

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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|---------------------------------------|---------------------------|
| MIDDLE EAST FORUM |) |
| 1500 Walnut Street, Suite 1050 |) |
| Philadelphia, PA 19102 |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) Civil Action No. |
| |) |
| US DEPARTMENT OF |) |
| THE TREASURY |) |
| 1500 Pennsylvania Ave. NW |) |
| Washington, D.C. 20220 |) |
| |) |
| Defendant. |) |

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff MIDDLE EAST FORUM (“MEF”) for its complaint against Defendant US DEPARTMENT OF THE TREASURY (“the Agency” or “Treasury”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production of records in response to a FOIA request to USAID submitted August 25, 2017.
2. Treasury has improperly denied the request by failing to provide an initial determination in accordance with *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
3. Plaintiff requested fee waivers for the request, as provided by FOIA, due to the public interest in the information the records address and, expressly in the alternative, the media and educational status of the requester.
4. Plaintiff expressly noted the search terms and probable locations of the records it was seeking as well as describing the significant public interest in these records.

4. Treasury has not given plaintiff any estimate the volume of records responsive to the request, nor a date by which responsive records would be produced, nor has it responded to plaintiff's request for a fee waiver.
5. Treasury therefore has failed to properly respond to plaintiff's request.
6. Accordingly, plaintiff files this lawsuit to compel the USAID to comply with the law and produce the properly described public records in these FOIA requests.

PARTIES

7. Plaintiff Middle East Forum ("MEF") has been and independent tax exempt 501(c) (3) nonprofit organization based in Philadelphia since 1994. MEF promotes American interests in the Middle East and protects Western values from Middle Eastern threats. The Forum sees the region - with its profusion of dictatorships, radical ideologies, existential conflicts, border disagreements, corruption, political violence, and weapons of mass destruction- as a major source of problems for the Unites States. Accordingly, MEF urges bold measures to protect Americans and their allies. In the Middle East MEF focuses on ways to defeat radical Islam; work for Palestinian acceptance of Israel; develop strategies to contain Iran; and deal with the great advances of anarchy. At home MEF emphasizes the dangers of Islamism; protects the freedoms of anti-Islamist authors, and publishers; and works to improve Middle East studies.
8. Defendant US Department of the Treasury ("Treasury") is a federal agency headquartered in Washington, DC.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this is brought in the District of Columbia, and because the defendant maintains offices in the District of Columbia. Furthermore, jurisdiction is proper under 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
11. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because FOIA grants the District Court of the District of Columbia jurisdiction, and because defendant is a federal agency.

FACTUAL BACKGROUND

12. On July 12, 2018 plaintiff submitted a FOIA requests to USAID, seeking communications concerning a grant given to World Vision Inc.
13. Plaintiff specified that the award ID was AID-OFDA-G-14-00023-001 and that the request sought information concerning the sub-grantee Islamic Relief Agency based in Khartoum, Sudan.
14. Plaintiff further explained that they specifically sought “*document, or series of documents, authorizing a one-time sub grant of \$125,000 to ISRA, believed by requesters to have been made by the Office of Foreign Assets Control (OFAC) in May of 2015.*”
15. Plaintiff provided a specific description of the documents assist the agency in locating records, and noted the types of records it was seeking, specifically “*relevant authorizing forms, memos, communications (including, but not limited to, emails, memos, meeting notes, letters, phone records, or similar materials),*” related to USAID grant AID-OFDA-G-14-00023-001, and the subsequent OFAC license granted to World Vision to pay designated charity ISRA.

16. Plaintiff also noted that the documents being sought were most likely located in the Office of Foreign Asset Control (OFAC), or the office of the Under Secretary of the Treasury for Terrorism and Financial Intelligence.

