative or if no practical risk of identification is present. *See, e.g.*, *Rosenfeld*, 57 F.3d at 813; *Am. C.L. Union Found. of Arizona v. U.S. Dep't of Homeland Sec.*, No. 14-02052, 2017 WL 8895339, at *24 (D. Ariz. Jan. 26, 2017) (risk of disclosure too attenuated due to "the impracticality of determining the identity of persons from reference to their citizenship, nationality and/or complexion referenced in the records at issue, especially in light of the fact that [direct] identifying information will remain redacted"); *Am. C.L.*

Union v. Dep't of Def., 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005) ("If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else's, may have been redacted from the picture, the intrusion into personal privacy [under Exemptions 6 and 7(C)] is marginal and speculative, arising from the event itself and not the redacted image."); *Block & Leviton LLP v. Fed. Trade Comm'n*, No. 19-12539, 2020 WL 6082657, at *6 (D. Mass. Oct. 15, 2020) (company's argument that "readers could reverse-engineer [company's] commercial priorities by tracking changes in the settlement terms from draft to draft likely stretches Exemption 4 too far").

Third, the Service provides no explanation for why, in many photos, everything has been redacted other than the marine mammal. The Ferdinand Declaration does not explicitly proclaim that everything in the photos—including, in some cases, what appears to be the sky, water, or fish—except the animal are exempt. Nor would such a claim be logical. Yet that is exactly what the Service has redacted here.

2. Photo metadata of fishery name, date, and location

The Service's brief suggests that the requested metadata is exempt because this information, combined with background visual information in the photos (which, as discussed above, the Service also withheld), poses a risk of indirectly identifying persons. Serv. Br. 8. But metadata revealing the fishery name, date, time, and geographic location of marine mammal take is not exempt from disclosure under the MMPA. 16 U.S.C. § 1387(e); *see also, e.g.*, 50 C.F.R. § 600.10 (Jan. 16, 2025); Cyr Email.

The Service's claim is also unsupported by the agency's own declaration. *See Kamman*, 56 F.3d at 48 (courts rely on *agency declarations* (not counsel's assertions that have no declaration support) to determine whether burden under FOIA is satisfied). The declaration does not assert that metadata information, combined with the photos, poses risk of indirect identification. It only states, in a conclusory manner, that the photos were "cleaned of confidential metadata," and otherwise provides no justification for the withholding of metadata regarding the fishery, date, and location. Ferdinand Decl. ¶ 39.

It is also unreasonable to assert that anyone would be able to identify vessels or persons from metadata that merely reveals the fishery, the date of the take, and the location of the take. In addition to the fact that there are more than 600 vessels catching groundfish in the North Pacific per year, fishing vessels are mobile and operate across thousands of miles in the region. The agency's suggestion that data disclosing where a marine mammal take occurred on a particular date years ago could allow a member of the public to identify the vessel or any persons on that vessel is highly speculative at best, and cannot justify withholding the data.

3. Redacted information in the spreadsheets

The Service redacted a variety of information from the spreadsheets, including what appears to be location data (e.g., "NMFS Area" and longitude and latitude where the marine mammal bycatch occurred). The Service also redacted information such as specimen numbers, haul information, and other details associated with the marine mammal take. It is unclear from the face of the spreadsheets what many of the other

redactions are (and there is no *Vaughn* index describing these redactions). Nowhere does the Service provide explanations for why any of this information was redacted.

Any information in the spreadsheets regarding the date, time, and location of marine mammal take, as well as all information that is not proprietary observer information that would disclose the identity or business of persons, is not exempt from disclosure under the MMPA. *See supra* pp. 4–5, 19–21. As discussed above, location data would not disclose the identity or business of any person. *See supra* pp. 25–26.

B. The MSA Does Not Exempt the Redacted Information.

The Service has not shown that the MSA governs the marine mammal take records requested by Oceana. *See supra* pp. 19–20. The MSA sets forth confidentiality requirements, subject to a variety of exceptions, for (1) certain information submitted to the Service by any person *in compliance with MSA requirements* and (2) certain observer information *collected under the MSA*. 16 U.S.C. § 1881a(b). The Service has provided no evidence that the records at issue here were submitted to the agency pursuant to MSA's requirements or collected by observers under the MSA. *See Kamman*, 56 F.3d at 49.

Even assuming that the MSA is relevant here, the redacted information does not fall within the scope of information deemed exempt from disclosure under the MSA. First, as a general matter, marine mammal take information is not confidential under the MSA. Such information (other than proprietary observer information that cannot be released in a form that obscures identities or businesses of persons) is public information under the MMPA, and in fact is often required to be made public under the statute's provisions. *See supra* pp. 4–5. The Service itself recognizes that reported and observer

marine mammal take data—including the name and description of the fishery; the date, time, and location of the take; and the fishing practices and gear involved—is not confidential under the MSA. *See supra* p. 7.

Second, even assuming that some submitted and observer information on marine mammal take could theoretically be confidential under the MSA, the statute expressly authorizes the Service to release otherwise confidential information in "any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person *who submits such information*." 16 U.S.C. § 1881a(b)(3) (emphasis added). As discussed above, *see supra* n.5, the information sought here was not submitted by permit holders; it was collected by observers on behalf of the Service. There is no possibility of direct disclosure of submitters' identity or business here. Moreover, because Oceana is not seeking vessel names or persons' names, faces, or addresses, there is no possibility of directly disclosing the identity or business of any vessel or crew involved in the observed fishing operations. Nor would disclosure of the redacted information indirectly disclose the identities or businesses of any submitter, vessel, or crew. *See supra* pp. 21–27.

C. The Service's Inconsistent Invocation of Exemption 3 Undermines Its Argument that the Redacted Information Is Exempt.

Exemption 3 only applies to information "specifically exempted from disclosure by" another statute. 5 U.S.C. § 552(b)(3). Despite claiming that the MSA prohibits disclosure of the redacted information in the photos, the Service released numerous unredacted, or minimally redacted, photos in response to Oceana's FOIA requests. These

photos reveal vessel areas, gear layout, observer sampling stations, and more—the same information that the Service claims is exempt under the MSA in the extensively-pixelated photos. The Service says nothing to explain this inconsistency. The Service does not show how it is possible that the MSA does not prohibit disclosure of the unredacted or less redacted photos but does prohibit disclosure of the pixelated photos. Nor does it explain why some photos would reveal the identity or business of the submitting party but other substantively similar photos would not. *See, e.g.*, *Jaffe v. Cent. Intel. Agency*, 516 F. Supp. 576, 581 (D.D.C. 1981) ("[agency's] practice in this case of withholding entire paragraphs … is seriously undermined by its inconsistent application, both in this proceeding, as well as in two other FOIA matters currently before this Court").

In sum, the Service has not met its burden to show that Exemption 3 applies here.

III. The Service Has Not Met Its Burden to Show that Exemption 7(A) Applies to the Withheld Record.

The Court should also reject the Service's invocation of Exemption 7(A) because the agency entirely fails to justify this exemption. Exemption 7(A) permits an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). First, the agency must establish that it is a law enforcement agency and that the withheld records were compiled for law enforcement purposes. *See Lewis v. I.R.S.*, 823 F.2d 375, 379 (9th Cir. 1987). Second, the agency must demonstrate that "disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are

(3) pending or reasonably anticipated." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (citation omitted). The Service fails to make either of these showings. The Service also fails to claim or show that disclosure would result in reasonably foreseeable harm. 5 U.S.C. § 552(a)(8)(A)(i).

First, the Service fails to show that the withheld record was compiled for law enforcement purposes. "To determine whether records are compiled for law enforcement purposes," courts focus on "how and under what circumstances the requested files were compiled and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Clemente v. F.B.I.*, 867 F.3d 111, 119 (D.C. Cir. 2017) (cleaned up). Agency declarations "must establish a connection between the assertedly exempt records and an inquiry into a possible security risk or violation of federal law." *Id.* (cleaned up). "Exemption 7 cannot be used as 'pretext' to withhold documents related to 'generalized monitoring and information-gathering that are not related to the [agency's] law enforcement duties.'" *Am. C.L. Union of N. Cal. v. F.B.I.*, 881 F.3d 776, 779 (9th Cir. 2018) (citation omitted).

When an agency with "mixed" administrative and law enforcement functions (unlike an agency with a primary law enforcement mandate) withholds records, courts apply a more "exacting standard." *Tax Analysts v. I.R.S.*, 294 F.3d 71, 77 (D.C. Cir. 2002) (citations omitted). A mixed function agency "must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 748 (9th

Cir. 1979), *overruled on other grounds*, *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016).

Courts routinely reject Exemption 7 claims where the agency has failed to provide adequate detail establishing the law enforcement purpose behind the compilation of the withheld records. *See, e.g.*, *Am. Ctr. for L. & Just. v. U.S. Dep't of Just.*, 334 F. Supp. 3d 13, 18 (D.D.C. 2018) (rejecting Exemption 7 claim where agency broadly stated that withheld documents were compiled in the course of its investigation, without making specific statements as to why the document was created for such a purpose); *Windel v. United States*, No. 02-00306, 2005 WL 846206, at *3 (D. Alaska Apr. 11, 2005) (finding agency had not shown information was compiled for law enforcement purposes where agency had not adequately described what proceedings took place, what officials were seeking to enforce, and the sanctions available); *Parker v. U.S. Dep't of Just. Exec. Off. for U.S. Att'ys*, 852 F. Supp. 2d 1, 11 (D.D.C. 2012) (finding that agency "must actually provide evidence that the disciplinary investigation focused on illegal activity which could result in civil or criminal sanctions"); *United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 45 (D.D.C. 2008) (declaration only reciting Exemption 7's requirement and identifying an ongoing investigation "falls far short").

The Service is a mixed function agency. *See supra* pp. 4–5 (describing the agency's duties). As such, the Service must satisfy a more exacting scrutiny and show that the withheld record was compiled for law enforcement purposes within the Service's proper authority. But the Service fails to meet even the more deferential standard, let alone the more exacting one. The Service only states that "[t]he fully redacted document

… was a document produced in the course of a law enforcement investigation." Ferdinand Decl. ¶ 32. The Service provides no details as to what the withheld document is or entails, what the "law enforcement investigation" is or entails, how and for what purpose the withheld document was compiled, and how withheld document relates to the investigation. The Service also provides no details about whether the document was compiled for enforcement within the Service's authority.

Second, the Service provides no evidence that the "law enforcement investigation" was pending or reasonably anticipated, or that the release of the withheld document would reasonably be expected to cause some articulable harm to that proceeding. The agency is required to "explain, publicly and in detail, how releasing each of the withheld documents would interfere with the government's ongoing" enforcement investigation. *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004), *overruled on other grounds*, *Animal Legal Def. Fund*, 836 F.3d at 987. The agency's declaration "must provide as much factual support for [its] position as possible without jeopardizing [its] legitimate law enforcement interest in withholding the documents, and it must be detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Id.* (cleaned up).

Nothing in the Ferdinand Declaration touches on these elements. The conclusory claim in the Service's brief that the investigation is ongoing and poses a risk of interference lacks record support. Serv. Br. 19. The Service cites only to an agency response letter, where the Service had merely recited Exemption 7(A)'s requirement without providing any detail as to how the withheld record meets this requirement. *Id.*

Third, the Service fails to assert or identify any foreseeable harm associated with releasing this document. 5 U.S.C. § 552(a)(8)(A)(i); *see Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021). Thus, the Service falls far short of meeting its burden to show the withholding is appropriate.

