

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

POWER THE FUTURE)
611 Pennsylvania Avenue, SE)
Suite No. 183)
Washington, DC 20003)

Plaintiff,)

v.)

Case No. 23-cv-1845

U.S. ENVIRONMENTAL PROTECTION AGENCY)
1200 Pennsylvania Avenue, NW)
Mail Code 2310A)
Washington, DC 20460)

Defendant.)

COMPLAINT UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff POWER THE FUTURE (“PTF”), for its complaint against Defendant U.S.

ENVIRONMENTAL PROTECTION AGENCY (“USEPA”), 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.
2. This action is filed following the USEPA’s failure to comply with the express terms of FOIA, including but not limited to its failure to provide any substantive response to the request at issue.
3. The USEPA’s failure to comply with FOIA also includes the agency’s failure to, e.g., 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), its failure to respond to Plaintiff’s request, and its constructive or actual

withholding of responsive information and/or documents in violation of Defendant's obligations.

PARTIES

4. Plaintiff Power the Future is a non-profit organization incorporated in the State of Delaware dedicated to "disseminating research, sharing facts and truths, engaging at the local level and interacting with the media," specifically relating to energy and environmental public policy.
5. Defendant United States Environmental Protection Agency is a federal agency headquartered in Washington, DC.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
7. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).
8. Plaintiff is not required to further pursue administrative remedies before seeking relief in this Court because Defendant 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 similarly situated plaintiffs of any exhaustion requirement).

PLAINTIFF'S FOIA REQUEST

9. On May 25, 2023, Plaintiff submitted by internet portal a request to Defendant seeking copies of certain described email correspondence between five named USEPA Region IV political appointees and eight named email domains of environmentalist pressure groups.

10. Plaintiff also sought waiver of any fees based on both grounds, in the alternative, of public interest and plaintiff's status as a media outlet.
11. On May 25, 2023, Defendant acknowledged Plaintiff's request and assigned it the tracking number EPA-R4-2023-004420.
12. USEPA did not provide, e.g., the required determination of how many documents were being processed or what exemptions USEPA expected to claim to withhold any information, as required by FOIA to be provided to a requester within 20 working days.
13. 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).
14. 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.
15. Neither of those scenarios are applicable to USEPA's actions in the instant matter.

16. Agencies are permitted an extension of time to complete a response if they should assert and establish that “unusual or exceptional circumstances exist”. 40 C.F.R §2.104(a).
17. EPA has not claimed that “unusual or exceptional circumstances exist”.
18. USEPA 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), by June 23, 2023.
19. As of this filing, USEPA has 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.
20. Defendant is now past its statutory period for issuing such a determination on the above-described request and/or seeking fees.
21. Defendant USEPA continues 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

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 Defendant has unlawfully withheld the information.
25. Plaintiff is not required to further pursue administrative remedies.

26. 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. USEPA's processing of Plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy USEPA's obligations under FOIA;
 - c. USEPA 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

27. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
28. Plaintiff is entitled to injunctive relief compelling Defendant to produce the records responsive to the FOIA request described herein.
29. 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, at no cost to the Plaintiff.
30. 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 USEPA's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

31. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
32. 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.
33. This Court should enter an injunction or other appropriate order requiring the Defendant 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 Defendant complies with FOIA and every order of this Court;
2. Declare Defendant has 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 Defendant 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 24th day of June 2023,

POWER THE FUTURE

By Counsel:

/s/Christopher Horner

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