

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|-----------------------------|---|------------|
| NATURAL RESOURCES DEFENSE |) | |
| COUNCIL, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| UNITED STATES ENVIRONMENTAL |) | 17-cv-3519 |
| PROTECTION AGENCY, |) | ECF Case |
| |) | |
| Defendant. |) | |
| |) | |

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendant United States Environmental Protection Agency (EPA) is violating the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by failing to disclose responsive records requested by plaintiff Natural Resources Defense Council (NRDC).

2. Since his nomination as EPA Administrator, many observers have questioned Scott Pruitt’s ability to be impartial with respect to the public health and environmental protections that EPA must implement and enforce. This case involves several simple document requests seeking information about Administrator Pruitt’s compliance with ethical rules and whether he is favoring stakeholders that share his ideology concerning regulatory matters.

3. On February 22, 2017, NRDC submitted a FOIA request to EPA for documents related to the agency’s February 17 press release announcing Pruitt’s

“Ascension.” The statutory deadline to produce the requested documents was March 22. EPA has not produced any records to NRDC in response to this request.

4. On March 9, 2017, NRDC submitted a FOIA request to EPA for records that disclose Pruitt’s involvement, if any, in two pleadings filed by EPA in ongoing litigation over the Clean Water Rule in which Oklahoma is a party. The statutory deadline to produce the requested documents was April 6. EPA has not produced any records to NRDC in response to this request.

5. On April 3, 2017, NRDC submitted a FOIA request to EPA asking for the memo or memos referenced by Pruitt during a radio interview and describing the agency’s settlement and consent decree policies, as well as documents and communications related to the memo and its subject. The statutory deadline to produce the requested documents was May 1. EPA has not produced any records to NRDC in response to this request.

6. On April 10, 2017, NRDC submitted a FOIA request to EPA asking for records that illustrate Pruitt’s participation in, recusal from, or receipt of an ethics waiver to participate in litigation—or other particular matters involving specific parties—in which the State of Oklahoma is a party, and names of staff who have participated in such cases. The statutory deadline to produce the requested documents was May 8. EPA has not produced any records to NRDC in response to this request.

7. NRDC seeks a declaration that EPA has violated FOIA by failing to provide final determinations as to whether it will comply with NRDC’s requests and

by failing to produce responsive documents by the statutory deadlines. NRDC seeks an injunction ordering EPA to disclose without further delay all non-exempt, responsive records to NRDC.

THE PARTIES

8. Plaintiff NRDC is a national, non-profit environmental and public health membership organization with hundreds of thousands of members nationwide. NRDC engages in research, advocacy, public education, and litigation related to protecting public health and the environment.

9. Defendant EPA is a federal agency within the meaning of FOIA, 5 U.S.C. § 551(1), and has possession or control of the records that NRDC seeks.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

11. Venue is proper in this district because plaintiff NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

STATUTORY FRAMEWORK

12. FOIA requires that federal agencies release, upon request, information to the public, unless one of nine statutory exemptions applies. 5 U.S.C. § 552(a)-(b).

13. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. *Id.*

§ 552(a)(6)(A)(i). The agency must "immediately notify" the requester "of such determination and the reasons therefor." *Id.* If an agency determines that it will

comply with the request, it must “promptly” release responsive, non-exempt records to the requester. *Id.* § 552(a)(6)(C)(i).

14. If the agency fails to comply with the statutory time limits, the requester is deemed to have exhausted her administrative remedies and may immediately file suit. *Id.* District courts may enjoin an agency from withholding agency records and “order the production of any agency records improperly withheld.” *Id.* § 552(a)(4)(B).

FACTUAL BACKGROUND

REQUEST REGARDING THE “ASCENSION” PRESS RELEASE

15. On February 17, 2017, EPA released a public statement titled, “Job Creators, American Energy Producers, Farmers and Elected Officials Cheer Scott Pruitt’s Ascension to EPA Administrator.” The press release included quotes from politicians and industry trade group representatives who denigrated the agency as “tone deaf,” “rogue,” and a “runaway bureaucracy.” The quotes praised Pruitt for fighting EPA in the past, and for restoring “regulatory sanity.”

16. NRDC filed a FOIA request with the agency on February 22, seeking documents and communications related to this press release, including drafts and comments on the drafts, as well as communications with outside parties regarding the statements contained in the release. NRDC requested that the agency waive any fees for the search and production of the requested records, pursuant to FOIA’s and EPA’s fee waiver provisions. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

17. EPA assigned this request, submitted online, the tracking number EPA-HQ-2017-004161. An identical copy of this request was also mailed to the agency, and EPA assigned it tracking number EPA-HQ-2017-004364.

18. In a letter to NRDC dated March 2, 2017, and referencing tracking number -4364, EPA wrote that NRDC's request did not reach the minimum billable amount and so no charges would be associated with processing it. NRDC received a similar letter dated March 16, associated with tracking number -4161. The letters stated that the Administrator's Office would respond to the document request.