IV. The Service Did Not Reasonably Segregate All Non-Exempt Information.

Even assuming that the records at issue contain some exempt information, the Service has not shown that all the withheld information constitute entirely exempt, non-segregable material. 5 U.S.C. § 552(b) (any "reasonably segregable portion" of a record must be disclosed to a requester). Agencies must "offer[] an affidavit with reasonably detailed descriptions of the withheld portions of the documents and alleging facts sufficient to establish an exemption." *Pac. Fisheries, Inc.*, 539 F.3d at 1148. Where large proportions of the information in a record is non-exempt, courts "require a high standard of proof for an agency claim that … disclosure of the non-exempt material would indirectly reveal the exempt information." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

The Service has not met its burden to demonstrate that it was reasonable to remove the entire context of fishing operations from the photos. Although the Service's brief claims that the agency applied redactions "only to the extent necessary to protect exempt information," Serv. Br. 20, it defies logic that everything in the pixelated photos except the marine mammal, including what appears to be the sky or the water, is exempt. In any case, the agency did not perform an adequate segregability analysis detailing, for each record, "which portions of the document are disclosable and which are allegedly

exempt." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C 2009) (citation omitted).

Moreover, although the Service claims that its new pixelation method allows for "more precise drawing of the line between the protected and unprotected information," Ferdinand Decl. ¶ 41, such precision was not used here. A comparison between the photos redacted using the black-out polygon approach and the pixelated photos shows that the former resulted in more selective redaction with minimal disruption to the image. *Compare* Figure 1 *with* Figures 3–11.[23] The overbroad pixelation method does not constitute reasonable segregation under FOIA.

REMEDY

Because the Service has not met its burden to establish that disclosure of the redacted and withheld information is proper under FOIA, the Court should order the Service to immediately release all responsive records (with only vessel names and persons' names, faces, and addresses redacted). To the extent the Service redacts vessel names or persons' names, faces, and addresses, the Court should require the Service to submit a *Vaughn* index describing each of these redactions.

In the alternative, the Court should review the records *in camera* and order the Service to release all non-exempt information, and order the agency to produce a *Vaughn*

[23] The record suggests that the Service's decision to switch to the pixelation method was driven by the "size and scope" of Oceana's request, not because of a desire to more precisely disclose non-exempt information. *See supra* p. 11; *see also* Ferdinand Decl., Ex. 2, ECF No. 24-3. The Service has not asserted here that the size or scope of Oceana's request was so large as to render a proper segregability exercise unreasonable. Nor would such a claim have merit, especially given that the Service only produced 1,248 records, many of which Oceana is not challenging because they were not redacted or only minimally redacted. *See, e.g.*, *Anderson v. CIA*, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) ("[t]he duty to segregate does not depend on the volume of documents").

index and adequate declarations for redacted or withheld records. *In camera* review of the records here is particularly appropriate because the Service has failed to provide a *Vaughn* index, its declaration does not include sufficiently detailed and non-conclusory explanations, and its redactions are inconsistent. *See, e.g.*, *Islamic Shura Council of S. Cal. v. F.B.I.*, 635 F.3d 1160, 1166 (9th Cir. 2011) ("If the [agency's] affidavits are too vague, the court 'may examine the disputed documents *in camera* to make a first hand determination of their exempt status.'" (quoting *Lane*, 523 F.3d at 1135–36)); *Quinon v. F.B.I.*, 86 F.3d 1222, 1229 (D.C. Cir. 1996) ("[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is necessary."). But *in camera* review "is not an acceptable substitute for an adequate *Vaughn* index," so the Court should also order the Service to file a *Vaughn* index and adequate declarations for its redactings and withholdings. *Wiener*, 943 F.2d at 979 ("*In camera* review may supplement an adequate *Vaughn* index, but may not replace it.").

CONCLUSION

For the foregoing reasons, Oceana respectfully requests that the Court order the Service to immediately disclose the requested information; to the extent the Service redacts vessel names or persons' names, faces, and addresses, the Court should order the Service to submit a *Vaughn* index for these redactions. In the alternative, the Court should review the documents *in camera* and order the Service to release all non-exempt information and order the Service to submit a *Vaughn* index and adequate justifications for any redactions and withholdings.

Respectfully submitted this 7th day of July, 2025.

/s/ Rumela Roy

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

OCEANA, INC., Plaintiff, vs. NATIONAL MARINE FISHERIES SERVICE, Defendant.	**REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** Case No. 3:24-cv-00279-KFR

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The plain language of the Magnuson-Stevens Act (MSA)'s confidentiality provision states: "[a]ny observer information shall be confidential and shall not be disclosed ...." 16 U.S.C. § 1881a(b)(2). NOAA has consistently maintained that the MSA is a withholding statute under 5 U.S.C. § 552(b)(3) for purposes of the Freedom of Information Act

(FOIA). See 89 FR 102000, 102003 (Dec. 17, 2024). ("NMFS applies MSA section 402(b)(3) as the basis for FOIA Exemption Three, mandatory withholding authority."); 89 FR 17358, 17367 (March 11, 2024); 77 FR 30486, 30491 (May 23, 2012). It is uncontested that the records at issue in this case were collected by observers who were deployed under the authority of the MSA and funded entirely under the terms of the MSA. 50 C.F.R. §§ 679.50–.57. Therefore all observer information concerning fishery information, such as imagery of vessels, gear, and similar contextual elements, must be withheld from the relevant records in this case. 50 C.F.R. §§ 679.50–.57. Despite this, in an effort to reconcile various provisions of the MSA with those of the Marine Mammal Protection Act (MMPA), Defendant has still worked to release records in this case to the extent they are interpreted as being outside the definition of confidential information under the MSA by depicting the mammal that was the subject of the image. At the same time, Defendant complied with the MSA's requirements to protect confidential observer information, which is the focal issue of this case.

Indeed, Defendant has gone above and beyond its duty to respond to Plaintiff's request by creating a spreadsheet allowing Plaintiff to correlate the photographs that Plaintiff seeks with the detailed data and analysis on human-induced mortality and injury events that Defendant published along with its report on that topic. 2nd Ferdinand Declaration at ¶ 7. At the same time, and as required by the MSA, Defendant appropriately withheld imagery to avoid "directly or indirectly disclos[ing] the identity or business of any person," the same withholding that would be required of MMPA observer information. See 16 U.S.C. 1881a(b)(3); 16 U.S.C. 1387(d)(8) - (9). Defendants therefore

properly segregated the information related to these observers that is confidential under the MSA from the imagery of incidentally caught and deceased marine mammals to prevent the disclosure, directly or indirectly, of the identity or business of any person, which in this case includes the vessel, vessel owner, captain, crew members, and any observers. While Exemption 7(A) was properly used in order to withhold information compiled during the course of a law-enforcement investigation, the release of which could reasonably be expected to interfere with said ongoing investigation, Defendant has recently learned that the investigation is not proceeding, and will work to release this document with partial redactions for remaining protected information. Regardless, FOIA Exemption 3 was used appropriately in accordance with the values of open government and providing as much transparency as the law permits. Accordingly, Defendant respectfully requests that the Court grant its Motion for Summary Judgment (Dkt. 23) and deny Plaintiff's Cross-Motion for Summary Judgment (Dkt. 27).

II. ARGUMENT

A. Defendant Has Met Its Burden By Providing A Sufficient Level of Detail to Justify the Claimed Exemptions

An agency is entitled to summary judgment on the basis of an agency affidavit when the agency is able to "describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith," which is the case here. Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

Defendant has provided a declaration (Dkt. 24) that sets forth detailed and logical justifications for its invocation of FOIA Exemption 3, satisfying the requirements that the agency describe its redactions' consistency with the purpose of FOIA. This declaration, authored and affirmed by Jennifer Ferdinand, Deputy Director of the Alaska Fisheries Science Center at NMFS, summarizes Defendant's response to Plaintiff's FOIA requests and explains the scope and logic of the redaction process being contested. As required by the MSA, Defendant withheld imagery to prevent the disclosure, directly or indirectly, of the identity or business of any person. See 16 U.S.C. § 1881a(b)(3). The declaration logically describes the reasoning behind the redactions in light of the particular risk of disclosure that exists in this case; the images sought depict not only the marine mammals that were the subject of the request, but also the features of the vessels and individuals operating them, the disclosure of which could reveal their identity and business, and this risk cannot otherwise be mitigated by aggregation or summarization. The limited number of vessels in the relevant fisheries further increases the risk of disclosure, showing the necessity of the redactions. See 2nd Ferdinand Declaration at ¶ 3-5. Even so, the released versions of the records at issue were still carefully tailored via manual use of Adobe Photoshop pixelation to leave as much information unredacted as possible, which, as the declaration describes, was the method that Defendant specifically determined was the most efficient and effective means of doing so. Following this declaration's representation of the well-reasoned and non-conclusory basis behind these redactions, it is clear that Defendant has shown its work and met its burden in justifying these withholdings.

Plaintiff asserts Defendant failed to meet its burden to justify its invocation of the FOIA exemption, but Defendant has articulated in numerous instances that the information withheld could result in a prohibited direct or indirect disclosure under the MSA. For example, in the spreadsheet publicly released along with a report on human-caused mortality and injury that Defendant publishes each year, Defendant identified that takes of marine mammals occurred in the Bering Sea flatfish fishery in 2022. See, e.g., row 42 of the spreadsheet attached to the 2024 report available here: https://www.fisheries.noaa.gov/resource/publication-database/human-caused-mortality-and-injury-nmfs-managed-alaska-marine-mammal. If the imagery released allowed the viewer to identify that the take occurred by a large vessel, or that the vessel involved fish processing on board, the viewer would be able to narrow down the options to the Amendment 80 sector[1] which has about 18 vessels, because only Amendment 80 vessels are permitted to fish flatfish in the Bering Sea and only 18 of them operated in 2022. 2nd Ferdinand Declaration at ¶ 4**.** Further narrowing or full identification may be a simple process of using publicly-available information such as existing databases of vessel location/date information from Automatic Identification System (AIS) information providers, and their convenient cross-referencing and imagery resources. 2nd Ferdinand Declaration at ¶ 8. If information containing the date of an incident is released alongside

[1]The Amendment 80 sector is a subset of the Bering Sea Aleutian Islands (BSAI) trawl sector. It is referred to as the Amendment 80 sector because it was established by Amendment 80 to the Fishery Management Plan for Groundfish of the BSAI Management Area. Amendment 80 created a limited access program, effectively granting the eligible participants exclusive privileges to target six non-pollock groundfish species.

latitude and longitude data, the AIS information would provide an easy reference to look up and identify the vessel without any ambiguity, rendering the confidentiality protections provided by the MSA ineffective.

In this way, Defendant has clearly identified the foreseeable harms and risks that would likely result from failing to uphold the requirements of the MSA in this case. Because Defendant has sufficiently explained and justified its claimed exemptions via its declaration, it has satisfied its legal burden to do so.

B. Defendant Has Met Its Burden to Show that Exemption 3 Applies

1. The MSA confidentiality provisions apply.

Plaintiff urges the Court to focus on the MMPA's confidentiality provisions and ignore those of the MSA, but Plaintiff fails to show that the MSA does not govern. Because the responsive records were taken by fishery observers and submitted under the MSA, that statute demands that agencies prevent the statutorily prohibited disclosure of the identity or business of the vessel owner, the captain, crew, or observer. The withheld imagery depicts portions of fishing vessels, fishing gear, fishing decks, individuals, and the clothing they wore while on board, items that could be used to directly or indirectly identify a person or business, and which therefore must be withheld under the statutory requirements of the MSA. See Ferdinand Declaration at 34-38 (Dkt. 24).

As a preliminary matter, with respect to the redacted materials in this case, both the MSA and MMPA contain the same mandate prohibiting the redacted information and imagery in these records from being released to the public. That is, each statute provides that Defendant may release or make public certain information, but only in aggregate or

summary form, and in such a way that does not directly or indirectly disclose the identity or business of any person. See 16 U.S.C. 1881a(b)(3); 16 U.S.C. § 1387(d)(9).

While Plaintiff seeks to minimize MMPA confidentiality by restricting the definition of "proprietary information," it goes against its own plain meaning argument to do so. As Plaintiff notes, MMPA regulations describe, but do not directly define this term. 50 C.F.R. § 229.11(a) (noting a type of information included in the definition). The dictionary definition ("[i]nformation to which the owner has a protectable interest") is broadly inclusive. Commercial fishermen certainly have protectable interests in imagery and information from their vessel that could result in public identification of their vessels and crew, reveal fishing methods and practices, and enable harassment, which the MSA's confidentiality provisions were partly designed to protect against. Plaintiff has stated the CFR's definition above but then contorted it into a different concept regarding information that would disclose a protectable property interest. But the dictionary definition is simple; if the fisherman has an interest in the observer information that can be protected, the MMPA itself requires Defendant to protect it under § 1387(d)(8) and (9).

