

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE**

SOUTHERN ENVIRONMENTAL LAW)
CENTER,)

Plaintiff,)

v.)

TENNESSEE VALLEY AUTHORITY,)

Defendant.)

Case No. 3:24-cv-00095

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Southern Environmental Law Center (“SELC”) alleges as follows:

INTRODUCTION

1. This Freedom of Information Act (“FOIA”) suit challenges the unlawful failure by Defendant Tennessee Valley Authority (“TVA”) to respond timely to SELC’s request for public records.

2. In February 2023, SELC requested records pursuant to FOIA from TVA regarding the agency’s study of various programs for influencing regional electric load, including energy efficiency, demand response, and electrification (“Energy Programs Potential Study”). TVA committed in 2019 to conduct this study to determine whether demand-side energy management could reduce or offset the need for new electricity generation as the agency retires its fleet of aging coal plants.

3. TVA’s statements suggest that the Energy Programs Potential Study is finished, yet the agency has not made the study or its findings available for public review. SELC

submitted its FOIA request in an effort to better understand and shed light on the agency's energy resource decision-making process.

4. TVA has failed to comply with statutory deadlines to make a determination under FOIA in response to SELC's request. Despite repeated inquiries, reminders, and attempts to resolve this matter without litigation, SELC has not received any substantive response or records from TVA. SELC therefore seeks declaratory and injunctive relief from this Court as provided under FOIA.

JURISDICTION & VENUE

5. This Court has jurisdiction over this action under 5 U.S.C. § 552 (FOIA grant of jurisdiction), 28 U.S.C. § 1331 (federal-question jurisdiction), and 28 U.S.C. §§ 2201, 2202 (authority to issue declaratory judgment and further necessary or proper relief).

6. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), SELC is "deemed to have exhausted [its] administrative remedies" because TVA has "fail[ed] to comply with the applicable time limit provisions" of FOIA.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because, upon information and belief, the agency records responsive to SELC's FOIA request are situated in TVA's office located in this District; under 28 U.S.C. § 1391(b)(1) because TVA maintains its headquarters and principal place of business in this District; and under 28 U.S.C. § 1391(e), which provides for venue in the district in which a defendant resides or in which a substantial part of the events or omissions giving rise to the claim occurred in actions against an agency of the United States.

PARTIES

Plaintiff Southern Environmental Law Center

8. Plaintiff Southern Environmental Law Center is a 501(c)(3), nonprofit public interest environmental legal organization with a focus on six southeastern states.

9. SELC is a “person” for purposes of FOIA. 5 U.S.C. § 551(2).

10. SELC uses public advocacy and the law to protect the people and natural resources of the Southeast. As part of this work, SELC routinely uses FOIA requests to gather, analyze, and disseminate public information through its website, *southernenvironment.org*, as well as press releases, media interviews, reports, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings in Tennessee and throughout the Southeast, informed by and sharing their analysis of public information.

11. SELC has submitted public comments on TVA’s power generation plans throughout the Southeast on its own behalf and on behalf of other interested organizations. Among other topics, these comments have called for TVA to transition from a system that heavily relies on fossil fuels to a portfolio of cleaner electricity resources, including demand response and energy efficiency. SELC is hampered in its efforts to effectively advocate on behalf of itself and organizations whose members are TVA ratepayers when the agency unlawfully delays access to public information like the Energy Programs Potential Study at issue in this matter.

Defendant Tennessee Valley Authority

12. Defendant Tennessee Valley Authority is a corporate agency and instrumentality of the United States created by and existing pursuant to the Tennessee Valley Authority Act of 1933. *See* 16 U.S.C. § 831 *et seq.* (the “TVA Act”). The TVA Act provides that TVA “[m]ay sue or be sued in its corporate name.” 16 U.S.C. § 831c(b).

13. TVA is an “agency” within the definition provided by FOIA. *See* 5 U.S.C. § 551(1).

14. TVA maintains its headquarters and FOIA office in Knoxville, Tennessee.

15. TVA has possession or control of the records at issue in this case.

LEGAL BACKGROUND

Freedom of Information Act

16. “In enacting the FOIA, Congress sought to open agency action to the light of public scrutiny.” *Vaughn v. United States*, 936 F.2d 862, 865 (6th Cir. 1991) (quoting *U.S. Dep’t of Just. v. Repts. Comm. For Freedom of Press*, 489 U.S. 749, 772 (1989)). “The basic purpose [of FOIA] reflect[s] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *Id.* (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)).

17. FOIA requires federal agencies to make records available “promptly” upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must determine whether to comply with a FOIA request within 20 working days of receiving the request, and they must “immediately notify the requester of that determination.” *Id.* § 552(a)(6)(A).

