

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, X
:
Plaintiff, :
v. :
Centers for Medicare and Medicaid Services, :
Defendant. :
X

COMPLAINT

Plaintiff THE NEW YORK TIMES COMPANY, by and through its undersigned attorneys, alleges as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”), to obtain an order for the production of agency records from the Centers for Medicare and Medicaid Services (“CMS”) in response to a request properly made by Plaintiff.

PARTIES

2. Plaintiff The New York Times Company (“The Times”) publishes *The New York Times* newspaper and www.nytimes.com. The Times is headquartered in this judicial district at 620 Eighth Avenue, New York, New York, 10018.

3. Defendant the CMS is an agency of the federal government that has possession and control of the records that Plaintiff seeks.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

5. Venue is premised on Plaintiff's place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

6. FOIA requires that agencies respond to the Request within 20 business days. *See* 5 U.S.C. § 552(a)(6)(A).

7. Defendant CMS has failed to meet the statutory deadlines set by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)-(B). Plaintiff is therefore deemed to have exhausted all administrative remedies, pursuant to 5 U.S.C. § 552(a)(6)(C).

FACTS

8. On November 3, 2020, The Times submitted a FOIA Request (the "Request") to CMS. The Request sought:

- i. All emails sent to and from Evan Shulman, Director, Division of Nursing homes from January 1, 2017 to the present date, containing any of the following key words, individually or in combination, in the subject, text or attachments: Five Star Rating System; American Health Care Association; Technical Experts Panel; Nursing Home Compare; Self-reported data; Quality of Resident Care; Staffing levels; Staffing ratings; Health inspection rating; Overall rating; Quality measures; QMs; Cut points; Under-reporting; Underreporting; Strive Time Study.
- ii. A list of any audits conducted by CMS of nursing homes to verify the accuracy of staffing data submitted as part of the Nursing Home Compare Five-Star Rating process. For each audit, the Request sought: 1) All correspondence between the agency and the facility and/or the facility's representatives regarding the audit; and 2) Any penalties or other consequences imposed as a result of the audit.

9. On November 4, 2020, CMS responded by acknowledging receipt of the Request and by providing the tracking number 110420207003.

10. CMS has not communicated in any way with The Times since sending its acknowledgment letter on November 3, 2020.

FIRST CAUSE OF ACTION

11. Plaintiff repeats, realleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth herein.

12. Defendant is an agency subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any other materials as to which it is claiming an exemption.

13. Defendant has failed to meet the statutory deadlines of twenty business days set by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Accordingly, Plaintiff is deemed to have exhausted its administrative remedies under FOIA.

14. Defendant is permitted to withhold documents or parts of documents only if one of FOIA's enumerated exemptions apply.

15. No exemptions permit the withholding of the documents sought by the Request.

16. Accordingly, Plaintiff is entitled to an order compelling Defendant to produce records responsive to the Request.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

17. Declare that the documents sought by the Request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

18. Order CMS to undertake an adequate search for the requested records and provide those records to Plaintiff within 20 business days of the Court's order;

19. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

20. Grant Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 26, 2021

/s/ David E. McCraw
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