Plaintiff argues that the reports required under § 1387(e) render all information related to those types of information public.[2] This request to drastically limit MMPA confidentiality is unsupported and illogical. Even if disclosure of, for example, a permit

[2] Separate from the MMPA provisions at issue, Defendant notes that FOIA exemption 4 would protect trade secrets and commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. § 552(b)(4).

holder's description of a take is not confidential, that does not mean that another description of the take must be released, although it is different information in a different document, collected and submitted by a different individual from a different perspective and with different background and resources, and falling squarely within the statute's confidentiality. If the document in question is not a report made under § 1387(e), that subsection does not apply to it.

Plaintiff's similar argument that even confidential information must be released in a form that avoids the prohibited disclosure is inapposite with regard to imagery. Imagery cannot be aggregated or summarized, and the only processing that can remove its ability to identify is obscuring the image with pixelation or a solid color. This error in Plaintiff's logic underlies Plaintiff's repeated misuse of the "Cyr email," which was internal, non-binding guidance applicable only to data. It was not relevant to imagery, and the presumptions in question could not override reasonable conclusions that the information described (including date, time, and location of take, which themselves suffice to ID a vessel with current technology) would disclose the identity or business of a person.

For these reasons, Plaintiff's ambiguous arguments for release of "photo metadata[3]" must fail, though Defendant notes the information they seek (date, fishery, location) is found in different forms throughout these FOIA releases and in the technical publications regarding incidental catch. Plaintiff's quibble, perhaps, is that the latitude and longitude were redacted, but as stated previously, disclosing that information along with the

[3] The original photos of marine mammals at issue in this case did not contain metadata of fishery names, gear type, or location. 2nd Ferdinand Declaration at ¶ 13.

accompanying interaction date would make the entire confidentiality provision ineffective with regard to incidental take, where the interests of confidentiality are strongest. Providing such precise information would have the same effect as listing the vessel name for each incident as individuals could use easily accessible information to reidentify the information intended to be confidential.

Similarly, redaction of identifying information in the incident spreadsheets was necessary - they contained information such as latitude and longitude, NMFS area, tracking information for specimens, haul number, cruise number, and information regarding the observer's deployment and vessel identifier.[4] Defendant redacted this information because it provides sufficient information to determine the identity of the vessel or observer, using other public information such as AIS data and fleet information.

Plaintiff's conflation of the MSA and MMPA withholding statutes may be due to the variety of duties performed by groundfish observers. The MMPA does not mandate observer coverage for the North Pacific groundfish trawl fisheries, since they are all Category II or III in the annual List of Fisheries published by Defendant. See List of Fisheries for 2024, 89 FR 12257, at Table 1 (Feb. 16, 2024); 2nd Ferdinand Declaration at ¶ 2. Instead, the on-board observers were stationed on groundfish trawl vessels under the MSA, even though they also served a variety of roles collecting information to support Defendant's management and responsibilities under the MSA, MMPA, and other law. The controlling authority of the MSA is supported by the fact that the funding for

[4] See 2nd Ferdinand Declaration at ¶ 14-15.

the observers comes 100% from fees collected from the commercial fishing industry. See 2nd Ferdinand Declaration at ¶ 1. The MSA authorizes Defendant to establish an observer program and unlike the MMPA expressly authorizes Defendant to collect fees from the commercial fishing industry to fund those observers. See 16 U.S.C. § 1862(a)(1), (2) (the North Pacific Fishery Management Council may recommend, and NMFS may adopt, "a fisheries research plan for any fishery under the Council's jurisdiction except a salmon fishery which . . . requires that observers be stationed on fishing vessels . . . ," and that plan may contain a system of fees "to pay for the cost of implementing the plan"). Defendant has established that fisheries research plan, which contains a program that provides for 100% observer coverage for some fisheries and partial observer coverage and electronic monitoring in others. See 50 C.F.R. §§ 679.50–.57; https://www.fisheries.noaa.gov/alaska/fisheries-observers/north-pacific-observer-program (last visited Aug. 7, 2025). Each year, Defendant collects fees from the commercial fishing industry to cover the costs of implementing that plan or the industry directly pays them to the observer provider companies. For example, the North Pacific Observer Program 2023 Annual Report explains that for fishery sectors with full observer coverage (*i.e.*, 1-2 observers on every vessel), the "full coverage observer providers are permitted by NMFS and contract observer services directly with vessels and processing plants," which, for 2023, cost over $11 million. See North Pacific Observer Program 2023 Annual Report at pp. 18, 27 (Table 2-7), available at https://repository.library.noaa.gov/view/noaa/66036 (last visited on Aug. 6, 2025). In the National Observer Program's FY2022 annual report, the MSA is identified as the sole

authority for placing observers in the North Pacific Groundfish Observer Program. (See pp. 20-21, https://www.fisheries.noaa.gov/s3//2024-09/Natl-Observer-Program-NOP-FY22-Annual-Report.pdf).

While an MSA observer may sometimes collect information to support data gathering and take-reduction efforts under the MMPA, this limited relation of some observer imagery to the MMPA cannot be used as a waiver of protections put in place, by the MSA under which they are commissioned, for MSA information that is less probative for MMPA purposes. Doing so would significantly harm the confidentiality protections of the MSA, and would severely damage Defendant's ability to obtain voluntary cooperation from commercial fishing participants with additional information-gathering efforts. Defendant has long held that reconciling the provisions of these statutes requires care and consideration of the entire picture, and of how their terms are met in practice. Where, as here, an image taken by an MSA observer is provided for MMPA purposes, the only method of applying the MSA and the MMPA together is to release the mammal imagery component and withhold the fishery component. See 2nd Ferdinand Declaration at ¶ 6, 12. The former is useful for showing the condition of the mammal and lacks the qualities of other protected information, while the latter is useful mainly for its identifying information, and has limited value for minimization of incidental catch, particularly when significant data is otherwise provided in reports and publications on each event.

2. The redactions are required under the MSA.

The plain language of the Magnuson-Stevens Act's confidentiality provision prohibits the public release of photographs taken by observers deployed under the Act, which includes the 1,248 records that Defendant withheld in this case. 16 U.S.C. § 1881a(b)(2). Given the information that Defendant makes publicly available concerning the date of marine mammal and fishery interactions, location, species, and fishing practices and gear involved, and given the online information concerning the vessels and participants of commercial fisheries, there exists a real risk that release of imagery depicted in the photographs taken by the on-board observers would result in the disclosure of the identity of a person or business. As Defendant has articulated, disclosure of much of this pixelated information could directly or indirectly reveal the identities of the photographs' subjects, their vessels, or other sensitive information. Therefore, it was proper of Defendant to withhold this information under the confidentiality provisions of the MSA and Exemption 3.

Plaintiff misinterprets Defendant's recently-updated MSA confidentiality provisions. The rulemaking process makes clear that the new regulatory definition of "confidential information" excludes only limited types of information regarding marine mammal encounters: "the date, time, and location of interactions, the type of species, and the fishing practices and gear involved provided that information regarding fishing practices and gear would not constitute a trade secret under [FOIA]." Proposed Rule, 89 Fed. Reg. 17,358, 17,367 (March 11, 2024) ("For these reasons, NMFS proposes in § 600.10 that the definition of ''confidential information'' exclude the following observer information

on marine mammal protected species interactions: species of each marine mammal incidentally killed or injured; the date, time, and geographic location of the take; and information regarding fishing practices and gear used in the take that would not constitute a trade secret under FOIA…"). Further, the Final Rule publication clearly noted that imagery is not treated the same as information that must be submitted to Take Reduction Teams (TRTs) to support their efforts, and while Defendant will continue to release imagery of marine mammal injury/mortality events, it will do so after applying all necessary redactions to prevent disclosure of information protected under MSA confidentiality provisions - images were not being excluded from the "confidential information" definition. Final Rule, 89 Fed. Reg. 10,2001, 102,011 (Dec. 17, 2024).

Plaintiff argues in passing that the information Defendant redacted could have been released under Section 402(b)(3) of the MSA, which allows Defendant to release confidential information "in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information." 16 U.S.C. § 1881a(b)(3). Plaintiff dwells on the words "who submits such information," but furnishes scant support for reading these words to create a loophole whereby Defendant could reveal sensitive information about observed vessels in defiance of obvious congressional concern with the "identity or business" of *fishery participants*. The underlying purpose and policy of the observer confidentiality provisions—to facilitate reliable and effective data gathering, *see Oceana v. Locke*, No. CIV.A.08-1881 (PLF), 2010 WL 2363940, at *3 (D.D.C. May 18, 2010)—counsel in favor of interpreting "submit[ters]" of observer information to include regulated parties who comply with

observer coverage requirements. Plaintiff further insists that because it is not seeking such confidential information as vessel names or persons' faces, disclosure of confidential information is not possible. But Defendant has explained why the redacted information could lead to indirect disclosure of persons' identities or business.

The risk of indirect disclosure can be best illustrated by an example of such an occurrence. In April 2021, an unredacted non-Defendant image of a marine mammal incidental catch was posted in multiple places on the internet - most notably on the "Anchorage" and "Fishing" forums of Reddit,[5] with a subject line and comments from the poster seeking to identify the vessel or participants, or obtain similar information, based on the background contextual clues shown. See 2nd Ferdinand Declaration at ¶ 10**.** The image had no names or faces, but posters discussed the many ways one could investigate the issue, using vessel features, AIS locations, photo metadata, and other forums, and eventually named a company[6] based on imagery of vessel features alone. These Reddit forums were not dedicated toward such activities, but groups on Facebook such as "STOP Alaskan Trawler Bycatch" also show motivation and awareness of tools for similar investigations, as well as threats of violent action against trawlers and their crew. Public investigations based on contextual vessel information and public/crowdsourced information are a foreseeable result of Plaintiff's requested relief,

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[5] See https://www.reddit.com/r/anchorage/comments/mqji61/looking_for_information_on_crew_or_boat_do_you/ and https://www.reddit.com/r/Fishing/comments/mqjjv7/deleted_by_user/; See also 2nd Ferdinand Declaration at ¶ 9-10.

[6] NMFS will neither confirm nor deny here whether the named company was accurate.

via disclosure of indirectly identifying features, with the resulting harm of the loss of confidentiality of this information. See 2nd Ferdinand Declaration at ¶ 5, 11.

Multiple cases cited by Plaintiff on the issue of indirect disclosure are unhelpful or outdated. See Willamette Indus., Inc. v. United States, 689 F.2d 865 (9th Cir. 1982) (finding no clear error by the lower court in holding the agency's inability to predict risk of disclosure and argument it was impossible to know what information might indirectly disclose an identity were not supportive of the exemption); Rosenfeld v. U.S. Dep't of Just., 57 F.3d 803, 813 (9th Cir. 1995) (finding disclosure of a police officer's first name was "not likely to identify the party" because any attempt would be "impractical"); and Scarlett v. Off. of Inspector Gen., No. 21-819, 2023 WL 2682259 (D.D.C. Mar. 29, 2023) (the agency's insufficiently-specific declaration stated the redacted information was "email information" and "would directly or indirectly disclose the identities of the OIG complainant"). The first two decisions were written before the modern internet existed. The Scarlett case is actually supportive of Defendant's position, holding that the disclosure of "information that might identify the complainant, third-party witnesses, or OIG employees," exemption 6 requirements would be met. Id. at 10, citing Horvath v. U.S. Secret Serv., 419 F. Supp. 3d 40, 47, 48 (D.D.C. 2019) ("Just as disclosure of a name or email address can constitute an unwarranted invasion of personal privacy, the disclosure of "information about facts and events that would identify the speaker" can cause precisely the same harm" (internal quotation marks omitted)); Dep't of Air Force v. Rose, 425 U.S. 352, 380 (1976) (Exemption 6 case noting that "what constitutes identifying information ... must be weighed not only from the viewpoint of the public, but

also from the vantage of those who would have been familiar ... with other aspects of [the relevant individual's] career"). Defendant here has clearly shown the risk of indirect disclosure with predictions, assessments, and examples.

