

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the U.S. District Court in the District of Alabama. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Drummond Company, Inc.
(b) County of Residence of First Listed Plaintiff Jefferson, Alabama
(c) Attorneys (Firm Name, Address, and Telephone Number)
Joel I. Gilbert, Richard E. Glaze, Jr., and M. Talmadge Simpson
Balch & Bingham LLP, 1901 Sixth Ave. N, Ste. 1500, Birmingham, AL 35203, (205) 251-8100

DEFENDANTS
United States Environmental Protection Agency
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
PERSONAL INJURY
REAL PROPERTY
TORTS
PRISONER PETITIONS
FORFEITURE/PENALTY
LABOR
IMMIGRATION
BANKRUPTCY
SOCIAL SECURITY
FEDERAL TAX SUITS
OTHER STATUTES

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. section 552
Brief description of cause:
Withholding information in violation of Freedom of Information Act

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 08/28/2015 SIGNATURE OF ATTORNEY OF RECORD /s/ M. Talmadge Simpson

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

DRUMMOND COMPANY, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. _____
)	
UNITED STATES)	
ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Defendant.)	

COMPLAINT

Plaintiff Drummond Company, Inc. (“Drummond” or “Plaintiff”) files this action against the United States Environmental Protection Agency (“EPA” or “Defendant”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As set forth below, EPA has violated FOIA in both substance and procedure in its responses to three FOIA requests submitted by Drummond. For each of Drummond’s three FOIA requests, EPA continues to withhold responsive information without legal justification. Moreover, for each FOIA request, EPA has let lapse a statutory response deadline, thereby constructively exhausting Drummond’s administrative remedies. By unjustifiably withholding information responsive to Drummond’s FOIA requests, EPA is in violation of FOIA. Therefore, Drummond seeks an Order from this Court (1) finding that EPA has

violated its duties under FOIA and EPA's implementing regulations at 40 C.F.R. Part 2; (2) requiring EPA to promptly perform a thorough search for, and produce to Drummond, all records responsive to each of Drummond's FOIA requests; and (3) awarding to Drummond attorneys' fees and costs associated with these matters.

PARTIES

1. Plaintiff Drummond is an Alabama corporation with its principal office located in Birmingham, Alabama. One of Drummond's operational divisions, its ABC Division, operates a coke manufacturing facility in Tarrant, Alabama ("ABC Coke").

2. Defendant EPA is an independent agency of the United States government with its headquarters in Washington, D.C. EPA also has 10 regional offices, one of which (Region 4) is located in Atlanta, Georgia ("EPA Region 4"). EPA Region 4's jurisdiction covers eight Southeastern states, including Alabama.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B) (providing that "the district court of the United States in the district in which the complainant resides, or has his principal place of business . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").

This Court also has jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction).

4. Venue is proper in this forum pursuant to 5 U.S.C. § 552(a)(4)(B) because the Plaintiff's principal place of business lies within this District.

LEGAL BACKGROUND

5. FOIA provides that “each agency, upon any request for records [that] (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

6. FOIA further provides that “[e]ach agency, upon any request for records . . . shall determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and the right of such person to appeal to the head of the agency any adverse determination[.]” 5 U.S.C. § 552(a)(6)(A)(i). This “20-day period . . . shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests[.]” *Id.* § 552(a)(6)(A)(ii) (second paragraph).

7. FOIA requires each agency to produce all information responsive to a request unless the information qualifies for one of the nine enumerated exemptions under FOIA. *See* 5 U.S.C. § 552(b)(1)-(9). However, FOIA and interpreting case law clearly provide “the burden is on the agency to sustain its action” to withhold records pursuant to a FOIA exemption. *Id.* § 552(a)(4)(B); *see also Department of State v. Ray*, 502 U.S. 165, 173 (1991) (explaining that it is the agency’s burden “to justify the withholding of any requested documents”).

8. If an agency determines that a responsive record is or contains information that is exempt from mandatory disclosure under one of the enumerated FOIA exemptions, FOIA provides 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” and that “[i]f technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.” 5 U.S.C. § 552(b).

9. If a requester appeals an agency’s FOIA response, the agency must “make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the

agency shall notify the person making such request of the provisions for judicial review of that determination[.]” *Id.* § 552(a)(6)(A)(ii).