Defendant's Reply and Subsequent Proceedings

17. On August 1, 2018 FOIA, Treasury sent plaintiff an acknowledgment letter via electronic mail. This letter indicated that there were “unusual circumstances,” that would require an additional 10 days, as granted by the FOIA statute. It made no determination as to a fee waiver. The letter was signed by Cawana Pearson FOIA Case Manager, FOIA and Transparency.
18. On August 8, 2018 plaintiff received what appeared to be a second acknowledgement letter via electronic mail. It claimed that OFAC had a “substantial backlog” and said it dealt with requests in a “first in, first out,” basis. The letter did not give a determination, nor did it provide an estimated date by which a determination would be reached. The letter was signed by Sara Elizabeth Moss, Senior FOIA Reviewer.
19. The letter of August 8, 2018 also stated that plaintiff had been determined to be a “media requester”, but also claimed that a determination as to a fee waiver was moot since the cost would be de minimis. It also assigned the request number No. 2018-07-149 to plaintiff's request.
20. On August 8, 2018, Clifford V. Smith of the Middle East Forum, who filed the request, contacted plaintiff by email. In this email, Smith stated that he was sympathetic to Treasury's concerns, and stated that Treasury still had a number of days to meet their statutory obligations under 5 U.S.C § 552(6)(A)(i), which gives agencies twenty days to respond, and acknowledged the “unusual circumstances” under the FOIA law,

specifically 5 U.S.C § 552(6)(B)(iii), which gave the agency an additional ten days to respond. As a result, Smith stated he expected a determination by Treasury by September 20, 2018, which would be 30 full business days since Treasury received the request, and would under “unusual circumstances” be the date to which plaintiff was statutorily required to provide a determination.

21. On August 9, 2018, Treasury contacted Smith by email asking if he would be willing to discuss the issue on the phone on the morning of August 13, 2018. Smith replied that same day that he would not be able to discuss the issue by phone on that date, but would be available the afternoon of August 14, 2018.
22. On August 10, 2018, via email, Treasury accepted Smith’s invitation to call him to discuss the issue on the afternoon of August 14, 2018.
23. On August 14, 2018, at approximately 3pm, Smith received a call from Mr. Marshall Fields, Assistant Director Information Disclosure and Records Management at Treasury as previously scheduled.
24. On the phone call of August 14, 2018. Fields recapped the aforementioned emails in conversation with Smith, indicating Treasury was very busy various FOIA requests. Smith stressed he wasn’t seeking a production of documents by September 30, 2018, but a substantive determination under the statute, as interpreted by *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). Fields indicated the statute was originally passed in 1966, had not been updated by Congress, and Treasury thus could not comply with the statute.
25. Smith then informed Fields requesters had filed another FOIA request with the United States Agency on International Development (USAID) on the same date, and that USAID

had prioritized requester's request given the extraordinary public interest in this particular grant and was working to get a determination even before the legally required date (which was, in fact, done by USAID). Fields reiterated his original stance.

26. Finally, Smith stated to Fields that while plaintiffs would not give up their legal rights, he would negotiate in good faith to get a date estimate by which Treasury would provide a substantive response, even outside the legally required date of September 20, 2018.

Fields refused to negotiate a date by which Treasury would fulfil its legal obligations, even outside the statutorily required deadline.

27. On August 15, 2018, Smith sent an email to Fields summarizing the phone call to Fields.

In this email, he summarized the above and expressed surprise at the fact that Treasury was openly flouting the statutory deadline, nor even attempting to negotiate a later date by which plaintiffs could expect a determination.

28. On August 16, 2018, Fields responded to Smith via email. In this email, Fields stated he disagreed with Smith's summation of the phone call. Nonetheless, he admitted that the statute required a date by which Treasury would dispatch a determination, although he specifically said he would not provide a date by which Treasury would issue a determination. Fields said he had attempted to provide plaintiffs with a "realistic" timeframe but provided no timeframe, nor even a rough estimate of a timeframe. Fields also said that Treasury would comply with the statute, but simultaneously indicated that Treasury would not meet the statutory deadline. Fields indicated that a schedule of production was not required, nor would Treasury provide one. Fields offered various reasons for Treasury's position, but cited no law that would allow for it, nor did he offer

to negotiate for a date outside the statutory deadline that plaintiff could expect a determination.

29. Also on August 16, 2018, Smith responded to Fields via email. In this email Smith expressed “confusion,” as to Treasury’s position, as it seemed to simultaneously say Treasury will fulfill its obligations under the statute, but would not meet the statutorily mandated deadline to provide a legally sufficient determination. Smith reiterated that if Treasury were to provide a legally sufficient determination by September 20, 2018, there was no dispute between plaintiff and Treasury. Smith further reiterated plaintiff’s offer to negotiate a reasonable deadline outside of September 20, 2018 deadline by which Treasury would provide a determination.
30. Treasury did not reply to Smith’s email of August 16, 2018, nor has there been any further contact between plaintiffs and Treasury.
31. Treasury has failed to provide a schedule of production, or otherwise comply with FOIA’s requirements “within 20 working days of receiving the request, or within 30 working days in ‘unusual circumstances.’” *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
32. By failing to respond to plaintiff’s request in the required time in violation of statutory deadlines, defendant has also waived any ability to now seek fees.
33. Plaintiff has constructively and actually exhausted the administrative process as regards this request, because of Treasury’s failure to abide by FOIA’s statutory deadlines, or even to negotiate with plaintiff for a later date by which Treasury might meet FOIA’s requirements.