The fact that Defendant has, as Plaintiff states, released small batches of unredacted images in the past does not enjoin them from redacting photographs to a greater extent in the future. Different results occurred in some cases here because some imagery was determined by Defendant to be non-confidential. The change to the pixelation processing method with greater redaction of backgrounds occurred in part due to the need for greater efficiency in processing Plaintiff's voluminous requests for imagery, and partly due to changing understandings of what constitutes an indirect disclosure of the identity or business of a person as technology and investigatory resources advanced (and with the recently-noted example of the social media investigation noted above). Redactions are tailored to the level of appropriateness suitable in a given case. It is indeed consistent for Defendant to follow the underlying policy established by the MSA when redacting different kinds of records, as they did in this case. Therefore, the records in this case were properly withheld in line with the requirements of the MSA and under Exemption 3.

C. Defendant Reasonably Segregated All Non-Exempt Information

Defendant's discretion in withholding information that was not covered by an exemption, as well as its methods employed in doing so, were both proper.
Again, given the information that Defendant makes publicly available, independent of FOIA, concerning the date of marine mammal and fishery interactions, location, species, and fishing practices and gear involved, and given the online information concerning the

vessels and participants of commercial fisheries, there exists a real risk that release of imagery depicted in the photographs taken by the on-board observers would result in the disclosure of the identity of a person or business. Moreover, contrary to Plaintiff's contention that there are between 188 and 211 vessels using trawl gear and fishing for groundfish in the North Pacific (Dkt. 27 at 7, 23), the number is between 114 and 138, depending on the year. 2nd Ferdinand Declaration at ¶ 4. Plaintiff's number is incorrect because it may not have accounted for the fact that several vessels participate in multiple trawl fisheries; and there are certain fishery sectors that have much smaller numbers. For example, the pollock catcher-processor sector in the Bering Sea / Aleutian Islands management area has only 13 vessels participating. Id. Similarly, the "Amendment 80 sector" consists of only 14-20 vessels that harvest six species of non-pollock groundfish. Id. Thus, to the extent that one could use imagery to narrow down the vessel to a particular sector, the risk of disclosure increases. Factors relevant to such sleuthing include whether the fishing gear is bottom or pelagic trawl, the color schemes of the vessel, the color schemes of the deck, the type and style of the decking, the species of fish caught and depicted on board, and the number of crew on board.

It is not possible to release purely visual media such as photographs in aggregate or summary form, and it is well established that agencies have no requirement to create new records in response to requests received under the FOIA. See Nat'l Sec. Couns. v. CIA, 969 F.3d 406, 409 (D.C. Cir. 2020), Aguiar v. DEA, 992 F.3d 1108, 1113 (D.C. Cir. 2021). For these reasons, Defendant individually and carefully redacted portions of the pictures, using an appropriate pixilation method in doing so, and endeavored to leave

remaining the portion that depicted the deceased marine mammal. To the extent that Defendant's instructions and supervision of the redaction process may have potentially withheld more non-confidential material than it potentially could have, it was reasonable for them to do so based on the voluminous amount of records and time-consuming amount of work at issue. See Covington v. McLeod, 646 F.Supp.2d 66, 72 (D.D.C. 2009) (quoting Mays v. Drug Enf't Admin., 234 F.3d 1324, 1327 (D.C. Cir. 2000); See also 2nd Ferdinand Declaration at ¶ 16-17 (noting a hazard of leaving context unredacted, and the threat of penalties for staff errors). Defendant therefore acted reasonably in its discretion to primarily focus on providing the most relevant non-exempt materials in these records: the requested mammal images.

Defendant's efforts to release reports and data, among others, demonstrate that it has met its obligations under the MMPA to provide certain information to the public. Moreover, even though not required to do so, Defendant created a spreadsheet to assist Plaintiff in correlating the photographs Defendant had in its records to the data included in the report on human-induced mortality and injury. See Ex. 4 to 2nd Ferdinand Declaration**.** It is therefore disingenuous for Plaintiff to suggest that it did not receive information relating to the date, type of interaction, species killed or injured, and the general geographic location of the incident – indeed, Defendant has gone out of its way to provide as much information as possible on these details. Rather, only confidential observer information, prevented from disclosure under the boundaries of the MSA, was withheld, using the most selective and narrowly-tailored method available via Adobe Photoshop pixelation. In doing so, Defendant reasonably segregated and released as

much non-exempt information from the responsive records as possible in line with the requirements of the FOIA.

For the above reasons, Defendant respectfully requests that the Court grant its Motion for Summary Judgment (Dkt. 23) and deny Plaintiff's Cross-Motion for Summary Judgment (Dkt. 27).

RESPECTFULLY SUBMITTED this August 25, 2025, in Anchorage, Alaska.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC., *Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE, *Defendants*.	Case No. 3:24-cv-00279-KFR

REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The observer information at issue in this Freedom of Information Act (FOIA) case is essential for understanding where, when, and how marine mammals are caught by North Pacific groundfish fisheries, and would allow Plaintiff Oceana, Inc. (Oceana) to formulate and advocate for effective marine mammal take reduction measures. FOIA requires the release of this information because neither the Marine Mammal Protection Act (MMPA) nor the Magnuson-Stevens Fishery Conservation and Management Act (MSA) specifically prohibits its release. Rather, disclosure is necessary to comply with the MMPA's mandates to reduce fisheries' take of marine mammals and involve the public in marine mammal protection. The arguments Defendant National Marine Fisheries Service (NMFS) advances to defend its indiscriminate withholdings lack legal support, contradict the agency's own longstanding interpretations and practice, and rely on unsubstantiated speculation as to how observer information might generally be used to identify businesses or individuals while failing to show that any of the specific withheld information would pose such a risk. NMFS has failed to carry its burden to justify its withholdings under FOIA. Therefore, the Court should order NMFS to release the requested information.

ARGUMENT

I. NMFS Has Not Provided a *Vaughn* Index or Sufficient Declarations.

NMFS has not provided the requisite justification to demonstrate that the redacted records are exempt. First, NMFS failed to submit a *Vaughn* index. Oceana Br. 16–17, ECF No. 26. A *Vaughn* index is particularly necessary here because NMFS extensively

redacted hundreds of records based on the general assertion that the information could theoretically allow a viewer to identify individuals or businesses. Yet NMFS does not disclose what each redacted document specifically depicts or how specific redacted information, if released, would result in identification. *See Wiener v. F.B.I.*, 943 F.2d 972, 977 (9th Cir. 1991). This deprives Oceana of a meaningful opportunity to contest NMFS's withholdings and this Court of its ability to assess NMFS's claims. *Id.*

Second, the Ferdinand declarations do not describe the documents in reasonably specific detail, and provide only speculative and conclusory assertions that, at times, contradict record evidence. Oceana Br. 17–18. The Second Ferdinand Declaration advances hypotheticals about how releasing observer information could—through lengthy chains of events—lead to potential identification. But it does not demonstrate how release of the specific redacted information here would risk identification. *See infra* pp. 13–17. Speculations and attenuated theories do not suffice. *See, e.g.*, *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 868 (9th Cir. 1982) (rejecting agency's unlikely theory that readers could use location and other data in records to indirectly discern identities, and finding agency's arguments "too speculative and not supported by facts" because, although agency "testified that in certain circumstances a knowledgeable person in the industry might be able to identify" persons, "no specific evidence was given as to how often this danger of indirect identification might exist"); *Rosenfeld v. U.S. Dep't of Just.*, 57 F.3d 803, 813 (9th Cir. 1995) (disclosure of name "not likely to identify" party because search would be "impracticable"); *Am. C.L. Union Found. of Arizona v. U.S. Dep't of Homeland Sec.*, No. 14-02052, 2017 WL 8895339, at *24 (D.

Ariz. Jan. 26, 2017) (identification risk "attenuated" due to "impracticality" of discerning identities from citizenship, nationality, and complexion information, especially because direct identifying information remained redacted); *Block & Leviton LLP v. Fed. Trade Comm'n*, No. 19-12539, 2020 WL 6082657, at *6 (D. Mass. Oct. 15, 2020) (rejecting claim that readers could "reverse-engineer" exempt information from records). The declarations therefore are insufficient under FOIA.

II. NMFS Has Not Shown That Exemption 3 Applies to the Redacted Records.

Under FOIA Exemption 3, agencies may only withhold records that are "specifically exempted from disclosure by" another statute. 5 U.S.C. § 552(b)(3). The MMPA governs the releasability of marine mammal take records. Because the records do not constitute proprietary observer information under the MMPA, the redacted information is not exempt. But even assuming that the records contained such information or that the MSA applied here, NMFS fails to show that disclosure has a reasonable risk of revealing identifying information. Thus, NMFS has not shown that any statute specifically prohibits release. *See Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir. 2007) (information must fall within scope of withholding statute for Exemption 3 to apply, and courts do not defer to agencies in making this determination). Indeed, NMFS has released many substantially similar records with no or little redaction, which it could not have done if those releases were prohibited.

A. The MMPA Governs the Marine Mammal Bycatch Records at Issue.

The MMPA governs the marine mammal bycatch records at issue because they depict species protected by the MMPA and have been collected to ensure compliance

with the MMPA. NMFS fails to identify any legal authority supporting its claim that the source of funding for observers determines which statute applies to observer information. As a practical matter, because the MSA provides general authority to NMFS to deploy observers *and* requires compliance with other applicable laws including the MMPA, MSA-funded observers often collect records on marine mammals and other species that are not directly regulated under the MSA, to facilitate compliance with these other laws. NMFS itself has recognized the MMPA's confidentiality provisions apply to observer information on marine mammal take regardless of who collects it.

The MMPA is the relevant statute here because the records depict marine mammal take and were collected for MMPA purposes. The MMPA prohibits take of marine mammals except in specified limited circumstances. 16 U.S.C. § 1371(a). The statute's "immediate goal" is that "incidental mortality or serious injury of marine mammals occuring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." *Id.* § 1387(a). The MMPA requires NMFS, *inter alia*, to prevent depletion of marine mammals from incidental take by fisheries, prepare stock assessments for marine mammal populations, and classify fisheries as I, II, and III based on their risk of taking marine mammals. *Id.* §§ 1386(a), 1387(c), (f). The MMPA recognizes that monitoring fisheries' takes is essential for reducing take. *Id.* § 1387(d); *see also id.* § 1387(e) (requiring reporting on marine mammal take). To ensure compliance with the MMPA, NMFS deploys observers to collect information on fisheries' bycatch of marine mammals and uses that information to inform marine mammal management and conservation under the MMPA. *Id.* § 1387(d);

see 2nd Brock Decl. Ex. 4 (observer data "is valuable to understanding fisheries bycatch, and cannot be obtained through any other means"); *id*. Ex. 3 ("[North Pacific] observer program provides information that is used in analyses that support the conservation and management of living marine resources and that are required under" the MMPA and other laws); *id.* Ex. 2 (North Pacific observer program data "contribute[s] to the best available scientific information used to manage the fisheries in the North Pacific and meet data collection mandates of" the MMPA and other laws).