10. FOIA further provides that “[a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph”). 5 U.S.C. § 552(a)(6)(C)(i).

11. EPA implementing regulations require “EPA offices [to] . . . respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office” unless “unusual circumstances exist” and that “[i]f EPA fails to respond to [a] request within the 20 working day period, or any authorized extension of time, [the requester] may seek judicial review to obtain the records without first making an administrative appeal.” 40 C.F.R. § 2.104(a).

12. EPA regulations further require that EPA notify a requester whenever it determines to deny the requester’s FOIA request, and that an unsuccessful requester be given an opportunity to seek an administrative appeal of EPA’s determination with EPA’s Office of General Counsel. *See id.* § 2.104(g) (“Once [EPA] makes an adverse determination of a request, the requestor will be notified of that determination in writing. An adverse determination consists of [*inter alia*] a determination to withhold any requested record in whole or in part”); *id.* § 2.104(j) (“If [a requester is] dissatisfied with any adverse determination of [the]

request, [the requester] may appeal that determination to the Headquarters Freedom of Information Staff”).

13. Any time EPA makes an adverse determination with respect to a FOIA request, EPA is required under its FOIA regulations to furnish the requester with certain information concerning the determination, including:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reason(s) for the denial, including an identification of records being withheld . . . and any FOIA exemption applied by the office in denying the request;
- (3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation . . . ; and
- (4) A statement that the denial may be appealed under, and a description of the requirements of, paragraph (j) of this section.

40 C.F.R. § 2.104(h)(1)-(4).

14. EPA is required by its regulations to make a determination on any FOIA appeal within 20 working days. *Id.* § 2.104(j).

FACTUAL BACKGROUND

35th Avenue FOIA Request

15. On September 20, 2013, EPA Region 4 notified Drummond that EPA had determined under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA,” also commonly known as “Superfund”) that

Drummond is one of five Potentially Responsible Parties (“PRP”) for the 35th Avenue Superfund Site in Birmingham, Alabama (“35th Avenue Site” or the “Site”).

16. In 2014, EPA instructed 35th Avenue Site PRPs and other interested parties who sought EPA records related to the Site to submit formal FOIA requests for all records related to EPA’s investigation of the Site so that EPA could better coordinate its production of records to the PRPs and interested parties.

17. On July 28, 2014, Drummond, through its counsel, submitted a FOIA request to EPA Region 4, seeking “[a]ny and all records related to the 35th Avenue Superfund Site” to include “all records released to date and any records in forthcoming productions.” EPA assigned Drummond’s FOIA request tracking number EPA-R4-2014-008895¹ (hereinafter, the “35th Avenue FOIA Request”).²

18. On August 15, 2014, EPA Region 4 informed Drummond’s counsel by telephone that it wished to close the 35th Avenue FOIA Request, as well as all other FOIA requests EPA had received pertaining to the Site, in order to coincide

¹ Drummond submitted this request through EPA’s FOIAOnline website, <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280303b0b>.

² Drummond had made several FOIA requests for 35th Avenue Site records, and had received multiple productions of responsive records, prior to July 28, 2014. The July 28, 2014, re-submittal of Drummond’s FOIA request was made to comply with EPA’s announcement that it would coordinate its responses to all requests from the PRPs and interested parties.

with the completion of EPA's preliminary assessment and site investigation work at the Site (the "Investigation Phase") and transition to a formal proposal to list the Site on the CERCLA National Priorities List ("NPL") (the "NPL Phase"). EPA explained that it anticipated receiving FOIA appeals and that segmenting its FOIA processing in this manner would allow EPA to continue processing FOIA requests in the 35th Avenue Superfund matter without further delay. Despite the ongoing work at the Site, and existence of additional responsive records to the 35th Avenue FOIA Request, Drummond agreed to allow EPA to close its request and open a new request for all records pertaining to the NPL Phase.

19. On September 9, 2014, EPA confirmed via email that it was issuing a final response to the 35th Avenue FOIA Request and would soon contact the FOIA requesters to begin processing a new FOIA request for records pertaining to the Site. *See* Ex. 1.

