

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

TEXAS PUBLIC POLICY FOUNDATION,)
a 501(c)(3) non-profit,)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES DEPARTMENT)
 OF COMMERCE,)
)
 Defendant.)
_____)

Civil Action No. 1:22-cv-01210

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, the Texas Public Policy Foundation (“the Foundation”), brings this action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking records related to the Department of Commerce’s (“Department” or “DOC”) efforts to support the Biden Administration’s Nationally Determined Contribution pledge for reducing greenhouse gas emissions as part of the Paris Agreement. The Foundation submitted a FOIA request seeking these records on February 9, 2022, almost a year ago, and, to date, has received no response from the Department, other than an acknowledgment that the Department received the request. Setting the Nationally Determined Contribution Number is a matter of huge economic significance. Both the Foundation and public have the right to know the extent of the Department’s role in doing so.

2. The Foundation seeks declaratory relief that the Department has violated FOIA by failing to make a determination and respond to the Foundation’s request.

3. The Foundation further seeks injunctive relief requiring the Department to immediately process and release the requested records.

PARTIES

4. The Foundation is a 501(c)(3) non-profit, non-partisan research institute headquartered in Austin, Texas. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Historically, the Foundation has worked through its Life:Powered project to advocate for energy policies that promote economic freedom and advance the human condition.

5. The Department is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of records responsive to the Foundation's FOIA request.

JURISDICTION AND VENUE

6. This Court has jurisdiction to enjoin the Department from withholding records and to order the production of any records improperly withheld from the Foundation. 5 U.S.C. § 552(a)(4)(B).

7. The Foundation has exhausted its administrative remedies with respect to its FOIA request because the Department has failed to comply with the request within the statutory time limit. 5 U.S.C. § 552(a)(6)(C)(i); *see also Citizens for Responsibility and Ethics in Washington ("CREW") v. Fed. Election Comm.*, 711 F.3d 180, 188 (D.C. Cir. 2013); *accord Voinche v. F.B.I.*, 999 F.2d 962, 963 (5th Cir. 1993).

8. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201, and 2202.

STATUTORY AND REGULATORY BACKGROUND

9. FOIA, 5 U.S.C. § 552, requires federal agencies to release requested records to the public unless one or more specific statutory exemptions apply.

10. Each agency, upon receiving a request for records, must make a determination and inform the requester within 20 days whether the agency has responsive documents and whether and when it will provide them. 5 U.S.C. § 552(a)(6)(A)(i); *see also* 15 C.F.R. § 4.6(b); *CREW*, 711 F.3d at 188.

11. Upon any determination by an agency to comply with a request for records, the agency shall make the records promptly available to the requester. 5 U.S.C. § 552(a)(6)(C)(i).

12. If an agency has determined that “unusual circumstances” apply such that the agency cannot comply with the request within 20 days, the agency must notify the requester of the unusual circumstances, and the agency’s failure to make a determination is excused for an additional 10 days. 5 U.S.C. § 552(a)(6)(B)(i); 15 C.F.R. § 4.6(b); *CREW*, 711 F.3d at 182.

13. If an agency fails to make a determination within the statutory time limit, the requester shall be deemed to have exhausted administrative remedies with respect to the request. 5 U.S.C. § 552(a)(6)(C)(i); *CREW*, 711 F.3d at 188.

FACTUAL BACKGROUND

14. On January 20, 2021, the United States rejoined the 2015 Paris Agreement.¹ Countries party to the Paris Agreement pledge to reduce greenhouse gas emissions by submitting a plan for climate action, known as a Nationally Determined Contribution (“NDC”).²

¹ The White House Briefing Room, *The Paris Agreement* (Jan. 20, 2021), <https://bit.ly/3NKRkLm>; United States Department of State, *The United States Officially Rejoins the Paris Agreement* (Feb. 21, 2021), <https://bit.ly/3EF5tY9>.

² U.N., *Paris Agreement* (Dec. 12, 2015), <https://bit.ly/2L3Ao1a>.

15. On April 22, 2021, the United States submitted an NDC pledging an “economy-wide target of reducing [the United States’] net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030.”³

16. The NDC stated that the United States would undertake a “whole-of-government approach” on climate action at the federal level to meet the 2030 NDC emissions target, in which “[a]ll levels of government and the private sector will partner to drive and implement this NDC and create a more equitable, resilient, zero carbon future for the American people.” The “whole-of-government approach” included “a bottom-up analysis of existing and potential policies and measures at the federal level, accounting for capital stock turnover, technology trends, infrastructure needs, and continued subnational policies and measures.”

17. The National Climate Advisor and the White House Office of Domestic Climate Policy consulted with “relevant departments and agencies across the federal government” to conduct a detailed analysis underpinning the 2030 NDC emissions target.

18. On February 9, 2022, the Foundation submitted a FOIA request to the Department seeking records related to the agency’s efforts to support the 2030 NDC emissions target.

19. Specifically, the FOIA request asked the Department to:

1. Please provide all final recommendations provided by Secretary Raimondo, DOC employees, or contractors communicating on behalf of DOC to any member or employee of the National Climate Task Force or contractor acting on behalf of the National Climate Task Force regarding the 2030 emissions target.
2. Please provide all final determinations provided by Secretary Raimondo, DOC employees, or contractors communicating on behalf of DOC to any member or employee of the National Climate Task Force or any contractor acting on behalf of the National Climate Task Force regarding the 2030 emissions target.

³ U.N., The United States of America Nationally Determined Contribution (Apr. 22, 2021), <https://bit.ly/3CA6JZZ>.

