

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INSTITUTE FOR ENERGY RESEARCH)
1155 15th Street, NW)
Suite 900)
Washington, D.C. 20005)

Plaintiff,)

v.)

Case No. 1:22-cv-3653

UNITED STATES DEPARTMENT OF)
THE TREASURY)
1111 Constitution Avenue, NW)
Washington, D.C. 20224)

and)

INTERNAL REVENUE SERVICE)
1111 Constitution Ave., NW)
Washington, D.C. 20224)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff INSTITUTE FOR ENERGY RESEARCH (“IER”) for its complaint against Defendants UNITED STATES DEPARTMENT OF THE TREASURY (“Treasury”) and UNITED STATES INTERNAL REVENUE SERVICE (“IRS”), 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 one FOIA request seeking certain described emails sent or received by named IRS officials and involving named outside correspondents.
2. This suit follows the IRS’s failure to comply with the express terms of FOIA, including but not limited to its failure to produce responsive information and to fulfill its obligation

to make a “determination” 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

3. Plaintiff IER is a non-profit public policy institute organized under the laws of Texas. It has an office in the District of Columbia, and is recognized under section 501(c)3 of the tax code, with research, publication and other media functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources. All of the aforementioned missions include broad dissemination of public information obtained under open records and freedom of information laws.
4. Defendant United States Internal Revenue Service (“IRS”) is within and a part of the Department of the Treasury. It is an agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). IRS has possession, custody, and control of records responsive to Plaintiff’s FOIA request. Its headquarters is located in the District of Columbia. IRS is sued for its own acts and omissions in responding to the FOIA request at issue in this case.
5. Defendant United States Department of the Treasury is an agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). Treasury has possession, custody, and control of records responsive to Plaintiff’s FOIA request because the Internal Revenue Service is a subordinate part of the Department of the Treasury. Treasury’s headquarters is located in the District of Columbia. This suit seeks relief against Treasury only for acts and omissions of IRS.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because the defendants are federal agencies and this case is filed in the District of Columbia.

7. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the defendants are federal agencies operating in the District of Columbia, because records are likely held or processed in the District of Columbia, and because this suit is filed in the District of Columbia.
8. IER is not required to further pursue administrative remedies before seeking relief in this Court because the Defendants have failed to make a timely “determination” as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) in response to the request.
9. IER has no obligation to further 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).

INSTITUTE FOR ENERGY RESEARCH’S FOIA REQUEST

10. On November 4, 2022, Plaintiff IER submitted by the FOIA.gov IRS FOIA portal a request to Defendant seeking copies of certain described correspondence sent to or from named IRS officials that also was sent to or from certain named staff of the United States Congress.
11. IER requested waiver or reduction of its fees on alternative bases of the public interest and its status as a media outlet.
12. Defendant IRS assigned that request confirmation number 481316.
13. Defendant IRS did not then or thereafter inform IER of basic information including but not limited to, e.g., the approximate number of potentially responsive records IRS was processing or expected to process, the approximate date when such processing was expected to conclude, or any other information about other potentially responsive records IRS was processing or their status.

14. Defendant IRS did not then or thereafter provide a determination on IER's requests in the alternative for fee reduction or waiver.
15. 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).
16. Under the precedent of this Circuit, within the aforementioned statutory deadline, "a 'determination' under Section 552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. Rather, in order to make a 'determination' and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).
17. 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.

18. Defendants did not so toll FOIA's 20-day requirement for a substantive response including, e.g., the number of potentially responsive records.
19. As of the date of this filing, IRS has not provided IER with the information required by *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013), including but not limited to, e.g., the approximate number of potentially responsive records it was processing, by approximately when the processing would commence or might be expected to conclude, or any other information about potentially responsive records it was processing.
20. Defendant IRS has yet to produce responsive records, or in fact provided any response whatsoever beyond initial correspondence in which it assigned the confirmation number.
21. Defendant IRS has thereby failed to provide timely access to agency records in violation of FOIA or make any of its required determinations. Defendant IRS is constructively and/or actually withholding the records Plaintiff requested under FOIA.

FIRST CLAIM FOR RELIEF
Duty to Produce Records – Declaratory Judgment

22. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
23. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
24. Plaintiff has a statutory right to the information it seeks, and Defendants have unlawfully withheld the information.
25. Plaintiff is not required to further pursue administrative remedies.
26. Plaintiff cannot be assessed any fees under FOIA either because Plaintiff is entitled to a fee waiver or because IRS has waived its entitlement to fees by virtue of its failure to comply with FOIA deadlines.

27. 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 Defendants have failed to provide the records;
 - b. IRS 's processing of Plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy IRS 's obligations under FOIA;
 - c. IRS must now produce records responsive to Plaintiff's request, and must do so without cost to the Plaintiff.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

28. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
29. Plaintiff is entitled to injunctive relief compelling Defendants to produce the records responsive to the FOIA request described herein.
30. Plaintiff is entitled to injunctive relief compelling Defendants to grant the Plaintiff's request for a fee waiver.
31. Plaintiff is entitled to injunctive relief prohibiting Defendants from assessing fees to fulfill the FOIA request at issue.
32. Plaintiff asks the Court to enter an injunction ordering Defendants 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, at no cost to the Plaintiff.
33. 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 Defendants' preparation of a *Vaughn* log and a briefing schedule for

resolution of remaining issues associated with Plaintiff's challenges to IRS's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

34. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
35. 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.
36. This Court should enter an injunction or other appropriate order requiring the Defendants to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Institute for Energy Research respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendants comply with FOIA and every order of this Court;
2. Declare Defendants have violated FOIA by failing to provide Plaintiff with the requested records, by failing to grant Plaintiff's request for a fee waiver, and/or by 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 records under 5 U.S.C. § 552 *et seq.*, and must be disclosed;
4. Order Defendants to expeditiously provide the requested records to Plaintiff within 20 business days of the Court's order;
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 7th day of December, 2022,

INSTITUTE FOR ENERGY RESEARCH
By Counsel:

/s/Matthew D. Hardin

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