20. By letter dated September 9, 2014, EPA issued its final response to Drummond's 35th Avenue FOIA Request. *See* Ex. 2 ("35th Avenue Final Response"). In the 35th Avenue Final Response, EPA Region 4 withheld numerous responsive records pursuant to FOIA Exemptions 4, 5, 6, and 7. 5 U.S.C. §§ 552(b)(4)-(7). EPA provided an index of withheld records with the 35th Avenue Final Response, which listed completely withheld and partially redacted records. *See* Ex. 3 (hereinafter, "35th Avenue Withholding Index").

21. In the 35th Avenue Withholding Index, EPA cited Exemption 5 approximately 131 times as a basis for withholding responsive information. However, the 35th Avenue Withholding Index does not explain, even in general terms, why EPA believes that the specific information withheld qualifies under an Exemption 5 privilege, nor does the 35th Avenue Withholding Index identify which Exemption 5 privilege EPA believes to apply.

22. EPA's only reference to its reliance on Exemption 5 to withhold voluminous responsive information is a generic statement in its 35th Avenue Final Response about the "general purpose" of "the deliberative process privilege" that "Exemption 5 of the FOIA . . . incorporate[s]." Ex. 2 at 2.

23. EPA's 35th Avenue Final Response notified Drummond that it could appeal EPA's final response to the National FOIA officer in EPA's FOIA and Privacy Branch in Washington, D.C.

24. On October 9, 2014, Drummond, through its counsel, timely appealed EPA's final response to the 35th Avenue FOIA Request. *See* Ex. 4 (hereinafter, "35th Avenue FOIA Appeal"). Drummond appealed EPA's claims in its final response letter that certain of its responsive records and portions of the records are not subject to release under FOIA Exemption 5. As Drummond explained, it appealed EPA's withholdings because EPA had not "indicated its basis or bases for claiming Exemption 5 for any of the withheld documents." Ex. 4 at 1-2. This was

important because, as Drummond explained: “many of the documents that EPA may [have been] withholding pursuant to the deliberative process privilege [were] . . . likely to no longer qualify for such privilege now that EPA ‘ha[d] *finalized* the preliminary assessment/site investigation phase of the Superfund remedial process’” (emphasis added). EPA’s 35th Avenue Final Response was not clear about which of the records EPA withheld under Exemption 5 it claimed to fall under the deliberative process privilege and which it claimed qualify for some other Exemption 5 privilege, which limited Drummond’s ability to understand the basis for the withholdings and made it difficult for Drummond to object to specific withholdings.

25. By letter dated October 14, 2014, EPA confirmed that its Office of General Counsel received the 35th Avenue FOIA Appeal and assigned to it the tracking number APP-2015-000378. *See* Ex. 5.

26. EPA’s deadline to respond to the 35th Avenue FOIA Appeal was approximately November 10, 2014.

27. On November 21, 2014, Drummond’s counsel submitted correspondence to EPA Region 4’s Chief FOIA officer inquiring as to the status of, and expressing concerns regarding, EPA’s delay in responding to two separate FOIA matters, including the 35th Avenue FOIA Appeal. *See* Ex. 6 (the “Nov. 21, 2014 FOIA Letter”).

28. After approximately five additional months with no response to its 35th Avenue FOIA Appeal, Drummond's counsel requested, by letter dated June 4, 2015, that EPA respond to Drummond's 35th Avenue FOIA Appeal. *See* Ex. 7. In its June 4, 2015 letter, Drummond stated that, as a last resort, it would seek judicial enforcement of FOIA if necessary to cause EPA to act upon its 35th Avenue FOIA Appeal. *Id.* at 2.

29. To date, EPA has not responded to Drummond's 35th Avenue FOIA Appeal.

30. EPA continues to unlawfully withhold information responsive to the 35th Avenue FOIA Request.

31. Drummond has exhausted all of its administrative remedies with respect to the 35th Avenue FOIA Request.

GASP Petition for Preliminary Assessment FOIA Request

32. On October 10, 2014, Drummond submitted a FOIA request through its counsel to EPA Region 4, seeking "any and all EPA records relating to the July 14, 2014 petition for preliminary assessment in Tarrant (North Birmingham), Alabama, submitted to EPA by the organization GASP" (the "GASP Petition"), excluding a few records previously provided by EPA Region 4 in response to a previous Drummond FOIA request (hereinafter, the "GASP Petition FOIA

