

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

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 17-1622

U.S. DEPARTMENT OF THE TREASURY,
1500 Pennsylvania Avenue NW
Washington, DC 20220

Defendant.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of the Treasury under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have constructively exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining

Defendant from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan non-profit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of the Treasury (Treasury) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). Treasury has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

The May 5 FOIA Request

7. On May 5, 2017, American Oversight submitted a FOIA request to Treasury seeking access to the following records:

All communications between Treasury and Congressman Jeb Hensarling, any other member of the House Financial Services Committee, or any staff member working for either the House Financial Services Committee or one of its members concerning proposed legislation or administrative actions related to financial regulation.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

A copy of the May 5 request is attached hereto as Exhibit A and incorporated herein.

8. Treasury assigned the May 5 request tracking number 2017-05-163.

9. On June 7, 2017, American Oversight wrote to Treasury and requested that Treasury expedite the processing of the May 5 request under 31 C.F.R. § 1.5(e)(2)(ii).

10. On June 8, 2017, Treasury informed American Oversight that it had granted the request for expedited processing of the May 5 request.

The May 11 FOIA Request

11. On May 11, 2017, American Oversight submitted a FOIA request to Treasury seeking access, *inter alia*, to the following records:

- a) All communications relating to the opinion of Committee Chairman Jeb Hensarling that communications between the House Financial Services Committee and federal agencies are not subject to disclosure under the Freedom of Information Act, including but not limited to instructions, directives, or guidance received on this issue from Chairman Hensarling or his staff, as well as internal agency correspondence on the issue. Please provide all responsive records from January 20, 2017, to the date the search is conducted.
- b) Any memoranda, policies, rules, protocols, restrictions, directives, guidance, or other guidelines addressing how [the agency] responds to FOIA requests that implicate communications with Congress or records created at the request of Congress. Please do not limit the date of the search for records responsive to this portion of American Oversight's FOIA request.

A copy of the May 11 request is attached hereto as Exhibit B and incorporated herein.¹

12. Treasury assigned the May 11 request tracking number 2017-05-210.

¹ The May 11 request also requested a similar, but slightly broader, set of records to those sought in the May 5 request. However, in the interest of streamlining the requests for ease of processing, American Oversight has since withdrawn that portion of its May 11 request. Accordingly, the operative requests for purposes of this litigation are quoted in paragraphs 7 and 11 of this Complaint.

Both FOIA Requests Sought Agency Records

13. Both FOIA requests referred to a letter sent from House Financial Services Committee Chairman Jeb Hensarling to Treasury Secretary Steve Mnuchin asserting that all communications between the Committee and Treasury related to “legislative, oversight, and investigative matters” are “congressional records” rather than “agency records” for purposes of FOIA requests.

14. Both FOIA requests requested that Treasury inform American Oversight if it withheld any records responsive to the requests on the grounds that they are congressional records and not subject to disclosure under FOIA, because American Oversight intended to litigate whether that is a proper basis for withholding records.

15. The records sought by American Oversight’s FOIA requests were either created or obtained by Treasury.

16. Treasury was in control of the records sought by American Oversight’s requests at the time the request was made.

17. The records sought by American Oversight’s FOIA requests relate to Treasury agency business.

18. On information and belief, the records sought by American Oversight’s FOIA requests were used by Treasury in the course of conducting agency business.

19. On information and belief, some or all of the Treasury officials in possession of the requested records had the authority and discretion in practice to determine whether to circulate the records to other Treasury officials.

20. On information and belief, some or all of the Treasury officials in possession of the requested records had the authority and discretion in practice to determine whether to circulate the records to officials at other executive branch agencies or in the White House.

21. On information and belief, some or all of the Treasury officials in possession of the requested records had the authority and discretion in practice to determine how to use the records.

22. On information and belief, Treasury officials have read or relied upon the requested records.

23. The records sought by American Oversight's FOIA requests were in the physical custody of Treasury, contained in Treasury systems of records, or contained in Treasury information systems at the time the requests were made.

24. On information and belief, the requested records were integrated in Treasury's record systems or files at the time the requests were made.

25. On information and belief, Treasury did not maintain the requested records in files segregated from other Treasury agency records at the time the requests were made.

Exhaustion of Administrative Remedies

26. As of the date of this Complaint, Treasury has failed to (a) notify American Oversight of any determination regarding the requests, including the scope of any responsive records Treasury intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

27. Through Treasury's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Records

28. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

29. American Oversight properly requested agency records within the possession, custody, and control of Treasury.

30. Treasury is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

31. Treasury has failed to promptly review agency records for the purpose of locating those records which are responsive to American Oversight's requests.

32. Treasury's failure to conduct adequate searches for responsive records violates FOIA.

33. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Treasury to promptly make reasonable efforts to search for records responsive to American Oversight's May 5 and May 11 FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Records

34. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

35. American Oversight properly requested agency records within the possession, custody, and control of Treasury.

36. Treasury is an agency subject to FOIA and must therefore release in response to a FOIA request any disclosable records and provide a lawful reason for withholding any materials.

37. Treasury is wrongfully withholding agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

38. Treasury's failure to provide all responsive agency records violates FOIA.

39. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Treasury to promptly produce all non-exempt agency records responsive to its May 5 and May 11 FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to conduct a search reasonably calculated to uncover all records responsive to American Oversight's May 5 and May 11 FOIA requests;
- (2) Order Defendant to produce, by such date as the Court deems appropriate, any and all non-exempt agency records responsive to American Oversight's May 5 and May 11 FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's May 5 and May 11 FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

(5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: August 11, 2017

Respectfully submitted,

/s/ Sara Kaiser Creighton

Sara Kaiser Creighton

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