The record confirms that the observer information at issue here, depicting marine mammal bycatch in North Pacific groundfish fisheries, is used directly and primarily for MMPA purposes. Per NMFS's report on Alaska marine mammal take from 2016–2020, "the [MMPA] requires [NMFS] to estimate human-caused marine mammal mortality and serious injury," and NMFS uses "records of human-caused mortality and injury of marine mammal stocks … obtained through … observer programs" to calculate these estimates. ECF No. 41-5, at iii, 12. NMFS's Alaska marine mammal stock assessments use observer information on North Pacific groundfish fisheries' marine mammal take to "evaluate the progress of each fishery towards achieving the MMPA's goal of zero fishery-related mortality and serious injury of marine mammals." 2nd Brock Decl. Ex. 1. NMFS's 2025 North Pacific observer program manual also demonstrates that observers deployed in North Pacific groundfish fisheries collect information on marine mammal take to comply with the MMPA. *Id.* ¶ 8, Ex. 3. Indeed, NMFS acknowledges the records at issue support the agency's MMPA responsibilities. NMFS Reply 9, 11, ECF No. 40; 2nd Ferdinand Decl. ¶ 12, ECF No. 41 ("the North Pacific Fishery Observer Program is instrumental in

aiding NMFS to produce annual reports of human-caused mortality and injury of NMFS-managed marine mammals" and "photographs allow NMFS to properly identify the species, analyze the initial determination of injury and cause, and potentially aid in criminal or civil enforcement actions"). Because the records are primarily relevant to ensure compliance with the MMPA, the MMPA applies. Oceana Br. 19–27.

NMFS's claim that the MMPA does not "automatically require" observer coverage in the Category II and III North Pacific groundfish trawl fisheries fails to bolster its case. 2nd Ferdinand Decl. ¶ 2; *see* NMFS Reply 9. Regardless of whether the MMPA automatically requires observers for all Category II and III fisheries, NMFS *does* deploy observers on North Pacific groundfish trawl fisheries for the purpose of collecting marine mammal take information and uses that information for MMPA purposes. *See supra* pp. 4–6; 16 U.S.C. § 1387(c)(3)(B) (Category I and II vessels required to carry observers upon NMFS request), (d)(7) (NMFS may, with vessel owner's consent, station observers on Category III vessels), (d)(2)–(7) (NMFS's obligations and authorities to place observers on vessels). Indeed, NMFS categorizes fisheries into Category I, II, and III because it is required to do so under the MMPA. *Id*. § 1387(c)(1). Observer information on North Pacific groundfish fisheries' marine mammal take is crucial for informing NMFS's categorization of these fisheries under the MMPA. *See* 89 Fed. Reg. 12257, 12258 (Feb. 16, 2024) (NMFS's 2024 List of Fisheries noting "[d]ata obtained from the observer program and observer coverage levels are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations").

NMFS also erroneously claims that the releasability of observer information depends on an observer program's funding source. NMFS provides no legal authority to support this position. Moreover, the suggestion that confidentiality is determined by whether an "MSA-funded" or "MMPA-funded" observer collected the information is inconsistent with how NMFS deploys observers and the information it directs them to collect. To comply with the MMPA, MSA, and other applicable laws, NMFS must collect data on various types of bycatch, including fish, marine mammals, birds, and Endangered Species Act (ESA)-listed species. NMFS does not deploy separate observers on a single vessel or fishing trip to collect data on each category of species. Rather, it deploys one or two observers on a vessel, *see* 50 C.F.R. § 679.51, and tasks each observer with collecting data generally, regardless of how the observer is funded.

For example, NMFS's North Pacific observer program manual explains the duties assigned to an observer deployed on North Pacific fishery vessels—and funded under the MSA, according to NMFS—including recording takes of marine mammals and ESA-listed species. 2nd Brock Decl. ¶ 8, Ex. 3; *see id.* Ex. 4 (North Pacific observer program brochure noting observers collect data on a wide range of species including marine mammals). NMFS admits the observers that collected the information at issue "served a variety of roles collecting information to support [NMFS's] management and responsibilities under the MSA, MMPA, and other law." NMFS Reply 9; *see* 2nd Ferdinand Decl. ¶ 12. Given NMFS tasks North Pacific observers with collecting catch and bycatch data to comply with multiple statutory obligations, categorizing the data they

collect (and the confidentiality thereof) according to the funding source from which NMFS pays them is arbitrary and unsupported.

NMFS's position also defies logic. Under NMFS's interpretation, the same exact photo depicting marine mammal bycatch would be subject to different confidentiality provisions depending on whether it was taken by an MSA- or MMPA-funded observer.

Under a reading that respects statutory language and purpose, the MMPA's information collection and confidentiality provisions apply to information *related to marine mammals* that would help ensure compliance with the MMPA. This is further supported by the fact that, while the MMPA directly regulates marine mammal bycatch (16 U.S.C. § 1387), the MSA defines "bycatch" as used in that statute to concern fish rather than marine mammals. *Id.* §§ 1802(2) ("bycatch" means "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards"), 1802(12) (excluding "marine mammals" from definition of "fish"). Thus, the MMPA is the more appropriate statute through which to evaluate confidentiality of information regarding marine mammal bycatch.

In fact, because the MMPA allows release of a variety of information related to marine mammal take (including the name and description of the fishery; species of each marine mammal killed or injured; date, time, and location of the take; and non-proprietary information regarding fishing practices and gear involved in the take), *see id.* § 1387(e), (f), NMFS itself considers observer information on these topics non-confidential under *both* the MMPA and MSA—irrespective of whether an observer

deployed under the MSA or MMPA collects it. *See, e.g.*, ECF No. 26-2 (Cyr email);[1] 50 C.F.R. § 600.10 (Jan. 16, 2025);[2] 77 Fed. Reg. 30486, 30491–92 (May 23, 2012). This makes sense: observers deployed under the MSA broadly collect information on fisheries' bycatch of marine mammals, and it is often necessary to make this information public to ensure compliance with the MMPA. *See* 77 Fed. Reg. at 30491–92; 89 Fed. Reg. 17358, 17367–68 (Mar. 11, 2024); 89 Fed. Reg. at 102010–11.[3] For example, the MMPA requires public involvement in MMPA-mandated processes such as take reduction team planning. 16 U.S.C. § 1387(f)(1), (f)(6)(D), (f)(7)(B), (f)(8)(B). Because observer information is essential for developing take reduction plans, the information must be released to enable implementation of the MMPA. Oceana Br. 5.

Moreover, the MSA requires consistency with other applicable laws, meaning that NMFS cannot construe the MSA confidentiality provisions in a manner that would interfere with the language, purpose, and implementation of those laws. 16 U.S.C. § 1854(a)(1), (b)(1), (c)(1). Determining the confidentiality of information based on what

[1] The Cyr email constituted interim guidance on the release of observer information under the MSA, MMPA, and ESA, and displays NMFS's longstanding understanding that information on marine mammal take is non-confidential under the MSA and MMPA. Contrary to NMFS's claim, NMFS Reply 8, nothing in the email suggests it does not apply to observer photos. *See* 16 U.S.C. § 1802(32) ("observer information" includes observer photos).
[2] NMFS's 2024 Confidentiality of Information Rule became effective in 2025, 89 Fed. Reg. 102001 (Dec. 17, 2024), and postdates the filing of this lawsuit, so is not applicable here. However, it demonstrates NMFS's continued understanding that a variety of observer information on marine mammal take is non-confidential.
[3] NMFS claims that, although a variety of information on marine mammal take is nonconfidential, photos depicting this same information are different. NMFS Reply 12–13. But "observer information" includes photos. 16 U.S.C. § 1802(32). It is arbitrary and inconsistent with the statutes to treat the confidentiality of photos differently from other observer information, especially because observer photos routinely inform take reduction efforts. Brock Decl. ¶¶ 20–21, ECF No. 26-12; Tribal Amici Br. 11–14, ECF No. 29-2; 2nd Brock Decl. ¶¶ 10–14. While NMFS's response to comments in its 2024 Confidentiality of Information Rule presented this flawed understanding of photo confidentiality, NMFS did not enshrine this interpretation into its regulations. In any case, this Rule does not apply to this case.

the information depicts—rather than how the observer collecting it is labeled—helps ensure compliance with the MMPA and other applicable laws.

Additionally, FOIA strongly favors disclosure and requires FOIA exemptions to be "narrowly construed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Carlson*, 504 F.3d at 1129 ("an Exemption 3 statute's 'identified class of nondisclosable matters [must be] narrow' to meet the requirements of Exemption 3" (citation omitted)). Because the MMPA's confidentiality provisions are specifically tailored for marine mammal information and treat a narrower category of information as confidential than the MSA, *see infra* pp. 10–11, applying the MMPA to the records at issue comports with FOIA. Unlike NMFS's reading of the law, which subverts the purposes of the MMPA and FOIA and misreads the MSA, Oceana's reading gives "harmonious" effect to each statute's provisions. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

B. The MMPA Requires Release of the Redacted Information.

The MMPA designates *only* "proprietary" observer information as confidential, and *requires* NMFS to "release or make public upon request" any such proprietary information "in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person." 16 U.S.C. § 1387(d)(8), (9). NMFS's arguments that the redacted information constitute proprietary information fail.

First, NMFS incorrectly claims that the MSA and MMPA "contain the same mandate" regarding confidentiality. NMFS Reply 6–7. Whereas the MSA treats "observer information" as confidential, 16 U.S.C. § 1881a(b)(2), the MMPA treats a

narrower category of "proprietary" observer information as confidential, *id.* § 1387(d)(8).[4] NMFS's claim improperly reads the word "proprietary" out of the statute. *See United States v. Cabaccang*, 332 F.3d 622, 627 (9th Cir. 2003) (en banc) ("[W]e must interpret statutes as a whole, giving effect to each word …" (citation omitted)).

Second, as NMFS recognizes, observer information on marine mammal take depicting names and descriptions of fisheries; date, time and location of take; and non-trade secret fishing practices and gear involved is *not* confidential under the MMPA. *See supra* pp. 8–9; *id.* § 1387(d), (e), (f). It is inconsistent with NMFS's own understanding to treat information depicting these details as confidential "proprietary" information under the MMPA. A more reasonable interpretation of "proprietary" would protect only the information in which permit holders have protectable property interests, such as trade secrets. NMFS's overbroad interpretation of "proprietary" to include protectable interests not specifically tied to a person's property or ownership rights, NMFS Reply 7, contradicts plain meaning. *See* Proprietary, Black's Law Dictionary (12th ed. 2024) (defining "proprietary" as "[o]f, relating to, or involving a proprietor" and "[o]f, relating to, or holding as property"); Proprietary Information, Black's Law Dictionary (12th ed. 2024) (defining "proprietary information" as "[i]nformation in which the owner has a protectable interest" and referencing the definition of "trade secret"); Proprietary, Online Etymology Dictionary, https://www.etymonline.com/word/proprietary (last visited Sept.

[4] Moreover, NMFS's assertion that the MMPA "provides that [NMFS] may release or make public certain information, but only in aggregate or summary form, and in such a way that does not directly or indirectly disclose the identity or business of any person" is wrong. NMFS Reply 6–7. The MMPA *requires* NMFS to release proprietary observer information "in aggregate, summary, *or other form* which does not directly or indirectly disclose the identity or business of any person." *Id.* § 1387(d)(9) (emphasis added).

20, 2025) ("proprietary" derived from *proprietas* meaning "ownership; a property"). The Cyr email, which states that "non-proprietary information regarding gear used in [marine mammal] take" is non-confidential, also undercuts NMFS's suggestion that "proprietary" in the MMPA broadly refers to information about fishing vessels and practices.

Third, information depicting names and descriptions of fisheries, date and time and location of the take, and non-trade secret fishing practices and gear—the same kind of information at issue here—is essential for understanding and reducing marine mammal take under the MMPA. *See supra* pp. 4–10. Oceana is seeking the information to effectuate the MMPA's purposes by formulating and advocating for more effective marine mammal take reduction measures in North Pacific groundfish fisheries. Brock Decl. ¶¶ 18–24. NMFS's withholdings contradict the language and purpose of the MMPA.

Fourth, NMFS's claim that it is proper under the MMPA to disclose only the "mammal imagery component" and withhold the "fishery component" in photos fails for the same reason. NMFS Reply 11. Section 1387 of the MMPA concerns *fisheries'* take of marine mammals and requires that such take be reduced. 16 U.S.C. § 1387. Thus, contrary to NMFS's illogical assertion that the MMPA is relevant only to the portion of the photos depicting the marine mammal and not the fishing operations that *caused* the take, the MMPA directly concerns the "fishery component" of the photos. Details regarding the fishery causing the bycatch, the fishing practices and gear involved, and the date and time and location of the take are essential for developing measures to reduce take, such as gear modifications or changes in fishing practices. Therefore, NMFS must

release information about the "fishery component" to comply with the MMPA's take reduction and public involvement mandates. *Id.* § 1387(a), (f).