Request”) (Ex. 8). EPA assigned the GASP Petition FOIA Request tracking number EPA-R4-2015-000406.³

33. The GASP Petition FOIA Request sought, *inter alia*, EPA communications related to the GASP Petition. Ex. 8 at 1-2.

34. EPA provided an initial response letter to Drummond’s counsel on October 15, 2014 (“Initial GASP Petition FOIA Response”) (Ex. 9). In the Initial GASP Petition FOIA Response, EPA provided four responsive records. *Id.* at 3 (index of records). EPA stated that, “[r]egarding the portion of your request for email records, . . . your request has been placed in the category of complex because” it is “voluminous or require[s] extensive search, review and analysis, to include consultation with other offices or agencies and/or negotiation with submitters regarding proprietary information.” Ex. 9 at 1. “Specifically,” EPA stated, “a search for email records must be conducted using a search service in consultation with Headquarters[.]” *Id.*

35. Shortly thereafter, EPA Region 4 FOIA personnel informed Drummond’s counsel via telephone conference that it could not process the email portion of the GASP Petition FOIA Request unless Drummond’s counsel could specifically identify which EPA personnel would likely be custodians of

³ The request was submitted through EPA’s FOIAOnline website, <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2803a800c>.

responsive records. Drummond's counsel explained that the only way for an individual outside of EPA to accurately predict which EPA employees have responsive records is to already have copies of such records, which would negate the need for the FOIA request. Drummond agreed to prioritize such EPA records custodians, if EPA could identify them, in order for EPA to search for and produce responsive information in stages. *See* Ex. 10.

36. By letter dated November 5, 2014, EPA provided Drummond with a list of 15 EPA records custodians and asked Drummond to list the custodians by priority to allow EPA to respond to the GASP Petition FOIA Request on a rolling basis. *See* Ex. 11. In EPA's November 5, 2014 letter, EPA estimated that its "initial search" returned 1,125 megabytes of responsive electronic information. *Id.* at 1.

37. On November 11, 2014, Drummond responded through its counsel to EPA's November 5, 2014 letter, providing EPA Region 4 FOIA personnel with a list of the 15 custodians arranged into three tiers of priority and asking that EPA proceed with processing the request, starting with records of the custodians identified in the first tier. *See* Ex. 12.

38. In the November 21, 2014 FOIA Letter, *see supra*, ¶ 27, Drummond explained its concerns over EPA's handling of the GASP Petition FOIA Request. *See* Ex. 6 at 2-3. As Drummond explained, 34 days had passed since the

appropriate EPA office had received the GASP Petition FOIA Request, and EPA had yet to provide a substantive response and had stated that it could not do so earlier than Dec. 5, 2014, 42 days after having received the request. *See id.* at 2. EPA admitted that much of this delay was due to the already-collected responsive records sitting on a desk in the program office waiting a final review for over three weeks. *See id.*

39. On December 1, 2014, EPA issued a second partial response to the GASP Petition FOIA Request (“Second GASP Petition FOIA Response”) (Ex. 13). In the Second GASP Petition FOIA Response, EPA provided three records in full and 12 partially-redacted records, but fully withheld 25 records pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *See* Ex. 13 at 7-12 (indices of responsive records).

40. By letter dated December 17, 2014, EPA issued a final response to the GASP Petition FOIA Request (the “Final GASP Petition FOIA Response”) (Ex. 14). In the Final GASP Petition FOIA Response, EPA provided 11 additional records in full and four additional partially-redacted records, but withheld in full an additional 20 responsive records. *See id.* at 4-7 (indices of responsive records).

41. EPA’s response to the GASP Petition FOIA Request encompassed a total of 79 responsive records, only 18 of which EPA produced in full to Drummond. For each instance of withheld information in the remaining 61

responsive records, EPA cited FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *See* Ex. 13 and 14.

42. The approximately 79 total responsive records contain a total of approximately 344 pages. *See* Ex. 9 at 3, Ex. 13 at 7-12, and Ex. 14 at 4-7 (indices of records).

43. According to EPA's FOIA website, the volume of information produced in response to the GASP Petition FOIA Request totals only 11.55 megabytes of data,⁴ which is approximately one percent of the estimated volume in EPA's Nov. 5, 2014 letter (Ex. 11).