18. A timely “determination” involves more than merely acknowledging receipt of the request and stating that the agency will produce any non-exempt records that it may later locate. *Citizens for Resp. & Ethics in Wash. (“CREW”) v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013); *see also Martinez v. U.S. State Dep’t*, No. 3-14-1616, 2015 WL 222210, at *2 (M.D. Tenn. Jan. 14, 2015).

19. Rather, to make a valid “determination” under FOIA, the agency must, at the very 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*, 711 F.3d at 188.

20. An agency may extend the deadline for responding to a records request by up to 10 working days if unusual circumstances apply and it provides timely written notice to the requester. 5 U.S.C. § 552(a)(6)(B).

TVA’s FOIA Regulations

21. TVA’s regulations establish an internal multitrack system for processing FOIA requests, under which TVA assigns each request it receives to one of three tracks based upon the “nature of the request and the estimated processing time.” 18 C.F.R. § 1301.5(b).

22. According to the agency, Track 1 requests are the fastest to process and “ordinarily” will receive a response within 20 working days of receipt by the FOIA Officer. *Id.* § 1301.5(b)(1). TVA places requests in Track 2 if they will take longer for the agency to process, and requests that are placed in Track 3 are those that will take the longest to process. *Id.* § 1301.5(b)(2), (3).

FACTUAL BACKGROUND

23. Since 2021, TVA has built, approved, or proposed eight new methane gas plants and dozens of miles of new gas pipelines to replace its retiring coal fleet. One of TVA’s rationales for swapping one polluting fossil fuel for another is that there are no feasible alternatives to meet the anticipated demand for electricity in TVA’s service area.

24. In 2019, TVA committed to perform an Energy Programs Potential Study, which was intended to evaluate regional opportunities for various programs, such as energy efficiency and demand response, that could meet demand for electricity without requiring construction of new power plants. TVA has since completed the Energy Programs Potential Study.

25. TVA has not disclosed the Energy Programs Potential Study, its findings, or the underlying data to the public, despite the fact that the agency justifies its decision to pursue methane gas, in part, by claiming that energy efficiency and demand response are not viable alternatives.

26. On February 24, 2023, SELC submitted a FOIA request to TVA via email and via TVA's online FOIA request portal for all records related to the Energy Programs Potential Study for the date range January 1, 2021, to December 31, 2023. A copy of SELC's FOIA request is attached as Exhibit 1.

27. On March 24, 2023, TVA's FOIA Officer, Denise Smith, sent an interim response letter (the "Interim Response Letter") notifying SELC that its FOIA request had been placed in Track 3, which is "for the requests that are expected to take the longest time to process." A copy of the Interim Response Letter is attached as Exhibit 2.

28. The Interim Response Letter did not communicate the scope of the documents that TVA intends to produce in response to SELC's FOIA request, as is required to be considered a valid "determination" under FOIA.

29. The Interim Response Letter did not invoke any statutory exemptions under FOIA for any of the records responsive to SELC's FOIA request.

30. The Interim Response Letter indicated that TVA had not yet conducted a search for, or a preliminary review of, any records responsive to SELC's FOIA request.

31. On September 22, 2023, SELC contacted Ms. Smith by email requesting an update on its FOIA request. SELC noted that a TVA official had stated during a webinar on the previous day that TVA had completed a study that appeared to be the Energy Programs Potential Study. Ms. Smith did not respond to this email.

32. On October 25, 2023, SELC followed up with Ms. Smith to again request an update on its FOIA request. SELC offered that if TVA’s final production of documents was not yet complete, it would accept a tiered FOIA response in lieu of receiving all responsive records at the same time. Under this tiered response, SELC proposed that TVA send the latest version of the Energy Programs Potential Study in the first phase, followed by all other responsive records in the second phase.

33. Ms. Smith responded to SELC on November 2, 2023, stating: “I don’t have anything on this one right now that I can provide you, but I followed up with the team that is collecting the information[,] and they believe they can complete [the request] by the end of this month.”

34. On November 28, 2023—the end of the month—SELC requested another update from Ms. Smith, asking whether either phase of the tiered response was ready to be released. At this point, it had been more than nine months since SELC initially filed its FOIA request.

35. On November 30, 2023, Ms. Smith responded to SELC that “[t]he staff is completing their search for the material this week. . . . I should be able to let you know something next week on time frame.”

36. In response, SELC again requested a two-part phased response from TVA on November 30, 2023.

37. After receiving no substantive response in the following week, SELC requested another update from Ms. Smith on December 11, 2023. Ms. Smith did not respond, and no one at TVA, including Ms. Smith, has communicated with SELC regarding its FOIA request since November 30, 2023.