C. The MMPA and MSA Require Release of the Redacted Information Because Release Would Not Disclose Identities or Businesses.

Even assuming that the records at issue were either proprietary observer information under the MMPA or subject to MSA confidentiality provisions, neither statute specifically prohibits the release of the information under FOIA Exemption 3. NMFS has not shown that the redacted information, if released, would directly or indirectly reveal the identities or businesses of persons. *Id.* §§ 1387(d)(9), 1881a(b)(3).

1. Pixelated redactions in photos

NMFS's assertion that disclosing the redacted information in the photos could theoretically disclose identifying information depends on a lengthy chain of hypothetical events and is speculative, implausible, and unsupported by the facts. Oceana Br. 21–25; *see id.*, Figures 3–11 (examples of pixelated photos). NMFS has not met its burden under FOIA to show that Exemption 3 applies.

First, NMFS broadly hypothesizes that disclosing unspecified vessel features and individuals depicted in the photos' background "could" reveal identity or business. NMFS Reply 4. This generalized statement about the photos as a whole fails to connect the specific redacted information in each photo to any real risk of revealing identifying information. *See, e.g.*, *Willamette*, 689 F.2d at 868 (agency's speculative and unspecific concerns about indirect identification do not suffice). NMFS does not explain what vessel features are depicted in *each* photo or how those particular features would result in actual or potential identification of persons. Oceana is not seeking information such as faces,

names, or distinctive details such as tattoos, and NMFS provides no explanation as to how non-distinctive information in a photo would result in identification. For example, NMFS has presented no evidence that identification from information such as generic fishers' clothing is possible—particularly because, as explained below, there are far more vessels in these fisheries than NMFS suggests.

Second, NMFS's claim that there are a "limited" number of vessels in the North Pacific groundfish trawl fishery is misleading and unsupported by the facts. As an initial matter, Oceana's Requests 2 and 3 sought photos and records from *all* North Pacific groundfish fisheries, not only *trawl* fisheries. NMFS does not dispute that there are more than 600 North Pacific groundfish fishing vessels every year. Oceana Br. 7. NMFS does not claim that there is reasonable risk of identification of one vessel from this large pool, nor does it present any evidence to support such a theory.

NMFS also ignores that Oceana's requests sought photos over multiple years (Request 1 sought photos from 2009 to 2021; Requests 2 and 3 sought records from 2019 to 2023), meaning that the pool of possible vessels depicted in the photos include all vessels fishing over these multi-year periods—not just the vessels fishing in a given month or year. *Cf.* 2nd Ferdinand Decl. ¶¶ 3–4 (discussing only the monthly and annual number of vessels in the North Pacific groundfish trawl fishery). Thus, the pool is far larger than NMFS suggests.

Regarding Request 1, which sought records related to North Pacific groundfish trawl vessels, NMFS states that there are between 114 to 138 such vessels per year. 2nd Ferdinand Decl. ¶ 4. NMFS does not explain how there could be reasonable risk of

identification when there are more than 100 vessels in the fishery each year and the request covers 12 years. *See Forest Guardians v. U.S. Dep't of Interior*, No. 02-1003, 2004 WL 3426434, at *16 (D.N.M. Feb. 28, 2004) (agency failed to show risk of identification where about 123 permittees per field office used their permits as collateral, and agency did not say "what minimal number of permittees in a field office—1, 2, 10, etc.—would make it possible" to link a permittee to requested collateral records).

NMFS's claim that there are "limited" numbers of vessels is based solely on dividing the North Pacific groundfish trawl fishery into more specific sectors. 2nd Ferdinand Decl. ¶¶ 3–4. But Request 1 sought photos from all trawl vessels over the course of 12 years, so the monthly or annual number of vessels in these specific sectors of the trawl fishery is irrelevant. Regardless, NMFS has in the past released unredacted or minimally redacted photos depicting vessels from a fishery sector with an average of 20 active vessels per year. Brock Decl. ¶ 19; *see also infra* pp. 17–18 (NMFS releasing unredacted or minimally redacted photos in response to Oceana's requests). NMFS does not explain why it is only sometimes prohibited from releasing photos from fisheries with limited vessels.

Moreover, NMFS does not claim, let alone demonstrate, that each photo at issue here would disclose such specific information about a vessel type that a viewer would be able to pinpoint a particular vessel. NMFS only speculates that, "*[i]f* the imagery released allowed the viewer to identify" a particular vessel type used within specific sectors, then a viewer may be able to narrow down the potential sectors to which the vessel may

belong. 2nd Ferdinand Decl. ¶ 5 (emphasis added). NMFS does not claim that the photos at issue would allow a viewer to identify sectors, let alone the exact vessel.

Third, NMFS points to one *non-observer* photo of orca bycatch, likely taken by a crew member and posted online, to theorize that the redacted information, if released, could prompt individuals to identify vessels and persons. Since this photo is not an observer photo, it is not relevant to the question of whether observer photos at issue here must be released. NMFS has not pointed to any instance where the release of an unredacted or minimally redacted observer photo—such as the many photos NMFS has routinely released—resulted in disclosure of identifying information specifically prohibited by the MMPA or MSA.[5]

2. Photo metadata of fishery name, date, and location

Observer information showing the fishery name and date and location of marine mammal take is not exempt from disclosure. *See supra* pp. 8–9. However, to minimize even a marginal possibility for identification, NMFS could detach photos' metadata depicting the fishery name, date, and location from the photos themselves and release this metadata separately. Alternatively, NMFS could release each photo with its metadata regarding fishery name, location, and the month and year of take (but withhold the precise day). Or NMFS could release the photos with its metadata regarding fishery name and location, and separately release information regarding the month and year. Withholding the precise date but releasing the month that take occurred would abate any

[5] Moreover, NMFS has not shown the non-observer photo actually resulted in identification of a vessel or crew members. NMFS points to one social media poster's speculation that a vessel likely belonged to a particular company, ECF No. 41-19, but NMFS does not claim the company was *correctly* identified.

risks of individuals attempting to use Automatic Identification System (AIS) data to identify vessels, while also providing Oceana with information essential for understanding where, when, and why marine mammal take is occurring, which is necessary to reduce such take. For example, data on the location and months where take occurred could reveal that marine mammal take is especially high in certain areas or during certain times of year, which would inform measures to reduce take.[6]

3. Redacted information in the incident spreadsheets

Observer information showing the fishery name and description, date and time and location of marine mammal take, and the non-trade secret fishing practices and gear involved is not exempt. *See supra* pp. 8–9. NMFS could release these spreadsheets with the time, location, fishing practices and gear involved, and the month and year of take.

D. NMFS Fails to Justify Its Inconsistent Invocation of Exemption 3.

Contrary to NMFS's suggestion that Oceana is seeking to "significant[ly] change" what information is protected under the law, 2nd Ferdinand Decl. ¶ 11, Oceana's requests are consistent with NMFS's own historical understanding and practice. Oceana Br. 28–29. Instead of explaining its inconsistent invocation of Exemption 3, NMFS claims that "some imagery was determined by [NMFS] to be non-confidential," NMFS Reply 16, without explaining why the unredacted or less redacted marine mammal bycatch photos were deemed non-confidential but substantially similar—and sometimes, almost-

[6] NMFS did not go "above and beyond" its duty to respond to Oceana's requests. NMFS Reply 2, 18. The spreadsheet NMFS references correlated a portion of the photos released to the date of take, contained mostly already publicly available information, and did not contain location data or the fishery name as requested, preventing Oceana from understanding where and how take occurs. 2nd Brock Decl. ¶ 4. For this spreadsheet, NMFS could release metadata regarding locations of the photos separately so that a viewer would not be able to correlate the location with the photos' dates.

identical—photos were not. *See* Brock Decl. ¶¶ 4–9; Oceana Br. 9–14. NMFS suggests the agency's change to the pixelation method was aimed at increasing "efficiency." NMFS Reply 16. But FOIA does not allow agencies to withhold information so they can more easily process requests. Oceana Br. 34 n.23; *see infra* pp. 18–20.

NMFS's claim that "changing understandings of what constitutes an indirect disclosure" partly informed the agency's change to the pixelation method, NMFS Reply 16, is inconsistent with evidence in the record. First, its declarations do not claim that NMFS switched redaction methods due to changes in understanding. To the contrary, the Ferdinand Declaration claimed the pixelation method allowed for "more precise" redactions. Ferdinand Decl. ¶ 41. Second, NMFS at times released heavily redacted photos and unredacted photos apparently depicting similar information not just in the same release but *in the same document*. Brock Decl. ¶ 6. Had the change to the pixelation method been driven by a new understanding of confidentiality, it would not make sense for the agency to simultaneously release certain information with no or minimal redactions and substantially similar information with extensive redactions. Third, the social media discussions regarding the non-observer orca bycatch photo occurred well before NMFS released unredacted and minimally redacted photos in response to Oceana's requests and thus likely did not drive NMFS's recent change to pixelation.

III. NMFS Did Not Reasonably Segregate All Non-Exempt Information.

Even assuming the records contained some exempt information, NMFS fails to show that the withheld information constitute entirely exempt, non-segregable material. 5 U.S.C. § 552(b). NMFS has not provided a segregability analysis detailing how the

redacted portions are exempt in their entirety. Oceana Br. 33–34. NMFS does not explain how everything in the photos except the marine mammal—including what appears to be the sky and water—could disclose identifying information. *Id.*, Figs. 3–11.

NMFS claims its failure to reasonably segregate the photos is excusable because of the alleged "voluminous amount of records and time-consuming amount of work at issue." NMFS Reply 18. But NMFS's duty to segregate "does not depend on the volume of documents." *Anderson v. CIA*, 63 F. Supp. 2d 28, 30 (D.D.C. 1999). All non-exempt portions of a document must be disclosed unless they are so "inextricably intertwined" with exempt portions that separating them would "impose significant costs on the agency and produce an edited document with little informational value." *Willamette*, 689 F.2d at 867–68 (citations omitted).

The exempt and nonexempt information in the photos are not "inextricably intertwined." NMFS has released, in response to these same FOIA requests, unredacted and minimally redacted photos, which demonstrates that segregation would not impose significant agency costs. In cases where courts have not required segregation, the costs on the agency far exceeded what is at issue here. *See, e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (district court did not clearly err in not requiring segregation where it would take eight work-years to identify non-exempt information in millions of pages of documents, and only a very small percentage of documents were non-exempt). Here, NMFS produced 1,248 records, many of which Oceana is not challenging because they were unredacted or minimally redacted. The redacted information also has significant informational value because it depicts the

relationship between marine mammal bycatch and the fishing operations that caused the bycatch, which is the reason Oceana sought these records.

NMFS also points to one instance where the agency discovered a vessel name shown "small and in an unexpected location." 2nd Ferdinand Decl. ¶ 16. NMFS's claim that this name would not have been redacted had the agency used a more selective redaction method lacks merit: after all, NMFS discovered the vessel name while reviewing the photo, and there is no evidence it would not have discovered the name earlier had it actually performed the required segregability review instead of using the overbroad pixelation method. Regardless, NMFS's unfounded fear of accidental release is not a legitimate reason to withhold non-exempt information under FOIA. *See Willamette*, 689 F.2d at 867–68 (only non-exempt portions "inextricably intertwined" with exempt portions may be withheld). NMFS offers no case holding that an agency may evade FOIA's segregability requirements solely because it could theoretically overlook some exempt information during its segregability review.

CONCLUSION

Oceana respectfully requests that the Court order NMFS to immediately disclose the requested information. To the extent NMFS withholds any information, the Court should order NMFS to submit a *Vaughn* index. In the alternative, the Court should review the documents *in camera* and order NMFS to release all non-exempt information and submit a *Vaughn* index and adequate justifications for any withholdings.