44. On January 16, 2015, Drummond through its counsel timely appealed EPA's withholding of responsive records in its Second GASP Petition FOIA Response and Final GASP Petition FOIA Response (the "GASP Petition FOIA Appeal") (Ex. 15). Drummond appealed EPA's responses on two bases: (1) EPA failed to establish that FOIA Exemption 5 applied to the withheld information, *Ray*, 502 U.S. at 173; and (2) EPA's collection of a mere 79 responsive records demonstrates that its search was not "reasonably calculated to uncover all relevant documents," particularly where EPA had initially identified 1,125 megabytes of

⁴ *See* FOIA Online, Request No. EPA-R4-2015-000406, *available at* <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2803a800c> (last accessed Aug. 28, 2015).

responsive information. *See Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). *See* Ex. 15 at 1-2.

45. By letter dated January 26, 2015, EPA's Office of General Counsel acknowledged receipt of the GASP Petition FOIA Appeal and assigned to it tracking number HQ-APP-2015-003391. Ex. 16.

46. EPA did not respond to the GASP Petition FOIA Appeal following its January 26, 2015 acknowledgement letter.

47. In its June 4, 2015 letter to EPA, *see supra*, ¶ 28, Drummond asked, *inter alia*, that EPA respond to the GASP Petition FOIA Appeal. *See* Ex. 7.

48. To date, EPA has not provided a substantive response to the GASP Petition FOIA Appeal.

49. EPA continues to unlawfully withhold information responsive to the GASP Petition FOIA Request.

50. Drummond has exhausted all of its administrative remedies with respect to the GASP Petition FOIA Request.

Civil Rights Act Title VI FOIA Request

51. On March 6, 2015, Drummond submitted through its counsel a FOIA request to EPA Headquarters seeking "any and all agency records, including but not limited to communications, related to the [Civil Rights Act] Title VI complaints submitted to EPA's Office of Civil Rights by Mr. David Ludder, which

are respectively dated February 5, 2015, and March 2, 2015” (“Title VI FOIA Request”) (Ex. 17).⁵ The Title VI FOIA Request specifically included, “in addition to all other records related to these two Title VI complaints, complete, unredacted copies of each complaint.” *Id.*

52. On March 9, 2015, EPA’s Headquarters FOIA office forwarded the Title VI FOIA Request to EPA’s Office of Civil Rights (“OCR”) FOIA coordinator.

53. EPA’s statutory 20-working-day deadline to respond to the Title VI FOIA Request expired on or before April 7, 2015. *See* 5 U.S.C. § 552(a)(6)(A)(i). EPA did not seek an extension to this deadline nor state that “unusual circumstances” apply to the Title VI FOIA Request under 5 U.S.C. § 552(a)(6)(B).

54. On April 22, 2015, Drummond’s counsel inquired as to the status of EPA’s response to the Title VI FOIA Request via telephone message with OCR’s FOIA coordinator. That same day, EPA’s Headquarters FOIA office confirmed to Drummond’s counsel by telephone that OCR had received the Title VI FOIA Request on March 9, 2015.

55. On April 24, 2015, OCR’s Equal Opportunity Investigator, Mr. Samuel Peterson, whom EPA identified as the lead contact for the underlying Title

⁵ The Title VI FOIA Request was submitted through EPA’s FOIAOnline website, <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280605aed>.

VI matter, emailed Drummond's counsel stating that, "on Thursday, April 23, 2015, the [EPA OCR] received the [FOIA] request that you submitted on March 6, 2015." EPA assigned the Title VI FOIA Request tracking number EPA-HQ-2015-004930.

56. Mr. Peterson's April 24, 2015 email confirmed the *verbatim* language of the Title VI FOIA Request and stated that "OCR is reviewing your request and will be in contact with you thereafter." Drummond's counsel responded that same day asking for a "more specific timeline for OCR's response" given EPA's expired response deadline and stating that EPA Headquarters had confirmed two days prior that OCR had already received the Title VI FOIA Request several weeks earlier. *See Ex. 18.* Mr. Peterson did not reply to Drummond's questions.

