

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENERGY POLICY ADVOCATES)
170 S. Lincoln Street)
Suite 150)
Spokane, WA 99201)

Plaintiff,)

v.)

Case No. 1:22-cv-1

NATIONAL HIGHWAY TRAFFIC)
SAFETY ADMINISTRATION)
1200 New Jersey Avenue, SE)
Washington, DC 20590)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ENERGY POLICY ADVOCATES for its complaint against Defendant NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* for declaratory, injunctive, and other relief, seeking immediate processing and release of agency records responsive to Plaintiff’s request following the National Highway Traffic Safety Administration’s failure to comply with the express terms of FOIA, and to fulfill its obligation to make a “determination” about a March 2021 FOIA request as that term is defined in *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 816 (D.C. Cir. 2013).

PARTIES

2. Plaintiff Energy Policy Advocates (“EPA”) is a non-profit organization incorporated in the State of Washington and dedicated to transparency and open government. Energy Policy

Advocates uses state and federal open records law to inform the public on the operations of government including private influences on government policymaking and other actions.

3. Defendant National Highway Traffic Safety Administration (“NHTSA”) is a constituent part of the United States Department of Transportation (“DoT,” or “the Department”). NHTSA and DOT are federal agencies within the meaning of FOIA, 5 U.S.C. § 552(f)(1). NHTSA has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
5. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).
6. EPA is not required to further pursue administrative remedies before seeking relief in this Court because the Defendant has failed to make a timely “determination” as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).
7. Further, EPA has no obligation to exhaust administrative remedies with respect to its FOIA request. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. U.S. Dept. of Justice*, 436 F. Supp. 3d 354, 359 (D.D.C. 2020) (citing various other cases and holding that the statutory text of FOIA relieves plaintiffs of any exhaustion requirement).

ENERGY POLICY ADVOCATES’ FOIA REQUEST

8. Plaintiff submitted the FOIA request at issue in this case to Defendant National Highway and Transportation Safety Administration (“NHTSA”), by electronic mail to NHTSAFOIAPublicliaison@dot.gov on March 17, 2021. The request sought certain described “onboarding” documentation for a single political appointee over a four-month period of time.

9. Defendant received the request on the same day it was sent and assigned it tracking number ES21-0204 with an acknowledgement letter dated March 22, 2021.
10. That letter sent by Defendant more than nine months ago stated that at some point in the future someone would inform Plaintiff of Defendant's determination on Plaintiff's request for fee waiver, and that at some point in the future it would respond to Plaintiff's request. Defendant has done neither.
11. As Plaintiff informed Defendant in the request at issue here, other federal agencies have acknowledged Plaintiff's status as a media outlet (*e.g.*, Securities & Exchange Commission Request No. 21-00769-FOIA, No. 21-01234-FOIA; Department of the Interior Request No. DOI-OS-2021-003335).
12. The FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, including a determination of whether the agency intends to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Within that deadline, the agency must also "determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents," and "inform the requester that it can appeal whatever portion of" the agency's "determination" is adverse to the requestor. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).
13. 5 U.S.C. § 552(a)(6)(A) prescribes that the 20-day time limit shall not be tolled by the agency except in two narrow scenarios: The agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester, 5 U.S.C. § 552(a)(6)(A)(ii)(I), and agencies may also toll the statutory time limit if necessary to

clarify with the requester issues regarding fee assessment. 5 U.S.C. § 52(a)(6)(A)(ii) (II). In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

14. Defendant has provided no further response after declining to make a determination on Plaintiff's request for fee waiver, and cursory explanation that at some point in the future it would respond to Plaintiff's request, which was conveyed on March 17, 2021.
15. Defendant continues to improperly deny Plaintiff access to agency records in violation of FOIA and further declines to make the statutorily required "determination" regarding when the Plaintiff might expect to be granted access to the documents it has requested.

FIRST CLAIM FOR RELIEF
Duty to Produce Records – Declaratory Judgment

16. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
17. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business
18. Plaintiff has a statutory right to the information it seeks, and Defendant has unlawfully withheld the information.
19. Plaintiff is not required to further pursue administrative remedies.
20. Plaintiff asks this Court to enter a judgment declaring that:
 - a. Plaintiff is entitled to records responsive to its FOIA request described above, and any attachments thereto, but Defendant has failed to provide the records;

- b. NHTSA's processing of Plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy NHTSA's obligations under FOIA;
- c. NHTSA must now produce records responsive to Plaintiff's request.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

- 21. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
- 22. Plaintiff is entitled to injunctive relief compelling Defendant to produce the records responsive to the FOIA request described herein at no cost to the Plaintiff.
- 23. Plaintiff asks the Court to enter an injunction ordering Defendant to produce to Plaintiff, within 20 business days of the date of the order, the requested records sought in Plaintiff's FOIA request described above, and any attachments thereto.
- 24. Plaintiff asks the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 30 days after Plaintiff receives the last of the produced documents, addressing Defendant's preparation of a *Vaughn* log and a briefing schedule for resolution of remaining issues associated with Plaintiff's challenges to NHTSA's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 25. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

26. Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
27. This Court should enter an injunction or other appropriate order requiring the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Energy Policy Advocates respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with FOIA and every order of this Court;
2. Declare that Defendant has violated FOIA by failing to provide Plaintiff with the requested records and failing to notify Plaintiff of a final determination within the statutory time limit;
3. 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;
4. Order Defendant to expeditiously provide the requested records to Plaintiff within 20 business days of the Court's order and at no cost to the Plaintiff;
5. Award Plaintiff's attorneys their fees and other litigation costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as this Court deems just and proper.

Respectfully submitted this the 1st day of January, 2022,

ENERGY POLICY ADVOCATES

By Counsel:

/s/Matthew D. Hardin

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