38. A copy of all email communications between SELC and TVA related to the FOIA request is attached as Exhibit 3.

39. It has now been over one year since SELC submitted its FOIA request related to the Energy Programs Potential Study.

40. TVA is currently preparing an updated Integrated Resource Plan (“IRP”), which is a long-term plan that includes information and projections about how TVA will meet electricity demand in the region. The IRP is part of a “least-cost planning program” designed to ensure adequate and reliable electricity service at the “lowest system cost.” 16 U.S.C. § 831m-1(b)(1). A key requirement is that this process must “treat demand and supply resources on a consistent and integrated basis.” *Id.* § 831m-1(b)(2)(C).

41. As TVA prepares its updated IRP and advances its methane gas plants and pipelines through permitting, the agency shields its own evaluation of whether cost-effective, emissions-free resources could meet energy demand without building new power plants and pipelines. TVA’s failure to disclose the Energy Programs Potential Study frustrates SELC’s and the public’s ability to assess the agency’s compliance with its core statutory obligation: to provide adequate and reliable electricity service at the lowest system cost.

SELC’s Constructive Exhaustion of Administrative Remedies

42. SELC has constructively exhausted its administrative remedies because TVA has failed to make a “determination” on its FOIA request within the statutory time period. 5 U.S.C. § 552(a)(6)(A), (C).

43. TVA has not communicated the scope of the records it intends to produce in response to SELC’s FOIA request.

44. TVA has not invoked a FOIA exemption for any of the records responsive to SELC’s FOIA request.

45. TVA has not provided a schedule of production for the records responsive to SELC's FOIA request.

46. TVA has not released any records responsive to SELC's FOIA request.

47. TVA has not notified SELC of the right to appeal an adverse determination on its FOIA request within the agency.

48. TVA's placement of SELC's FOIA request in Track 3 does not constitute an adequate "determination" under FOIA because TVA did not gather and review responsive documents, determine and communicate the scope of the documents it intends to produce and withhold and the reasons for withholding any documents, and inform SELC that it can appeal whatever portion of the determination is adverse.

49. TVA has failed to adhere to the 20-day deadline required by FOIA to make a satisfactory determination, thereby precluding the agency from relying on the administrative exhaustion requirement to keep this matter out of court.

CLAIM FOR RELIEF

COUNT ONE:

Improper Withholding of Records Responsive to SELC's FOIA Request

50. SELC incorporates by reference all preceding paragraphs of this Complaint as if fully stated herein.

51. More than 20 working days have passed since the submission of SELC's FOIA request.

52. TVA has violated FOIA by failing to make a "determination" on SELC's FOIA request as required by 5 U.S.C. § 552(a)(6)(A).

53. TVA has violated FOIA by failing to conduct a reasonable search for records responsive to SELC's FOIA request as required by 5 U.S.C. § 552(a)(3)(C).

54. TVA has violated FOIA by failing to provide SELC with all non-exempt records responsive to SELC's FOIA request.

55. By failing to make a "determination," conduct a reasonable search for records, and provide SELC with all non-exempt records responsive to its FOIA request, TVA has violated SELC's right to information as provided under FOIA.

56. Unless it is enjoined by this Court, TVA will continue to violate SELC's legal right to be timely provided with the information SELC asked for in its FOIA request.

57. SELC is directly and adversely affected and aggrieved by TVA's failure to provide responsive records to its FOIA request, as described above.

REQUEST FOR RELIEF

Wherefore, Plaintiff SELC respectfully requests that this Court:

A. DECLARE that TVA has violated and is continuing to violate FOIA by failing to make a timely "determination" on SELC's request;

B. DECLARE that TVA has violated and is continuing to violate FOIA by failing to conduct an adequate search for records in response to SELC's request;

C. DECLARE that TVA has violated and is continuing to violate FOIA by failing to provide SELC with all non-exempt documents responsive to SELC's request;

D. ORDER TVA to search for and provide all non-exempt, responsive documents to SELC without further delay;

E. ORDER TVA to produce an index identifying any documents or parts thereof that it intends to withhold and the basis for the withholdings pursuant to 5 U.S.C. § 552(a)(8) and (b), in the event TVA determines certain responsive records are exempt from disclosure;

F. RETAIN jurisdiction over this matter to rule, if necessary, on the adequacy of TVA's search for responsive documents or on assertions by the agency that any responsive documents are exempt from disclosure;

G. AWARD Plaintiff its reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(5)(E);

H. GRANT Plaintiff any other relief the Court deems just and proper.

Respectfully submitted this 27th day of February, 2024.

**SOUTHERN ENVIRONMENTAL LAW
CENTER**

/s/ O. W. "Trey" Bussey _____

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Pro hac vice application forthcoming

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