57. On May 28, 2015, having received no further response from OCR, Drummond's counsel again inquired via telephone to Mr. Peterson regarding the status of EPA's response to the Title VI FOIA Request. On this phone conference, Mr. Peterson admitted that there should not have been a six-week delay in initially responding to the Title VI FOIA Request, but could not explain how the delay occurred. Mr. Peterson stated that the initial "scoping" review had been completed and that responsive documents had been submitted to OCR management for secondary review. Drummond's counsel further inquired regarding an estimated timeline for EPA's response and an estimated volume of responsive information, to

which EPA did not have answers on the May 28, 2015 telephone conference. Mr. Peterson stated on the call that EPA would have answers to Drummond's questions by the following Monday, June 1, 2015.

58. During the telephone call on May 28, 2015, Mr. Peterson indicated that EPA interpreted the Title VI FOIA Request as seeking *only* unredacted copies of the two referenced Title VI complaints, despite the plain language of the Title VI FOIA Request seeking "*any and all* agency records . . . related to the Title VI complaints . . . to include, *in addition to all other records related to these two Title VI complaints*, complete unredacted copies of each complaint," *see* Ex. 17 (Title VI FOIA Request) (emphasis added), and despite Mr. Peterson's written confirmation of the scope of the Title VI FOIA Request on April 24, 2015. Ex. 18. Drummond's counsel reminded Mr. Peterson that the Title VI FOIA Request seeks *all* records related to the two complaints. Mr. Peterson attempted to characterize this reminder as a "clarification" of the scope of the request, although no clarification was necessary, nor was Drummond's statement intended as one. Mr. Peterson stated that he would discuss the scope of the Title VI FOIA Request with OCR management and would have more information by Monday, June 1, 2015.

59. On June 1, 2015, Drummond's counsel called OCR to follow up on the items discussed with Mr. Peterson on May 28, 2015. Mr. Peterson did not return the phone call but emailed Drummond's counsel on June 1, stating only that

he has “been in touch with the [EPA] General Counsel’s Office,” that it has “received your FOIA request and [is] currently working [on] it to define the scope of the request and your eligibility to receive unredacted documents from an open investigation,” and that “OCR hopes to resolve this issue shortly.” Drummond’s counsel responded that day, again asking for an estimated timeline and volume of responsive information. *See* Ex. 19. Mr. Peterson did not respond.

60. On June 4, 2015, Drummond’s counsel again emailed Mr. Peterson asking for an update on the Title VI FOIA Request. Ex. 19. Mr. Peterson did not respond.

61. On June 9, 2015, Drummond’s counsel again emailed Mr. Peterson asking for an update on the Title VI FOIA Request. Mr. Peterson responded that same day, stating only that the “FOIA request is currently being reviewed by [EPA’s] Office of General Counsel.” Drummond’s counsel replied that same day, asking whether *responsive documents* were being reviewed for release or EPA is still reviewing the request itself. Mr. Peterson did not respond further, and has yet to respond further. *See* Ex. 20.⁶

62. On June 24, 2015, Drummond received a letter from EPA, dated June 17, 2015, regarding the Title VI FOIA Request (the “EPA June 17, 2014 Letter”) (Ex. 21). EPA’s June 17, 2014 Letter implicitly, but unofficially and unclearly,

⁶ This email exchange with EPA also includes an update on a separate FOIA request that is not at issue in this case.

denied Drummond's Title VI FOIA Request under FOIA Exemptions 7(A) and 7(B). In EPA's June 17, 2014 Letter, EPA cited merely those exemptions and stated that "EPA will be unable to provide you with further information on these complaints until such time as the matters are resolved." Ex. 21 at 1. EPA's June 17, 2014 Letter: (1) did not specifically state that it was in fact denying Drummond's request; (2) did not identify any responsive records being withheld; and (3) did not provide any information regarding the FOIA requester's appeal rights, all of which EPA is required to do under FOIA and its FOIA regulations. *See* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. §§ 2.104(g), (h), & (j).

63. On top of EPA's failure to provide a legally sufficient response to the Title VI FOIA Request, the EPA June 17, 2014 Letter failed to establish (or even properly allege) that Exemptions 7(A), 7(B), or any other FOIA Exemption applies to any information responsive to the Title VI FOIA Request. *See* Ex. 21.