Respectfully submitted this 22nd day of September, 2025.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE,

Defendant.

Case No. 3:24-CV-00279-SLG

TRIBAL AMICI'S BRIEF IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Organized Village of Kake, the Hoonah Indian Association, and the Organized Village of Kasaan ("Tribal Amici") file this brief because (1) they have a deep and longstanding connection to the marine ecosystems of the North Pacific Ocean and a unique cultural and legal interest in the protection of marine mammals, including orcas and other species of spiritual, subsistence, and ecological significance; and (2) public access to the photos and records requested by Plaintiff Oceana in this case supports Tribal Amici's interest in protecting these marine resources. This case implicates fundamental questions about the scope of federal transparency and the government's stewardship responsibilities toward protected marine species; Tribal Amici support Oceana's efforts to obtain visual documentation and other information regarding marine mammal bycatch withheld or redacted by the National Marine Fisheries Service ("NMFS") under Freedom of Information Act ("FOIA") exemptions.

FOIA was enacted to ensure open access to government information and foster accountability; its limited exemptions must be narrowly construed and justified by the agency seeking to withhold records. Although FOIA allows agencies to protect certain categories of information, it does not permit blanket redaction of images showing harm to marine mammals—especially where the redactions obscure details that are not personally identifying or commercially sensitive. Tribal Amici recognize that there are valid reasons for the exemptions created in FOIA, and there may be strong arguments for protecting confidential information from public disclosure in certain situations. However, those reasons must fit within the exemptions articulated in the statute, and must be justified by the agency seeking to withhold or redact responsive records. Further, while Tribes, as sovereigns, have a special relationship with the federal government and may request and receive information outside of FOIA, FOIA's promise

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of access to information remains an important tool for both Tribes and their partners to carry out their interests in the protection of natural resources consistent with federal laws, like the Marine Mammal Protection Act ("MMPA").

The public's right to access information about harm to marine mammals is not only consistent with FOIA and the confidentiality provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), as explained below, but also vital to fulfilling the objectives of the MMPA. The MMPA was enacted specifically to prevent the depletion and extinction of marine mammal populations, and it anticipates meaningful public, and Tribal, participation in that mission. It also provides for co-management and consultation with Tribal entities, and empowers Tribes to take part in shaping the policies that govern marine mammal protection and fisheries regulation.

The withheld and redacted photographs and other information in this case are critical tools in identifying entanglement patterns, diagnosing systemic risks, informing regulatory change, and achieving the conservation goals of the MMPA. As documented extensively in NMFS' own reports, forensic analysis of entanglement images has led directly to gear modifications, improved fishery practices, and reductions in whale mortality. Denying access to these images and other information undermines both the science of conservation and Tribal Amici's sovereign right to participate meaningfully in the stewardship of marine species with whom they share profound cultural and ecological relationships.

FACTUAL BACKGROUND

Tribal Amici adopt and incorporate by reference Oceana's factual background at pages 7–15 of the Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment ("Oceana Br."), ECF No. 26.

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LEGAL BACKGROUND

This case involves the intersection of three federal statutes. Tribal Amici summarize these statutes and expand upon Oceana's presentation. *See* Oceana Br. at 2–7.

I. The Freedom of Information Act Favors Disclosure of Information, and Exemptions Must be Construed Narrowly.

The "basic purpose" of FOIA, 5 U.S.C. § 552, is "to open agency action to the light of public scrutiny." *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 272 (1976)). Congress had two goals in creating FOIA: first, "to permit access to official information long shielded unnecessarily from public view," and second, "to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute on other grounds.* The purpose of FOIA is "disclosure, not secrecy." *Rose*, 425 U.S. at 361.

To achieve its goals of government transparency and accountability, FOIA "establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1st Sess. 1965). Thus, FOIA requires federal agencies to release requested records to the public unless a specific statutory exemption applies. 5 U.S.C. § 552(b)(1)–(9). These exemptions protect interests such as personal privacy and national security, *see id.*, but must be narrowly construed in light of FOIA's primary objective of disclosure. *FBI v. Abramson*, 456 U.S. 615, 630 (1982). The agency has the burden to prove that it may withhold responsive records. 5 U.S.C. § 552(a)(4)(B); *see also McCutchen v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 183, 185 (D.C. Cir. 1994). Withholding a record is permissible "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption * * * or disclosure is prohibited by law." 5 U.S.C.

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§ 552(a)(8)(A)(1)(I), (II).[1]

Here, the majority of disputed records were redacted or withheld under Exemption 3, which allows agencies to exempt records that are "specifically exempted from disclosure by" another statute, if that statute "requires that the matters be withheld in such a manner as to leave no discretion on the issue," or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

II. Information about Vessel Interactions with Marine Mammals is Necessary to Carry Out the Purposes of the Marine Mammal Protection Act.

The primary objective of the MMPA is to conserve marine mammals and prevent their populations from declining. *See* 16 U.S.C. § 1361. Congress enacted the MMPA specifically out of concern that human activities were threatening marine mammals with extinction or significant depletion. *Id.* § 1361(1). The MMPA emphasizes the considerable cultural, recreational, and economic importance of marine mammals, and establishes a statutory framework under which their populations can be conserved, managed, researched, and allowed to flourish. *Id.* § 1361(1)–(6). The MMPA was designed to protect and foster the international recovery and development of marine mammal populations to their greatest potential extent. *Id.* § 1361(6). To achieve this, the MMPA prohibits the "taking" of any marine mammal species, with limited exceptions. *Id.* § 1371(a).[2]

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[1] Tribal Amici also recognize that FOIA's structure may inhibit the sharing of sensitive information with federal agencies, when those agencies cannot guarantee the confidentiality of that information.

[2] "Take" means "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect or kill, any marine mammal." 16 U.S.C. § 1362(13). The Marine Mammal Authorization Program issues certificates for fisheries authorizing the incidental, but not intentional, taking of non-endangered/threatened marine mammals while engaged in commercial fishing operations. These authorizations require the reporting of all incidental mortality or injury of marine mammals to NMFS within 48 hours of the end of each trip, and require allowing observers access to monitor fishing operations. *See* 50 C.F.R. Part 229.

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The MMPA plays a critical role in the survival of marine mammals, at its core reflecting a strong national commitment to the stewardship of marine ecosystems and the species that inhabit them. All orcas are protected under the MMPA, as are other marine mammals of interest and special relationship to Tribal Amici. *See id.* § 1362(1), (6).

Importantly, the MMPA operates within a broader legal and cultural framework that recognizes the sovereign rights of Tribes and their enduring relationship to marine life. In particular, several provisions of the MMPA recognize the special relationship of Alaska Native Tribes with marine mammals. For example, Section 119 provides for the co-management of marine mammals between NMFS and Alaska Native Organizations including, but not limited to, Alaska Native Tribes and tribally authorized co-management bodies. *Id.* § 1388. Section 101(b) provides exceptions for subsistence uses by Alaska Natives, recognizing the customary and traditional uses of marine mammals for direct personal or family food, shelter, clothing, tools, and transportation. *Id.* § 1371(b).

Alaska Native organizations are among the representatives to be included on Take Reduction Teams ("TRTs"). *Id.* § 1387(f)(6)(C). TRTs are groups established by NMFS to develop and implement plans aimed at reducing incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. *Id.* § 1387(f)(6). These teams hold public meetings, where they work to develop strategies to reduce incidental take. *Id.* § 1387(f)(6)(D). To do so effectively, TRTs require specific details of interactions with marine mammals. *Id.* § 1387(f)(6). Though the statute does not explicitly recognize the spiritual relationship with orcas (which are not traditionally hunted by Tribal Amici), these provisions do reflect the special position and interests of Alaska Native tribes with marine mammals.

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III. Confidentiality Provisions Under the Magnuson-Stevens Fishery Conservation and Management Act are Narrow.

In adopting the MSA, Congress recognized the need for a national program for the management of fisheries resources to prevent overfishing, ensure conservation, and protect essential fish habitats. 16 U.S.C. § 1801(a)(6), (b). In 1996, the Sustainable Fisheries Act added new national standards to address bycatch. *Id.* § 1851(a)(9). Further, the MSA Reauthorization Act of 2007 enhanced international cooperation to address illegal, unregulated, and unreported fishing and bycatch. *Id.* §§ 1822(h), 1826i–j, 1829. Bycatch of protected species like marine mammals is a significant threat to recovering sensitive and dwindling populations.[3]

A core purpose of the MSA is enabling "consumer and environmental organizations, and other interested persons to participate in, and advise on," fisheries conservation and management processes. *Id.* § 1801(b)(5). Fisheries information is "essential" to effective conservation, management, and scientific understanding. *Id.* § 1801(a)(8). While the MSA includes confidentiality provisions, those provisions are designed to protect the proprietary commercial information provided to federal regulators by fishing vessels and operators—not to shield commercial fisheries from oversight.

The MSA's confidentiality provisions ensure that businesses will continue to voluntarily provide sensitive operational data to inform sustainable fisheries management without fear of competitive harm. *See id.* § 1881a(b). Specifically, the statute safeguards information that could directly or indirectly reveal the identity or business practices of fishers, recognizing the legitimate interest in protecting vessels and their crews from commercial disadvantage or undue

[3] *See, e.g.*, LEE BENAKA ET AL., U.S. DEP'T OF COMMERCE, NOAA, U.S. NATIONAL BYCATCH REPORT FIRST EDITION UPDATE 3, NOAA TECH. MEMO. NMFS-F/SPO-190 at v (2019), available at https://media.fisheries.noaa.gov/dam-migration/nbr_update_3.pdf (last visited July 10, 2025).

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scrutiny. *See id.* Again, this narrowly-tailored confidentiality is intended to shield fishing vessels' proprietary economic and operational strategies, as well as prevent unwanted exposure of personal identities—not to obscure the environmental impacts of fishing practices or impede transparency regarding harm to protected marine mammal populations of profound cultural and subsistence significance to Tribes.

The limits of confidentiality are clear, particularly when fisheries operations are causing injury or mortality to marine mammals and protected species like orcas. MSA implementing regulations promulgated by NMFS explicitly exclude from the definition of "confidential information" observer information related to interactions with species protected under the MMPA. 50 C.F.R. § 600.10 (Jan. 16, 2025). This observer information can be publicly disclosed, provided that information relating to fishing practices and gear would not constitute a trade secret under FOIA Exemption 4. *Id.* This definition thus recognizes that detailed information is necessary for the MMPA to work effectively, without raising concerns that such disclosure violates the MSA confidentiality interests.

ARGUMENT

Defendants would have this Court read the MSA's confidentiality provisions in a vacuum and apply them in a manner inconsistent with FOIA, the MMPA, and the MSA itself. On the other hand, by reading the three statutes broadly and harmoniously, it is clear that NMFS must release unredacted photos showing marine mammal bycatch, as well as related information. *Cf. United States v. Millis*, 621 F.3d 914, 917 (9th Cir. 2010) (a "fundamental cannon of construction is that words must be read in their context, with a view to their place in the overall regulatory scheme, and to fit, if possible, all parts into a harmonious whole"). Disclosure of information related to mortality and injury of marine mammals protected under the MMPA—

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particularly orcas—is important to Tribal Amici's goals of protecting this sacred animal.

I. Defendants' Position Elevates Narrow Exceptions Over the Purposes of the Statutes.

Assuming for the sake of argument that the MSA is applicable, NMFS has misconstrued the purpose and scope of the MSA's confidentiality provisions by extensively redacting images of marine mammal bycatch.[4] While the MSA does protect certain confidential information, it does not apply to information regarding take of marine mammals.

