

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HUSCH BLACKWELL LLP)
1801 Pennsylvania Avenue NW, Suite 1000)
Washington, DC 200006,)
)
Plaintiff,)

v.)

Civil Action No. _____

DEPARTMENT OF COMMERCE,)
1401 Constitution Ave NW)
Washington, DC 20230,)

and)

BUREAU OF INDUSTRY AND SECURITY,)
1401 Constitution Ave NW)
Washington, DC 20230,)

Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Husch Blackwell LLP (“Husch Blackwell”) states the following for its Complaint against Defendants Department of Commerce (“Commerce”) and Bureau of Industry and Security (“BIS”) (collectively, the “Agency”):

NATURE OF ACTION

1. Husch Blackwell brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the Agency’s failure to fulfill Husch Blackwell’s September 27, 2023 FOIA requests for copies of the final proposals in support of the decision by the End-User Review Committee (“ERC”) to place Yangtze Memory Technologies Corporation (“YMTC”) and Yangtze Memory Technologies Corporation (Japan) (“YMTJ”) on the Entity List maintained by BIS.

2. Husch Blackwell seeks declaratory and injunctive relief finding the Agency is in violation of FOIA for failing to produce the requested records and ordering the Agency to completely and immediately comply with Husch Blackwell's FOIA requests. Additionally, Husch Blackwell seeks attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

PARTIES

3. Husch Blackwell is a Wisconsin limited liability partnership with its principal places of business in Missouri.

4. Commerce is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1) and oversees economic matters in the United States, including, but not limited to, international trade matters.

5. BIS is an agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1) that is within and under the jurisdiction of Commerce. BIS is responsible for publishing the Entity List, which subjects enumerated foreign entities to export restrictions and licensing requirements.

JURISDICTION AND VENUE

6. This Court has both subject matter and personal jurisdiction over the parties and claims pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

7. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

STATEMENT OF FACTS

8. The Agency is tasked with maintaining the Entity List, which identifies foreign entities where the Agency finds "there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States. . . ." 60 Fed. Reg. 77,505 (Dec. 19, 2022).

9. Under the Export Administration Regulations (“EAR”), placement on the Entity List subjects the entity to specific license requirements for the export, reexport, and/or transfer (in-country) of specified items. *Id.* These additional license requirements represent significant and costly restrictions on trade in the United States for entities placed on the Entity List, including a presumption of denial for all items subject to the EAR. *Id.*

10. The ERC, which comprises of the Departments of Commerce (as Chair), State, Defense, Energy, and Treasury, makes all decisions regarding additions and removal from the Entity List. *Id.*

11. Upon information and belief, before voting to place an entity on the Entity List, the ERC receives a final proposal setting forth the “specific and articulable facts” recommending whether or not an entity should be placed on the Entity List. *Id.* This final proposal often includes attachments, such as exhibits or appendices, that are incorporated in the final proposal.

12. On December 19, 2022, the Agency published a final rule adding YMTC and YMTJ to the Entity List. *Id.*; *see also* 15 C.F.R. Part 744.

13. In support of this decision, the Agency stated that it placed YMTC and YMTJ on the Entity List “based on information indicating that these companies present a risk of diversion to parties on the Entity List, to include Huawei Technologies Co., Ltd., and Hangzhou Hikvision Digital Technology Co., Ltd.” 60 Fed. Reg. 77,505 (Dec. 19, 2022). The Agency concluded “[t]his activity is contrary to the national security or foreign policy interests of the United States under § 744.11(b) of the EAR.”

14. Upon information and belief, the ERC received a final proposal for YMTC and a final proposal for YMTJ, likely with attachments, exhibits, or appendices, that set forth the reasons and justifications for placing YMTC and YMTJ on the Entity List.

15. On September 27, 2023, Husch Blackwell submitted a narrowly tailored FOIA request to BIS requesting only “a copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the End-User Review Committee (“ERC”) in support of the decision to place Yangtze Memory Technologies Corporation (“YMTC”) on the BIS Entity List.” The YMTC FOIA request stated that it was seeking these records from BIS “as both in its capacity as Chair of the ERC and in its capacity as an individual member of the ERC.” A true and correct copy of the September 27, 2023 YMTC FOIA request is attached hereto as **Exhibit A**.

16. Additionally, Husch Blackwell submitted an almost identical, but separate, narrowly tailored FOIA request to BIS on September 27, 2023 seeking only “a copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the End-User Review Committee (“ERC”) in support of the decision to place Yangtze Memory Technologies Corporation (Japan) (“YMTJ”) on the BIS Entity List.” Like the YMTC FOIA request, the YMTJ also stated that it was seeking these records from BIS “as both in its capacity as Chair of the ERC and in its capacity as an individual member of the ERC.” A true and correct copy of the September 27, 2023 YMTJ FOIA request is attached hereto as **Exhibit B**.