64. To date, EPA has not issued a determination nor provided any substantive response regarding the Title VI FOIA Request.

65. To date, EPA has not performed a search "reasonably calculated to uncover all relevant documents" with respect to the Title VI FOIA Request. *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

66. EPA continues to unlawfully withhold records responsive to the Title VI FOIA Request.

67. Drummond has exhausted all of its administrative remedies with respect to the Title VI FOIA Request.

PLAINTIFF'S COUNT I

68. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 31 as if fully set forth herein.

69. Defendant EPA has withheld records responsive to Drummond's 35th Avenue FOIA Request pursuant to FOIA Exemption 5 without establishing the applicability of FOIA Exemption 5.

70. Defendant EPA has unlawfully ignored Drummond's administrative appeal of EPA's determination to withhold records that are responsive to the 35th Avenue FOIA Request well beyond its mandatory deadline under FOIA.

71. Defendant EPA continues to unlawfully withhold information responsive to the 35th Avenue FOIA Request.

72. As a result of EPA's unlawful withholding of responsive information, EPA has denied Drummond access to public information to which it is entitled under FOIA.

73. As a result of EPA's failure to respond to Drummond's administrative appeal, EPA has denied Drummond an opportunity to challenge EPA's withholdings, as is Drummond's right to do under FOIA and EPA's FOIA regulations.

74. As a direct result of EPA's noncompliance with FOIA in connection with the 35th Avenue FOIA Request, Drummond has expended substantial additional resources, including but not limited to attorneys' fees.

75. Drummond has exhausted all of its administrative remedies with respect to the 35th Avenue FOIA Request.

PLAINTIFF'S COUNT II

76. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 14 and 32 through 50 as if fully set forth herein.

77. Defendant EPA has withheld records responsive to Drummond's GASP Petition FOIA Request without establishing the applicability of FOIA Exemption 5, as required by FOIA.

78. Defendant EPA has failed to perform an adequate search for information responsive to the GASP Petition FOIA Request.

79. Defendant EPA has unlawfully ignored Drummond's administrative appeal of EPA's determination to withhold records that are responsive to the GASP Petition FOIA Request well beyond its mandatory deadline under FOIA.

80. Defendant EPA continues to unlawfully withhold information responsive to the GASP Petition FOIA Request.

81. As a result of EPA's inadequate search for, and unlawful withholding of, information responsive to the GASP Petition FOIA Request, EPA has denied Drummond access to public information to which it is entitled under FOIA.

82. As a result of EPA's failure to respond to Drummond's administrative appeal, EPA has denied Drummond an opportunity to challenge EPA's withholdings as is Drummond's rights to do under FOIA.

83. As a direct result of EPA's noncompliance with FOIA in connection with the GASP Petition FOIA Request, Drummond has expended substantial additional resources, including but not limited to attorneys' fees.

84. Drummond has exhausted all of its administrative remedies with respect to the GASP Petition FOIA Request.

PLAINTIFF'S COUNT III

85. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 14 and 51 through 67 as if fully set forth herein.

86. Defendant EPA has failed to respond to Drummond's Title VI FOIA Request within the time period required by FOIA and EPA's FOIA regulations.

87. Defendant EPA has failed to perform an adequate search for responsive records to the Title VI FOIA Request.

88. EPA continues to unlawfully withhold public information responsive to Drummond's Title VI FOIA Request without establishing a sufficient basis for withholding such information under FOIA.

89. EPA has failed to comply with required procedures for making a determination with respect to Drummond's Title VI FOIA Request and has constructively denied Drummond's Title VI FOIA Request without properly notifying Drummond of an adverse determination, thereby denying Drummond the opportunity to seek an administrative appeal, in violation of FOIA and EPA's FOIA regulations.

90. As a result of EPA's inadequate search for responsive records and unlawful withholding of responsive information, EPA has denied Drummond access to public information to which it is entitled under FOIA.

91. As a result of EPA's failure to timely respond to the Title VI FOIA Request, failure to make a determination with respect to the Title VI FOIA Request, and failure to afford Drummond administrative appeal rights, EPA has denied Drummond the opportunity to challenge EPA's unlawful withholding of responsive information in contravention of FOIA and EPA's FOIA regulations.