ARGUMENTS

24. Transparency in government is the subject of high-profile executive branch promises arguing forcefully against agencies failing to live up to their legal record-keeping and disclosure obligations.
25. Under the Freedom of Information Act, after an individual submits a request, an agency must determine within 20 working days after the receipt of any such request whether to comply with such request, or 30 days under “unusual circumstances,” which Treasury has claimed 5 U.S.C.S. § 552(a)(6)(A)(i) & § 552 (a)(6)(B)(i). Under *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), that response must provide particularized assurance of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. This 20-working- day time limit also applies to any appeal. § 552(a) (6)(A)(ii).
26. U.S. Code 5 U.S.C.S. § 552(a)(6)(A) proclaims that the 20-day (or 30-day under “unusual circumstances”) time limit shall not be tolled by the agency except in two narrow scenarios: The agency may make one request to the requester for information and toll the 20-day (or 30-day) period while it is awaiting such information that it has reasonably requested from the requester, § 552(a)(6)(A)(ii)(I), and agencies may also toll the statutory time limit if necessary to clarify with the requester issues regarding fee assessment. § 552(a)(6)(A)(ii)(II). Neither situation presents itself in this case.
27. In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011) this Court noted: “[The effect of] the 2007 Amendments was to impose consequences on agencies that do not act in good faith or otherwise fail to comport with FOIA’s requirements. See S. Rep. No. 110-59. To underscore Congress's belief in the importance of the statutory time limit,

the 2007 Amendments declare that ‘[a]n agency shall not assess search fees... if the agency fails to comply with *any time limit*’ of FOIA” (*emphasis added*).

28. Defendant Treasury owes plaintiffs records responsive to the requests at issue in this suit, which request reasonably described the information sought and was otherwise filed in compliance with applicable law, subject to legitimate withholdings, and has failed to provide responsive records or any substantive response in violation of statutory deadlines.
29. Further, plaintiff notes that defendant has waived fees and/or waived its ability to assess fees under § 552(a)(4)(A)(viii) by failing to substantively respond to plaintiffs within the statutory deadline(s). The Treasury, therefore, has waived all fees and must produce the requested documents as required by law.

FIRST CLAIM FOR RELIEF Seeking Declaratory Judgment

28. Plaintiff re-alleges paragraphs 1-29 as if fully set out herein.
29. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business, because defendant has failed to substantively respond pursuant to *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
30. Plaintiff asks this Court to enter a judgment declaring that:
 - A. Treasury records as specifically described in FOIA request No. 2018-07-149 is subject to release under FOIA;
 - B. Treasury must release those requested records or segregable portions thereof subject to legitimate exemptions;
 - C. Treasury may not assess or seek costs and fees for the request at issue in this case, as plaintiffs are entitled to a waiver of their fees.

SECOND CLAIM FOR RELIEF Seeking Injunctive Relief

34. Plaintiff re-alleges paragraphs 1-33 as if fully set out herein.
35. Plaintiff is entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiff's FOIA requests, without fees, subject to legitimate withholdings.
36. Plaintiff asks the Court to order the defendant to produce to plaintiffs, within 30 business days of the date of the order, the requested records described in plaintiffs' FOIA request, subject to legitimate withholdings.
37. Plaintiff asks the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 30 days after plaintiffs receives the last of the produced documents, addressing defendant's preparation of a *Vaughn* log and a briefing schedule for resolution of remaining issues associated with plaintiffs' challenges to defendant's withholdings and any other remaining issues.

THIRD CLAIM FOR RELIEF Seeking Costs and Fees

38. Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.
39. Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
40. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of defendant's refusal to fulfill the FOIA request at issue in this case.
41. Plaintiff asks the Court to order the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 2nd day of January, 2019.

By Counsel:

A handwritten signature in black ink, appearing to read "Cliff Smith". The signature is written in a cursive style with a large initial "C" and "S".

Clifford V. Smith
Washington Project Director - Middle East Forum
csmith@meforum.org, (202) 730-9793
Maryland State Bar # 201106150244