3. Please provide any final qualitative analysis prepared by any DOC employee or contractor acting on behalf of DOC regarding the Nationally Determined Contribution Number that was developed for the 2030 emissions target.
 - a. Please provide the inputs or outputs to any model used in preparing a final qualitative analysis responsive to Request Number 3 above.
4. Please provide any final quantitative analysis prepared by any DOC employee or any contractor acting on behalf of DOC regarding the Nationally Determined Contribution Number that was developed for the 2030 emissions target.
5. Please provide any final analysis of regulatory and/or technology costs conducted by any DOC employee or contractor acting on behalf of DOC in relation to the 2030 emissions target.
6. Please provide any summary or discussion of DOC's regulatory and voluntary programs to address greenhouse gas emissions prepared in relation to the Nationally Determined Contribution Number that was developed for the 2030 emissions target.
7. Please provide any summary or discussion of DOC's regulatory and voluntary programs to address greenhouse gas emissions provided by any DOC employee or any contractor acting on behalf of DOC to any member or employee of the National Climate Task Force or any contractor acting on behalf of the National Climate Task Force.
8. Please provide any analysis of or determinations of greenhouse gas reductions achievable through regulatory or voluntary programs administered by DOC that was prepared by any DOC employee in relation to the Nationally Determined Contribution Number that was developed for the 2030 emissions target.
9. Please provide any analysis of or determinations of greenhouse gas reductions achievable through voluntary or regulatory programs administered by DOC that was provided by any DOC employee or any contractor acting on behalf of DOC to any member or employee of the National Climate Task Force or any contractor acting on behalf of the National Climate Task Force.
10. Please provide all documents, communications, analyses and or results from running a model relating to the "whole-of-government approach," which included "a bottom-up analysis of existing and

potential policies and measures the federal level” that NDC document referenced.

20. The FOIA request further stated:

For the purposes of this request, **“records”** means documents, information, memoranda, letters, reports, drafts, communications, records of communications, telephone message records, calendars, agendas, meeting sign-in sheets, presentations, handwritten or typed notes, facsimile transmissions, electronic mail, transcripts or recordings (audio or visual) of meetings, tapes, and all other types of records in the possession, control or custody of the Agency or contractors working for the Agency. **“Communications”** means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise). **“DOC employees”** means career staff and political appointees. **“Model”** means a computer program designed to simulate what might or happen in a situation. **“Input”** means data that is transmitted or electronically or manually to a model. **“Output”** means any data or information obtained through running or performing experiments or simulations with a model.

For all records responsive to these requests that are not produced based on an asserted exemption from disclosure, please prepare a privilege and/or exemption log describing at a minimum: (i) the type of record withheld, (ii) the date(s) of the creation of the record; (iii) the subject of the record, (iv) the identity of the author and all recipients of the records; and (v) a detailed description of the basis upon which the Agency is withholding the record (*e.g.*, the claim of privilege, FOIA exemption, etc.). To the extent any responsive documents are withheld based upon a claim of privilege or other exemption from disclosure, please produce redacted copies of all non-privileged or non-exempt factual material contained within such documents. 5 U.S.C. § 552(b).

21. The Foundation’s request sought a fee waiver.

22. The Department acknowledged in a February 9, 2022, e-mail receipt of the Foundation’s FOIA request and assigned it tracking number DOC-OS-2022-000727.

23. The Department did not assert that a 10-day extension was necessary to comply with the Foundation’s request.

24. The Department did not make responsive records promptly available.

25. To date, the Foundation has not received any additional communication from the Department regarding its FOIA request.

CLAIM

COUNT I

5 U.S.C. § 552

The Department's Wrongful Withholding of Records Responsive to the Foundation's FOIA Request

26. The Foundation incorporates all prior paragraphs as though fully set forth herein.

27. The Foundation's February 9, 2022, FOIA request properly sought records within the possession, custody, and control of the Department.

28. The Department has wrongfully failed to make a determination of records responsive to the Foundation's FOIA request and to notify the Foundation of the documents the agency will produce or withhold.

29. The Department is wrongfully withholding records responsive to the Foundation's FOIA request.

30. The Department has failed to conduct an adequate search in response to the Foundation's FOIA request.

31. By failing to timely release all requested records in full to the Foundation, the Department has violated FOIA, 5 U.S.C. § 552.

32. The Foundation is entitled to declaratory and injunctive relief requiring an immediate processing and disclosure of the records requested in its February 9, 2022, FOIA request to the Department. 5 U.S.C. § 552(a)(4)(B).

PRAYER FOR RELIEF

WHEREFORE, the Foundation respectfully requests that the Court:

- A. Issue a declaration that the Foundation is entitled to immediate processing and disclosure of the requested records;
- B. Order the Department to immediately and fully process the Foundation's February 9, 2022, FOIA request and disclose all non-exempt documents to the Foundation;
- C. Provide for expeditious proceedings in this action;
- D. Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- E. Award the Foundation its costs and reasonable attorneys' fees in this action; and
- F. Grant such other relief as the Court deems proper and just.

Dated: November 16, 2022

Respectfully submitted,

Michael B. Schon*
mike@lehotskykeller.com
LEHOTSKY KELLER LLP
200 Massachusetts Avenue, NW
Washington, DC 20001

**Pro Hac Vice Application Forthcoming*

/s/ Todd Disher
Todd Disher (Texas Bar # 24081854)
todd@lehotskykeller.com
Alexis Swartz (Texas Bar #24122045)*
alexis@lehotskykeller.com
LEHOTSKY KELLER LLP
919 Congress Ave.
Ste. 1100
Austin, TX 78701
T: (512) 693-8350
F: (833) 233-2202

**Application for Admissions Forthcoming*