Conspicuously absent from Defendants' briefing is any citation to NMFS' definition of "confidential information" that would be subject to the MSA's confidentiality protections. At 50 C.F.R. § 600.10 (Jan. 16, 2025), NMFS explicitly states that "'confidential information' does not include observer information related to interactions with species protected under the [MMPA]: the date, time, and location of interactions, the type of species, and the fishing practices and gear involved provided that information regarding fishing practices and gear would not constitute a trade secret under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)."[5] Consequently, records involving observer information concerning interactions with marine mammals is not "confidential information" subject to the MSA's confidentiality provisions, such that FOIA Exemption 3 could apply. *Contra* Serv. Br. at 18–19. Instead, for such records involving

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[4] Tribal Amici agree with Oceana that the MMPA is the relevant statute for purposes of FOIA Exemption 3 here, not the MSA. *See* Oceana Br. at 19–20. To the extent the MSA applies, Tribal Amici provide this further argument on how that statute's confidentiality provisions should be read harmoniously with FOIA and the MMPA.

[5] *See also* Email from Ned Cyr, Dir., Off. of Sci. & Tech., to Serv. Science Directors et al., Re: Data Aggregation and Summarization Guidelines (July 2, 2009) (Roy Decl., Ex. 1, ECF No. 26-2) (agency guidance directing staff to apply presumption that "the release of the following information associated with incidental takes of marine mammals . . . will not disclose the identity or business of any person: the name and description of the fishery; the species of each marine mammal . . . incidentally killed or injured; the date, time, and geographic location of the take; and non-proprietary information regarding gear used in the take," if there are at least three participants in the fishery).

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observer information regarding interactions with marine mammals, only FOIA Exemption 4 may apply, and here, NMFS has made no argument regarding Exemption 4.[6] In sum, NMFS itself has already read the statutes harmoniously; Defendants' current position is contrary to the statutes and the agency's own interpretation of them.

As a general matter, Oceana, and Tribal Amici, do not seek access to identifying information such as vessel names, crew faces, or personal identifiers that could realistically reveal the identities of observers, employees, or businesses. Rather, they seek visual documentation showing how marine mammals—culturally and subsistence-important species—are harmed by fishing practices. NMFS's extensive use of pixelation to remove contextual details, such as gear configuration and general operational settings, goes well beyond any reasonable application of the MSA's confidentiality provisions. Such details cannot plausibly reveal proprietary economic secrets or meaningfully identify specific vessels or individuals, especially given the hundreds of vessels that operate within the North Pacific fisheries annually. The shift to extensive pixelation redactions in this case is both unnecessary and overly broad.

Ultimately, the confidentiality protections of the MSA were never intended to shield fisheries from accountability for their impacts on protected marine mammals. NMFS's interpretation here impedes Tribes from accessing information vital to their cultural survival, ecological knowledge, and sovereign stewardship responsibilities. NMFS's expansive redactions and withholdings misconstrue the narrow statutory protections intended solely to safeguard personal identities and commercially sensitive information, unnecessarily blocking Tribal

[6] It goes without saying, Tribes are not commercial competitors seeking access to proprietary information for market advantage. Rather, they are sovereign entities with a unique legal status and a recognized stake in the sustainable management of fisheries and the protection of marine mammals as mandated under the MMPA.

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Amici's meaningful participation in marine mammal conservation.

II. Public Access to Information Through FOIA is Critical to the Protection of Marine Mammals of Special Importance to Tribal Amici.

Read together, the MMPA, FOIA, and the MSA ensure transparency, informed stewardship, and public oversight of actions that impact marine mammals. Not only is transparency a statutory requirement, it is a moral and political obligation in the government's trust relationship with Tribes. The repeated, lethal bycatch of marine mammals—particularly orcas—has triggered alarm among Tribal members, especially given orcas' revered status in several Indigenous doctrines. When agencies like NMFS heavily redact or obscure key details about bycatch, they impede the ability of Tribes to fulfill their own roles as stewards and co-managers of these species, and hinder the ability of Tribes to protect their cultural heritage.

Marine mammals such as orcas, seals, sea lions, and whales are not interchangeable wildlife to Tribes—they are important figures in cultural, dietary, and ceremonial life. Modern data, particularly visual evidence that reflects gear interactions, condition of the animal, and situational context, serves as an extension of traditional stewardship relationships. Access to information about these animals allows Tribes to assess threats, demand regulatory accountability, and advocate for fisheries policies that protect species of cultural importance. This role is not ancillary to the MMPA and MSA, it is anticipated and endorsed by them.

Congress has been explicit about the public's role in fisheries management. The MSA emphasizes public engagement, openness, and transparency, stating among its purposes to enable "consumer and environmental organizations, and other interested persons to participate in, and advise on" fisheries management, and to assure that the national fishery conservation and management program involves, and is responsive to the needs of, interested and affected citizens. 16 U.S.C. § 1801(b)(5), (c)(3). The MMPA specifically calls for public reporting of marine

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mammal injury and mortality data, including the date, time, and approximate location of the take. *Id.* § 1387(e). This information is critical to the effectiveness of the MMPA's regulation of incidental take of marine mammals in the course of commercial fishing operations and the stated goal that "incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994." *Id.* § 1387(a)(1). However, 31 years after 1994, incidental mortality of marine mammals, particularly orcas, continues at alarming rates.

Visual documentation of incidental takes, especially photographs of entangled whales, have been essential to efforts to reduce future entanglements and protect vulnerable marine mammal populations. These images serve not only to confirm the occurrence and severity of an entanglement but also to illuminate the circumstances under which it occurred. By analyzing visual records, scientists and managers can identify the specific gear types, configurations, and entanglement mechanisms most commonly associated with harm to whales.

As detailed in NOAA's Large Whale Entanglements off the U.S. West Coast (1982–2017) report, photographic and video documentation enables experts to determine the species involved, the type of gear responsible, and the precise points of entanglement on the animal's body.[7] This information feeds into databases that track trends across fisheries, seasons, and geographies, and it informs management decisions such as time-area closures, gear

[7] LAUREN SAEZ ET AL., U.S. DEP'T OF COMMERCE, NOAA, LARGE WHALE ENTANGLEMENTS OFF THE U.S. WEST COAST, FROM 1982–2017, NOAA TECH. MEMO. NMFS-OPR-63A at vii–xii (2021), available at https://www.fisheries.noaa.gov/s3/2021-03/tm-opr-63a-final-031921.pdf?VersionId=null (last visited July 10, 2025).

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modifications, and fishery regulations.[8] NMFS explains that documentation collected during entanglement response was "invaluable in gaining an understanding of entanglements toward preventative solutions,"[9] and further notes that periodic reviews of entanglement data is crucial to evaluating future conservation recommendations, modifying management and response methods, and developing safer fishing practices.[10]

Forensic analysis of entanglement data, including images, is necessary for understanding the physical dynamics of entanglement, including the characteristics of the gear and fishery involved, the actions taken during response, the injuries sustained, and the behavior of whales.[11] Such analysis has led to practical recommendations to modify gear connections to minimize snagging risk.[12] As a result of documentation collected from entangled whales, managers have developed gear modifications and instituted line marking to help identify gear when buoys and traps have come off.[13] These insights would not be possible without the availability of detailed, case-specific visual documentation.

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[8] *Id.* at 2, 37, 47; *cf.* 50 C.F.R Parts 223 and 224 (ECF No. 26-30) (interim final rule prohibiting fishing with drift gillnets in the California/Oregon drift gillnet fishery from August 15 through November 15).

[9] SAEZ ET AL., *supra* note 7 at viii.

[10] *Id.* at 40–41.

[11] *See generally* FORENSIC REVIEW WORKSHOP REPORT: REVIEWING THE GEAR INVOLVED IN WEST COAST WHALE ENTANGLEMENTS (2018) (ECF No. 26-28). For example, "Pacific States Marine Fisheries Commission (PSMFC) and [NMFS] convened a two-day workshop in Long Beach, California, to review and discuss forensic analysis of available data and documentation related to recent whale entanglements on the U.S. west coast with thirty-one invited experts from a diversity of backgrounds. These experts included members of the U.S. west coast fishing industry as well as entanglement responders, scientists and managers knowledgeable about fishing gear and/or whale entanglements." *Id.* at 3. Participants were provided with a combination of photos and written documentation of multiple entanglement cases to review. *Id.* at 14.

[12] *See id.* at 4, 14, 20.

[13] *Id.* at 8.

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Images can be essential for identifying the species,[14] fishery, and specific type of gear involved in entanglements,[15] determining the likelihood of repeat events, and evaluating compliance with regulatory measures.[16] Photographic evidence is probative, diagnostic, and indispensable to any science-based strategy for reducing incidental takes.[17] Broad access to such materials is essential not only for governmental management agencies but also for Tribal governments, scientific researchers, and conservation organizations. Ensuring timely access to this evidence—particularly in cases involving marine mammals of cultural and ecological significance to Tribes—is crucial to advancing collaborative, transparent, and effective

[14] *Id.* at 13–14 (highlighting "the importance and need for improved documentation of entangled whales when sighted, including specific focus on taking pictures of flukes for identification, and suggested that responders (and other likely reporting parties) be provided information and trained in more standardized protocols for complete documentation of entanglement cases").

[15] *See generally* SAEZ ET AL., *supra* note 7 (researchers relied on photos and videos collected during entanglement events to identify species, gear, and fisheries involved). The NOAA Technical Memorandum also explains that positively identifying the origins of entangled gear on the U.S. West Coast has often been limited by "incompleteness of descriptions or documentation (photos or video) provided by reporting parties," the inability of reporting parties to identify various types of commercial fishing gear due to the general public's lack of familiarity with most types of gear, the "lack of accessible and comprehensive information regarding the types of gear used by specific commercial and recreational fisheries," and the "lack of markings or other characteristics on fishing gear that would facilitate unambiguous associations with specific fishery types." *Id.* at 3. Lack of transparency and dissemination of information related to bycatch and entanglement events only exacerbates this issue.

[16] *See id.* at 37–40 (explaining that use of seasonal patterns of whale presence along with data from entanglement reports (e.g., photos and videos) regarding the origins of entanglements aids in decision-making addressing conservation concerns; and stating that review of entanglement data is necessary to assess changes in entanglement trends and fishing patterns, especially following fishery management changes).

[17] *See* FORENSIC REVIEW WORKSHOP REPORT, ECF 26-28 at 20, 15 (workshop participants expressed support for increased dissemination and collection of photos from entangled whales, improvement in standardization of data collected during entanglement responses, and better education and training on data collection); SAEZ ET AL., *supra* note 7 at vii-ix, 32, 40 (noting that documentation collected during entanglement response, especially photos and videos, was "invaluable in gaining an understanding of entanglements toward preventative solutions," and discussing the need for better documentation and quality of information collected during these events (e.g., photo identification, gear identification, injuries)).

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conservation outcomes.

At bottom, unredacted images showing lethal bycatch are an important tool for initiating meaningful changes to fishing practices to further the purposes of the MMPA. When that information is collected by observers, but then obscured or withheld under speculative confidentiality claims, Tribes are denied a voice in government processes that directly affect the health of marine mammal populations upon which they rely. Written summaries and aggregate data cannot replicate the impact or specificity of photographic records. For Tribal Amici, visual documentation is critical for communicating harm to decision-makers, leaders, and community members. It allows for informed advocacy before federal councils, commissions, and public hearings where Tribes often demand greater protection for culturally significant species. Without access to unredacted images, Tribes are denied the ability to assess the full impact of industrial fishing practices on the marine species with whom they share special relationships.

Redacted photos strip away crucial context—such as fishing gear configuration, the spatial relationship between the animal and the vessel, and the condition of the animal upon retrieval. This context is essential for Tribes to meaningfully participate in co-management, advocate for protective regulations, and hold agencies accountable to MMPA standards. By withholding or redacting visual evidence essential for understanding how fisheries affect marine mammals, NMFS restricts Tribes' ability to fulfill their role as stewards and active participants in fisheries governance and marine mammal protection.

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CONCLUSION

For all of the foregoing reasons, Tribal Amici respectfully request that this Court grant summary judgment in favor of Oceana.

Respectfully submitted this 14th day of July 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2025, a true and accurate copy of AMICI BRIEF was filed electronically via the CM/ECF system by the United States District Court, District of Alaska.

DATED this 14th day of July, 2025

/s/ Oliver J. H. Stiefel

Oliver J. H. Stiefel

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