19. There have been no further communications from EPA about this request, and EPA has not produced any responsive documents to NRDC. The statutory deadline to produce the requested documents was March 22.

REQUESTS REGARDING PRUITT'S PARTICIPATION IN PARTICULAR
MATTERS INVOLVING OKLAHOMA

20. On June 29, 2015, EPA issued a rule titled "Clean Water Rule: Definition of 'Waters of the United States.'" 80 Fed. Reg. 37,054. Many parties sued EPA to challenge the rule, including the State of Oklahoma by its then Attorney General, Scott Pruitt. Lawsuits filed in the courts of appeals were consolidated in the Sixth Circuit. NRDC is a party to these consolidated proceedings.

21. Pruitt became EPA Administrator on February 17, 2017, and on the same day resigned from his position as Oklahoma Attorney General. On March 6, 2017, attorneys for EPA filed (1) a notice in the Sixth Circuit Clean Water Rule case (6th Cir. No. 15-3751) about a recent Executive Order regarding the Clean Water Rule; and (2) a notice and motion in the Supreme Court Clean Water Rule case (S.

Ct. Case No. 16-299)—where the Court is considering a preliminary procedural issue—notifying the Court of the Executive Order and requesting that the briefing schedule be held in abeyance.

22. NRDC filed a FOIA request with the agency on March 9, seeking records that disclose Pruitt's involvement, if any, in these two pleadings, including whether he sought a waiver from EPA's ethics officer in order to participate, and whether he was disqualified. NRDC requested that the agency waive any fee it would otherwise charge for the search and production of these records.

23. EPA assigned this request tracking number EPA-HQ-2017-004720. In a letter dated March 16, 2017, EPA granted the fee waiver request and wrote that EPA's Office of General Counsel would respond to the document request.

24. There were no further substantive communications from EPA about this request, and EPA has not produced any responsive documents to NRDC. The statutory deadline to produce the requested documents was April 6.

25. NRDC filed another FOIA request with the agency on April 10, 2017, seeking records that disclose Pruitt's involvement, if any, in any litigation or other particular matter involving specific parties in which EPA and Oklahoma are parties (including, but not limited to, the Clean Water Rule cases). The request seeks documents indicating whether Pruitt sought a waiver from EPA's ethics officer and whether he was disqualified. The request also seeks records indicating the names of EPA staff who have participated in such cases since January 20, 2017. NRDC

requested that the agency waive any fee it would otherwise charge for the search and production of these records.

26. EPA assigned this request tracking number EPA-HQ-2017-005963. In a letter dated April 27, 2017, EPA granted the fee waiver request and wrote that EPA's Office of General Counsel would respond to the document request.

27. Representatives of defendant and plaintiff exchanged voicemails about this request on May 5 and May 8, but EPA has neither responded to the substance of the request in writing nor produced any responsive documents to NRDC. The statutory deadline to produce the requested documents was May 8.

REQUEST REGARDING SETTLEMENT POLICY MEMOS

28. On March 29, in an interview conducted by the radio host Hugh Hewitt, Pruitt said, "one of the things we've done internally, Hugh, is send a memo out to our regions and also to headquarters to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended. And we've sent that out across the agency."

29. NRDC filed a FOIA request with the agency on April 3, seeking the memo or memos described in Pruitt's statement, as well as documents and communications related to the memos, and communications with outside parties on the subject matter of the memos. NRDC requested that the agency waive any fee it would otherwise charge for the search and production of these records.

30. EPA assigned this request tracking number EPA-HQ-2017-005678. In a letter dated April 26, 2017, EPA granted the fee waiver request and wrote that EPA's Administrator's Office would respond to the document request.

31. There have been no further communications from EPA about this request, and EPA has not produced any responsive documents to NRDC. The deadline to produce the requested documents was May 1.

CLAIM FOR RELIEF

32. Plaintiff incorporates by reference all preceding paragraphs.

33. NRDC has a statutory right under FOIA to obtain immediately all records responsive to its requests that are not exempt from disclosure.

34. EPA violated its statutory duty under FOIA, 5 U.S.C. § 552(a), to release all non-exempt, responsive records to NRDC.

REQUEST FOR RELIEF

Plaintiff respectfully requests that this Court enter judgment against EPA as follows:

A. Declaring that EPA has violated FOIA by failing to produce non-exempt records responsive to NRDC's FOIA requests by the statutory deadlines;

B. Ordering that EPA disclose the requested records to NRDC without further delay;

C. Retaining jurisdiction over this case to rule on any assertions by EPA that certain responsive records are exempt from disclosure;

- D. Ordering EPA to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event that EPA determines that certain responsive records are exempt from disclosure;
- E. Awarding Plaintiff its costs and reasonable attorneys' fees; and
- F. Granting such other relief that the Court considers just and proper.

Respectfully submitted,

/s/ Catherine Marlantes Rahm

Catherine Marlantes Rahm
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
T: (212) 727-4628
F: (415) 795-4799
crahm@nrdc.org

Counsel for Plaintiff

Dated: May 11, 2017