

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

GOVERNMENT ACCOUNTABILITY & OVERSIGHT)
1309 Coffeen Avenue)
Suite 3556)
Sheridan, WY 82801)

Plaintiff,)

v.)

C.A No. 23-cv-1712

UNITED STATES CENTERS FOR MEDICARE)
& MEDICAID SERVICES)
7500 Security Boulevard)
Baltimore, MD 21244)

And)

UNITED STATES DEPARTMENT OF HEALTH)
AND HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, D.C. 20201)

Defendants.)

FREEDOM OF INFORMATION ACT COMPLAINT

Plaintiff GOVERNMENT ACCOUNTABILITY & OVERSIGHT (“GAO”) for its complaint against Defendant UNITED STATES CENTERS FOR MEDICARE & MEDICAID SERVICES (“CMS”) and Defendant UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES (“the Department” or “HHS”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production of records in response to one FOIA request to a component of HHS, the U.S. Centers for Medicare & Medicaid Services.
2. CMS and HHS have improperly denied the request by failing to provide an initial determination, produce responsive records or otherwise perform in accordance with its

obligations under FOIA, as applied by this Court in *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).

3. Plaintiff sought fee waivers for the request, as provided by FOIA, based on the public interest in the information requested as detailed in the request itself, and requester's intention and ability to broadly disseminate the information.
4. Other non-profit requesters routinely receive fee waivers by federal agencies on the very same substantive issues for reasons of the public interest at issue.
5. CMS and HHS have not responded to plaintiff with an initial determination or substantive response to the request, but have only assigned the request a FOIA control number.
6. CMS and HHS have not ruled on plaintiff's fee waiver requests in the alternative, nor have they given plaintiff any estimate the volume of records responsive to the request, nor a date by which responsive records would be produced, nor any information with respect to any FOIA exemptions which the government anticipates might apply.
7. CMS and HHS have therefore failed to lawfully respond to plaintiff's request.
8. Accordingly, plaintiff files this lawsuit to compel CMS and HHS to comply with the law and to produce the properly described public records in plaintiff's FOIA request.

PARTIES

9. Plaintiff Government Accountability & Oversight ("GAO") is a nonprofit research, public policy and educational center organized under the laws of Wyoming. GAO is dedicated to education regarding responsible regulation and transparency in government, a key part of which is seeking public records illuminating how policymakers use public resources, and with whom.

10. Defendant United States Centers for Medicare & Medicaid Services (“CMS”) is within and a part of the United States Department of Health and Human Services (“HHS”). It is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). CMS has possession, custody, and control of records responsive to Plaintiff’s FOIA request.
11. Defendant United States Department of Health and Human Services (“HHS”) is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of records responsive to Plaintiff’s FOIA request because CMS is a subordinate part of HHS. HHS’s headquarters is located in the District of Columbia. This suit seeks relief against HHS for acts and omissions of CMS.

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
13. 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, and because records are likely held or processed in the District of Columbia.
14. Plaintiff is not required to further pursue administrative remedies before seeking relief in this Court because Defendants neither produced records nor made a timely “determination” as that term is defined in *Citizens for Responsibility & Ethics in Wash. v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). See also, 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).

PLAINTIFF'S FOIA REQUEST

15. On May 8, 2023, plaintiff submitted by FOIA.gov internet portal a request to Defendant CMS seeking copies of certain described correspondence.
16. CMS acknowledged this request on May 10, 2023, and assigned it control number 050820237092. CMS asserted that “unusual circumstances” “might impact” its ability to respond, and stated that at some point in the future someone would respond to plaintiff’s request.
17. However, CMS did not affirmatively claim unusual circumstances existed or that they would necessarily impact its response to the plaintiff’s request. Indeed, the claim of unusual circumstances appeared largely or even entirely based on the volume of FOIA requests received by CMS< a circumstance which plaintiff asserts, on information and belief, is not “unusual.”
18. CMS did not provide (and as of this filing, still has not provided) the required determination of how many documents were being processed, or what exemptions CMS expected to claim to withhold any records.
19. CMS also did not provide a determination on plaintiff’s requests in the alternative for fee waiver.
20. As of this filing, Defendant has not provided the still-required determination of how many documents were being processed.
21. 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).

22. 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.
23. Neither of those scenarios are applicable to CMS’s actions in the instant matter.
24. Defendants owed Plaintiff a “*CREW*” response to its request, including a “determination” as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013), no later than June 6th, 2023.
25. As of this filing, defendants have provided no substantive response or “determination” with respect to the request as that term is defined in the Freedom of Information Act and as the D.C. Circuit explained was the obligation of every agency in *CREW v. Federal Election Commission*, 711 F.3d 180, 188 *D.C. Cir. 2013).
26. Plaintiff also sought waiver of its fees based on both grounds, in the alternative, of public interest and its status as a media outlet.
27. Defendants have yet to provide a determination on Plaintiff’s request for fee waiver.

28. Defendants have yet to produce any records responsive to the FOIA request described herein, any substantive response, or a fee waiver determination, and as such is now past its statutory period for issuing such a determination on the above-described request and/or seeking fees.
29. Defendants continue to improperly deny plaintiff access to agency records in violation of FOIA, and also to withhold the statutorily required “determination” regarding fees and what number of records are responsive to plaintiff’s request and being processed.

FIRST CLAIM FOR RELIEF
Duty to Produce Records – Declaratory Judgment

30. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
31. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
32. Plaintiff has a statutory right to the information it seeks, and defendant has unlawfully withheld the information.
33. Plaintiff is not required to further pursue administrative remedies.
34. 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. CMS’s processing of plaintiff’s FOIA request described above is not in accordance with the law, and does not satisfy CMS’s obligations under FOIA;
 - c. CMS 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

35. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
36. Plaintiff is entitled to injunctive relief compelling defendants to produce the records responsive to the FOIA request described herein.
37. 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.
38. 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 CMS's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

39. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
40. 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.
41. This Court should enter an injunction or other appropriate order requiring the defendants to pay reasonable attorney's fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Plaintiff 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, and/or by failing to notify plaintiff of 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 10 business days of the Court's order and without 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 13th day of June 2023,

GOVERNMENT ACCOUNTABILITY & OVERSIGHT
By Counsel:

/s/Matthew D. Hardin

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