

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

NATURAL RESOURCES DEFENSE )  
COUNCIL, INC., )  
1152 15<sup>TH</sup> Street NW, Suite 300 )  
Washington, DC 20005, )

Plaintiff, )

v. )

CIVIL ACTION NO. 17-2734

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
1200 Pennsylvania Avenue NW )  
Washington, DC 20260, )

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. Upon receiving FOIA requests from the public, EPA must produce non-exempt records promptly. EPA sought to delay responding to at least two of NRDC's recent FOIA requests beyond the statutory deadline so that the agency could conduct what it called an "awareness review." This case involves a document request seeking information about the nature of these awareness reviews.

3. On September 5, 2017, NRDC submitted a FOIA request to EPA for documents related to any awareness review of FOIA requests or responses. The statutory deadline for EPA to notify NRDC if it would produce the requested documents was October 3. EPA has not produced any records to NRDC in response to this request, and has not indicated whether or how it intends to respond.

4. NRDC seeks a declaration that EPA has violated FOIA by failing to provide a final determination as to whether it will comply with NRDC's request and by failing to produce responsive documents by the statutory deadline. NRDC seeks an injunction ordering EPA to disclose without further delay all non-exempt, responsive records to NRDC.

#### **THE PARTIES**

5. 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.

6. 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**

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

8. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

## STATUTORY FRAMEWORK

9. 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).

10. 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).

11. An agency may seek an extension to the statutory deadline in the event of "unusual circumstances." *Id.* § 552(a)(6)(B)(i). To invoke this exception, however, the agency must provide the requester with written notice setting forth the unusual circumstances and the date by which the agency expects to respond to the request. *Id.*

12. If the agency fails to comply with the statutory time limit, the requester is deemed to have exhausted her administrative remedies and may immediately file suit. *Id.* § 552(a)(6)(C)(i). District courts may "enjoin the agency from withholding agency records" and "order the production of any agency records improperly withheld." *Id.* § 552(a)(4)(B).

## FACTUAL BACKGROUND

13. On at least two recent occasions, EPA has sought to delay production of documents responsive to NRDC FOIA requests so that the agency could conduct

what its representatives called an awareness review. FOIA, EPA's FOIA regulations, and publicly available documents describing EPA's FOIA procedures make no reference to awareness reviews.

14. NRDC filed a FOIA request with EPA on September 5, 2017, seeking documents and communications, dating back to January 1, 2017, related to any awareness review carried out while processing a FOIA request. The requested records include, *inter alia*, documents that identify EPA's policies governing awareness reviews, criteria for selecting responses subject to review, and the time required to complete these reviews.

15. NRDC also requested that the agency waive any search and production fees, 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).

16. EPA assigned this request the tracking number EPA-HQ-2017-011126.

17. In a letter to NRDC dated September 18, 2017, EPA granted NRDC's fee-waiver request and stated that the Administrator's Office would respond to the information request.

18. In a September 28, 2017 email, EPA wrote that "unusual circumstances" necessitated an extension to its statutory response deadline. EPA anticipated that it would need to "search for and collect the requested records from multiple EPA offices," and that the request "may require consultation with another agency having a substantial interest in the determination of the request."

19. The email did not provide an estimated date for responding to NRDC's request.

20. The email also invited NRDC to discuss the scope of its request with EPA. On September 28, 2017, NRDC's counsel and EPA staff discussed the scope of the request by phone. NRDC clarified that it was seeking records generated between January 1 and September 5, 2017. EPA did not provide an estimated response date during the phone call.

21. On November 20, 2017, in response to an email from NRDC seeking an update on the status of the request, EPA stated in an email that the agency had a significant backlog of FOIA requests and that it could not provide an estimated response date.

22. EPA has not produced any responsive documents to NRDC. The statutory deadline for EPA's response was October 3.

#### **CLAIM FOR RELIEF**

23. Plaintiff incorporates by reference all preceding paragraphs.

24. NRDC has a right under FOIA to receive a response to its request by the statutory deadline, which has passed.

25. NRDC has a right under FOIA to receive promptly all non-exempt records responsive to its request.

26. 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

NRDC 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 request by the statutory deadline;
- B. Ordering EPA to release the requested records to NRDC without further delay;
- C. Ordering EPA to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event EPA determines that certain responsive records are exempt from disclosure;
- D. Retaining jurisdiction over this case to rule on any relevant claims concerning the scope of EPA's obligations under FOIA;
- E. Awarding NRDC its costs and reasonable attorneys' fees; and
- F. Granting such other relief that the Court considers just and proper.

Respectfully submitted,

/s/ Peter J. DeMarco  
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Dated: December 21, 2017