17. On September 27, 2023, Husch Blackwell also submitted ten separate FOIA requests to the various members of the ERC, including the Departments of Commerce, State, Defense, Energy, and Treasury. All ten of these FOIA requests were similarly narrow in scope and only sought a copy of the final proposal and accompanying attachments, exhibits, or appendices that were submitted to the ERC in support of the decision to place YMTC and YMTJ on the Entity List.

18. Under FOIA, the agencies had 20 working days to furnish a response. None of the agencies provided a final response to Husch Blackwell's request within the 20-day period.

19. Commerce, Energy, State, and Treasury eventually forwarded their respective FOIA requests to BIS, and Defense has yet to issue a response. True and correct copies of the communications from Commerce, Energy, State, Treasury, and Defense are attached hereto as **Exhibit C**.

20. BIS did not provide a final response until January 26, 2024—nearly four months after the FOIA request was made.

21. Although BIS identified 553 pages of “responsive documents pertinent to [YMTC/YMTJ's] request[s],” BIS stated that it was withholding the records in full, that is, denying both YMTC and YMTJ an opportunity to view the justification for their inclusion on the Entity List, under the following FOIA Exemptions: (b)(1) for national security information; (b)(3) for materials protected under another statute, specifically Section 1761(h) of the Export Control Reform Act of 2018 “which protects information concerning export license applications;” (b)(5) for “inter-agency or intra-agency” government documents which are both pre-decisional and deliberative (including materials protected under the attorney work-product privilege and the attorney-client privilege), and (b)(6) for personal private information. A true and correct copy of the January 26, 2024 BIS final decision letter is attached hereto as **Exhibit D**.

22. Pursuant to 15 C.F.R. § 4.10(a) and the BIS final decision letter, Husch Blackwell appealed BIS's FOIA decision with respect to its FOIA requests within the 90-day deadline on February 26, 2024. A true and correct copy of the Husch Blackwell appeal is attached hereto as **Exhibit E**.

23. Husch Blackwell's appeal set forth a statement of the reasons why the records should be made available and why the BIS's FOIA decision was in error. *See* Ex. E.

24. Husch Blackwell submitted the FOIA appeal more than six months ago and contacted the Agency on the following dates about the status of the FOIA appeal: March 26, 2024, April 1, 2024, April 22, 2024, April 24, 2024, May 22, 2024, May 31, 2024, June 20, 2024, July 15, 2024, and July 24, 2024. True and correct copies of those communications are attached as **Exhibit F**.

25. Despite Husch Blackwell's numerous attempts to contact the Agency, Husch Blackwell has yet to receive a final decision on its appeal from the Agency even though the Agency was required to respond within 20 working days under 15 C.F.R. § 410(e).

26. Pursuant to 15 C.F.R. § 410(e), the Agency's failure to issue an appeal within 20 working days means that YMTC has exhausted all administrative remedies with respect to its FOIA requests, giving rise to a right of judicial review under 5 U.S.C. 552(a)(6)(C).

COUNT I
Declaratory and Injunctive Relief for Violation of FOIA, 5 U.S.C. § 552

27. Husch Blackwell re-alleges and incorporates by reference all preceding paragraphs.

28. Husch Blackwell properly requested records in its September 27, 2023 FOIA requests and the requested records are within the Agency's custody and control.

29. The Agency has failed to: (1) produce any of the records pursuant to Husch Blackwell's FOIA requests; and (2) has not offered sufficient justification in support of its decision to withhold the requested documents.

30. The Agency, by failing to produce and improperly withholding the requested agency records, has violated FOIA's plain language. *See* U.S.C. § 552(a)(3)(A) (stating that an agency "shall make the records promptly available to any person").

31. Husch Blackwell has exhausted all applicable administrative remedies with respect to the Agency's failure to respond to the FOIA requests. *See* 5 U.S.C. § 552(a)(6)(C).

32. Accordingly, Husch Blackwell is entitled to injunctive and declaratory relief with respect to the disclosure and release of the records pursuant to the FOIA requests.

WHEREFORE, Husch Blackwell respectfully requests that the Court order the Agency to produce the records responsive to the September 27, 2023 FOIA requests for both Yangtze Memory Technologies Corporation and Yangtze Memory Technologies Corporation (Japan); order all search and duplication fees waived; order the Agency to pay the reasonable attorneys' fees and litigation costs incurred in pursuing this action under 5 U.S.C. § 552 (a)(4)(E); and grant such other and further relief that may appropriate.

Dated this 25th day of September 2024.

Respectfully submitted,

/s/ George E. Stewart

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