

FILED
May 30, 2018

JULIA C. DUDLEY, CLERK
BY: /s/ J. JONES
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:18-cv-00037

SOUTHERN ENVIRONMENTAL LAW
CENTER

Plaintiff,

v.

MICK MULVANEY, in his official capacity
as Director of the Office of Management and
Budget,

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This Freedom of Information Act (“FOIA”) suit challenges Defendant Office of Management and Budget’s (“OMB” or the “agency”) unlawful and unreasonable delay in responding to requests for information relating to the proposed reorganization of agencies of the federal government responsible for the management of public lands.

2. Plaintiff Southern Environmental Law Center (“SELC”), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, requested information in OMB’s custody on November 9, 2017.

3. While OMB acknowledged receipt of the request on November 14, 2017, it has failed to provide requested information or a determination or otherwise respond to the request, and it has subsequently stopped communicating with SELC.

4. OMB has violated FOIA by failing to “promptly” provide requested information and make a determination within 20 working days of receiving a request. 5 U.S.C.

§ 552(a)(3)(A), (a)(6)(A). SELC seeks a declaration that OMB has violated FOIA and an order requiring OMB to provide all nonexempt, responsive documents without further delay.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

6. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiff is “deemed to have exhausted [its] administrative remedies” because OMB has “fail[ed] to comply with the applicable time limit provisions.”

7. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

PARTIES

Plaintiffs

8. Plaintiff Southern Environmental Law Center, Inc. (“SELC”) is a 501(c)(3), nonprofit public interest environmental law firm 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 the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information.

SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

Defendant

11. The Office of Management and Budget is an “agency” for purposes of FOIA. 5 U.S.C. § 551(1). OMB has possession or control of the requested information.

FACTS

Background

12. On March 17, 2017, Executive Order 13781 instructed each federal agency head, within 180 days, to “submit to the Director [of OMB] a proposed plan to reorganize the agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency.” The Executive Order also required OMB to solicit public comments on “improvements in the organization and functioning of the executive branch” and thereafter to “submit to the President a proposed plan to reorganize the executive branch”

13. Executive Order 13781’s instructions to agency heads was applicable to, *inter alia*, the agencies of the executive branch responsible for the management of federal public lands, including the United States Forest Service, the National Park Service, the Bureau of Land Management, and the United States Fish and Wildlife Service (hereinafter Public Lands Management Agencies).

14. Already executive branch officials have publicly forecasted major reorganizations of Public Lands Management Agencies¹ and have made staff changes and reassignments within

¹ *E.g.*, Fiscal Year 2019: The Interior Budget in Brief, February 2018, at DH-19 (stating that Interior is requesting \$17.5 million for reorganization efforts) *available at* https://edit.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf.

the Public Lands Management Agencies.²

15. Reorganization of Public Lands Management Agencies is a matter of significant public interest, drawing public comment from many stakeholders and organizations, including Plaintiff, who care about protecting the ability of the Public Lands Management Agencies to manage federal public lands effectively for the benefit of local economies, clean water, wildlife and fisheries, wilderness, and recreation.

16. While some information about proposed reorganizations has been obtained by the media,³ much of the information requested by Plaintiff remains unavailable, leaving the public in the dark about plans that could affect the ability of Public Lands Management Agencies to provide public benefits.

SELC's FOIA Request

17. On November 9, 2017, SELC submitted to OMB a FOIA request seeking “all records in the custody or control of OMB submitted in connection with Executive Order 13781 by any agency responsible for the management of federal public lands,” specifically including the United States Forest Service, the National Park Service, the Bureau of Land Management, and the United States Fish and Wildlife Service. The request encompassed “the required reports along with any appendices, attachments, or enclosures, as well as any other related records, whether draft or final.” A copy of this FOIA request is attached as Exhibit 1.