92. As a direct result of EPA's noncompliance with FOIA in connection with the Title VI FOIA Request, Drummond has expended substantial additional resources, including but not limited to attorneys' fees.

93. Drummond has exhausted all of its administrative remedies with respect to the Title VI FOIA Request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Defendant EPA to produce to Drummond all responsive information with respect to the 35th Avenue FOIA Request, including all responsive records up until the date upon which the Court grants the requested relief;

2. Order Defendant EPA to perform a thorough search for records responsive to the GASP Petition FOIA Request;

3. Order Defendant EPA to produce to Drummond all responsive information with respect to the GASP Petition FOIA Request, including all responsive records up until the date upon which the Court grants the requested relief;

4. Order Defendant EPA to perform a thorough search for records responsive to the Title VI FOIA Request;

5. Order Defendant EPA to produce to Drummond all responsive information with respect to the Title VI FOIA Request, including all responsive records up until the date upon which the Court grants the requested relief;

6. Order Defendant to waive all search, review, reproduction, and any other related fees or costs associated with its response to the Title VI FOIA Request;

7. Award to Plaintiff attorneys' fees and litigation costs associated with these matters pursuant to 5 U.S.C. § 552(a)(4)(E); and

8. Award any further relief the Court deems just and proper.

DATED: August 28, 2015

Respectfully Submitted,

s/ M. Talmadge Simpson

One of the Attorneys for

Plaintiff Drummond Company, Inc.

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LIST OF EXHIBITS

1. Email from Ms. Gayla Mendez, EPA Region 4 FOIA Coordinator (Sept. 9, 2014)
2. EPA's Final 35th Avenue FOIA Response (Sept. 9, 2014)
3. EPA's 35th Avenue FOIA Withholding Index (Aug. 21, 2014)
4. Drummond's 35th Avenue FOIA Appeal (Oct. 9, 2014)
5. Letter from EPA Acknowledging Receipt of 35th Avenue FOIA Appeal (Oct. 14, 2014)
6. Letter from Drummond to EPA Regarding 35th Avenue FOIA Appeal and GASP Petition FOIA Request (Nov. 21, 2014)
7. Letter from Drummond to EPA Regarding 35th Avenue FOIA Appeal and GASP Petition FOIA Appeal (June 4, 2015)
8. Drummond's GASP Petition FOIA Request (Oct. 10, 2014)
9. EPA's Initial GASP Petition FOIA Response (Oct. 15, 2014)
10. Email from Drummond to EPA Regarding Prioritization of GASP Petition FOIA Records Custodians (Nov. 3, 2014)
11. Letter from EPA Providing List of GASP Petition FOIA Records Custodians (Nov. 5, 2014)
12. Email from Drummond to EPA Prioritizing Records Custodians for GASP Petition FOIA Request (Nov. 11, 2014)
13. EPA's Second GASP Petition FOIA Response (Dec. 1, 2014)
14. EPA's Final GASP Petition FOIA Response (Dec. 17, 2014)
15. Drummond's GASP Petition FOIA Appeal (Jan. 16, 2015)

16. Letter from EPA Acknowledging Receipt of GASP Petition FOIA Appeal (Jan. 26, 2015)
17. Drummond's Title VI FOIA Request (Mar. 6, 2015)
18. Email Exchange Between Drummond and Mr. Samuel Peterson, EPA's Office of Civil Rights, Regarding Title VI FOIA Request (Apr. 24, 2015)
19. Email from Drummond to EPA Regarding Title VI FOIA Request (June 4, 2015)
20. Email from Drummond to EPA Regarding Title VI FOIA Request (June 9, 2015)
21. Letter from EPA Regarding Title VI FOIA Request (June 17, 2015)

CERTIFICATE OF SERVICE

I hereby certify that on the 28th of August, 2015, I served by placing in certified United States Postal Service mail a true and correct copy of the foregoing Complaint to the following:

United States Environmental Protection Agency
c/o Joyce Vance, United States Attorney
Office of the U.S. Attorney, N.D. Alabama
1801 4th Avenue North
Birmingham, Alabama 35203

United States Environmental Protection Agency
c/o Loretta Lynch, Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

s/ M. Talmadge Simpson
One of the Attorneys for
Plaintiff Drummond Company, Inc.