² For example, the Washington Post reported in April 2017, “Interior Secretary Ryan Zinke is reassigning dozens of top career officials within his ranks, a shake-up that appears to be the start of a broad reorganization of a department that manages one-fifth of all land within the United States.” Eilperin and Rein, Zinke moving dozens of senior Interior Department officials in shake-up, June 16, 2017 *available at* https://www.washingtonpost.com/politics/zinke-moving-dozens-of-senior-interior-officials-in-shake-up/2017/06/16/11801d3a-5295-11e7-b064-828ba60fbb98_story.html?noredirect=on&utm_term=.3a348e7c10b7.

³ E.g., Streater and Doyle, “Maps reveal Zinke plans for historic overhaul,” E&E News, January 10, 2018 *available at* <https://www.eenews.net/stories/1060070663/>.

18. SELC submitted this request to promote transparency around a matter of significant public interest.

19. SELC requested waiver of any fees on the basis that disclosure of the information would be in the public interest.

20. On November 15, 2017, OMB confirmed receipt of SELC's FOIA request as of November 14, 2017, and assigned it reference number 2018-61.

21. On January 2, 2018, SELC called Dionne Hardy in OMB's FOIA office to inquire about the request's status. Ms. Hardy acknowledged that the request was due and indicated other requesters had sought the same information. Ms. Hardy stated she would check internally on the request's status.

22. On March 6, 2018, SELC telephoned Ms. Hardy and left a detailed message, which was not returned.

23. On March 19, SELC again telephoned Ms. Hardy and left a detailed message noting that a response was long overdue, which was not returned.

24. Subsequent to the conversation with Ms. Hardy on January 2, 2018, SELC has received no communication from OMB related to the request.

25. To date, OMB has not provided any documents responsive to SELC's request.

26. More than 20 working days have passed since SELC submitted this request.

LEGAL BACKGROUND

27. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check

against corruption and to hold the governors accountable to the governed.” *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

28. “[T]he time provisions of the Act are central to its purpose.” *Hayden v. U.S. Dep’t of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to “promptly” make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must “determine . . . whether to comply” with a request within 20 working days of receiving the request, and they must “immediately notify” the requester of that determination. *Id.* § 552(a)(6)(A).

29. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

30. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. *Id.* § 552(a)(6)(B).

31. Under EPA regulations and FOIA, if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 40 C.F.R. § 2.104(d); 5 U.S.C. § 552(a)(6)(B)(ii).

CLAIMS FOR RELIEF

32. Plaintiffs incorporate by reference paragraphs 1 through 31 of this Complaint as if fully stated herein.

33. Defendant OMB has violated FOIA by failing to provide SELC with all non-exempt responsive records for its FOIA request.

34. By failing to provide SELC with all non-exempt responsive records to its FOIA request, Defendant OMB has denied SELC's right to this information as provided by law under the Freedom of Information Act.

35. Unless enjoined by this Court, Defendant OMB will continue to violate SELC's legal right to be provided with copies of the records that it has requested in its FOIA request.

36. SELC is directly and adversely affected and aggrieved by Defendant OMB's failure to provide responsive records to its FOIA request as described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (i) Declare that OMB has violated and is continuing to violate FOIA by failing to timely respond to SELC's request;
- (ii) Declare that EPA has violated and is continuing to violate FOIA by improperly withholding documents that are responsive to SELC's request;
- (iii) Direct OMB to provide all nonexempt, responsive documents to SELC without further delay;
- (iv) Retain jurisdiction over this matter to rule on any assertions by OMB that any responsive documents cannot be found or are exempt from disclosure;

- (v) Order OMB to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b), in the event that OMB determines that certain responsive records are exempt from disclosure;
- (vi) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
- (vii) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 30th day of May, 2018.

/s/ Morgan Butler
Morgan Butler– VA Bar No. 70409

/s/ Kimberley Hunter
Kimberley Hunter – NC Bar No. 41333 (*pro hac vice*
pending)

/s/ Sam Evans
Sam Evans – NC Bar No. 44992 (*pro hac vice* pending)

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