

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH)	
1101 15th Street, N.W.)	
Washington, D.C. 20005,)	
)	
Plaintiff,)	
)	
v.)	Civ No.
)	
NATIONAL OCEANIC AND)	
ATMOSPHERIC ADMINISTRATION)	
1401 Constitution Ave. NW, Room 5128)	
Washington, D.C. 20230,)	
)	
and)	
)	
UNITED STATES DEPARTMENT OF)	
COMMERCE)	
1401 Constitution Ave. NW)	
Washington, D.C. 20230)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the United States Department of Commerce and its National Oceanic and Atmospheric Administration (“NOAA”) to release non-exempt records concerning funding decisions for marine finfish aquaculture projects made pursuant to the National Sea Grant College Program’s 2018 Ocean, Coastal, and Great Lakes National Aquaculture Initiative (“Sea Grant”). These records are essential to efforts by Plaintiff Friends of the Earth (“FOE”) to monitor and educate the public regarding NOAA’s use of federal funds to promote finfish aquaculture, which poses a wide array of significant risks to ocean ecosystems, threatened and endangered species, and public health. Accordingly, Plaintiff FOE has been attempting to gain

access to the requested records for over a year—far longer than the twenty working day statutory deadline for processing FOIA requests. However, despite this extensive delay, and despite Plaintiff FOE filing a successful administrative appeal challenging NOAA’s wholesale withholding of records, neither NOAA nor Commerce has produced any non-exempt responsive records.

JURISDICTION

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

PARTIES

3. Plaintiff FOE is a non-profit organization headquartered in Washington, D.C. For more than forty years, it has championed the causes of a clean and sustainable environment, protection of the nation’s public lands and waterways, and the exposure of political malfeasance and corporate greed. FOE is the requester of the records at issue.

4. Defendant NOAA administers the Sea Grant program and is a federal agency with possession of the records at issue.

5. Defendant Commerce is the parent agency of NOAA and is accordingly a federal agency with possession of the records at issue.

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS

A. Aquaculture, Sea Grant Funding, and Environmental Impacts

6. Aquaculture is the farming of underwater organisms, like mollusks, crustaceans, and fish. “Offshore aquaculture” or “marine finfish aquaculture” is essentially the mass cultivation of finfish in the ocean in underwater nets, pods, or cages.

7. According to NOAA, aquaculture is one of the fastest growing forms of food production in the world. NOAA states that aquaculture produces almost half of the seafood that humans eat.

8. NOAA also stresses that although the United States consumes a great deal of seafood produced through aquaculture, the United States itself produces only a small percentage of that seafood. For this reason, NOAA dedicates significant amounts of taxpayer money towards the promotion of a domestic aquaculture industry. For example, in 2016, NOAA announced that Sea Grant would invest between \$50 million and \$100 million toward aquaculture research over a ten-year period.

9. The Sea Grant program provides annual grants to aquaculture projects. For example, in 2018, Sea Grant awarded \$11 million to 22 separate aquaculture projects. The Sea Grant Program has also announced the availability of at least \$9 million in grant funding for 2019.

10. Aquaculture, and especially offshore finfish aquaculture, has serious adverse environmental impacts. For example, because offshore aquaculture projects often use pens, pods, or cages that have no impermeable barrier between the farmed fish and the open ocean, these projects may release contaminants into the ocean, such as fish waste, parasites, excess feed, chemicals, and drugs administered to the fish. Likewise, farmed fish may themselves escape the aquaculture projects and cause harm to native ocean plants and animals, including threatened or endangered species. Additionally, offshore aquaculture presents serious entanglement, habitat exclusion, marine debris, and behavioral alterations risks to marine mammals, sea turtles, and seabirds.

11. FOE is extremely concerned that NOAA's Sea Grant program is expending taxpayer dollars to promote marine finfish aquaculture projects without devoting adequate consideration to the environmental impacts of this agency action, which is required under various major federal environmental laws, including the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act.

12. FOE routinely monitors, evaluates, and informs the public regarding the environmental impacts and social costs associated with aquaculture. To that end, FOE utilizes its website, a quarterly news magazine, fact sheets, press statements, and other means to engage and educate its members and the public regarding the impacts of aquaculture and the federal government's activities in promoting aquaculture. For example, FOE has published a thorough report, *The Dangers of Industrial Ocean Fish Farming*, which is available on its website alongside a number of fact sheets and infographics on the subject.

B. The Freedom of Information Act

13. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citations omitted). FOIA was enacted to "permit access to official information long shielded unnecessarily from public view" by creating a "right to secure such information from possibly unwilling official hands." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). "[D]isclosure, not secrecy, is the dominant objective of the Act." *John Doe*, 493 U.S. at 152 (citation omitted).

14. FOIA requires agencies of the federal government to conduct a reasonable search for requested records and to release them to a requester, unless one of nine specific statutory exemptions applies to the requested information. 5 U.S.C. § 552(a)(3), (b).

15. FOIA requires federal agencies to release all non-exempt segregable information that is requested. *Id.* § 552(b).

16. Upon receiving a FOIA request, an agency generally has twenty working days to respond, *id.* § 552(a)(6)(A)(i), and twenty working days to respond to any appeal of its initial determination, *id.* § 552(a)(6)(A)(ii).

17. A requester has exhausted administrative remedies “if the agency fails to comply” with either twenty-day deadline. *Id.* § 552(a)(6)(C)(i). In that event, FOIA authorizes the requester to invoke the jurisdiction of a federal court to obtain the requested information. *Id.* § 552(a)(4)(B).

C. Friends of the Earth’s FOIA Requests

18. Due to its concerns about marine finfish aquaculture’s adverse environmental impacts and the degree to which NOAA’s Sea Grant Program may be promoting these types of aquaculture projects without the legally required consideration of the adverse impacts, on April 3, 2018, Plaintiff FOE submitted a FOIA request to NOAA. FOE’s FOIA request sought “all records pertaining to any applications or proposals for certain finfish aquaculture projects submitted” to the Sea Grant program, and specifically “all applications or proposals for marine aquaculture projects involving the culturing, rearing, and/or harvesting of finfish species in the ocean, which have been received pursuant to the Sea Grant.”

19. NOAA assigned this FOIA request the tracking number DOC-NOAA-2018-001106.

20. On September 25, 2018, NOAA informed FOE that it had identified 115 records responsive to FOE's request. However, NOAA also asserted that "the information contained in these records is exempt from disclosure, under Exemption 4, 5 U.S.C. § 552(b)(4), which prohibits the disclosure of information that would harm identifiable private or governmental interests." NOAA withheld all responsive records in their entirety, and advised FOE of its right to file an administrative appeal.

21. On October 12, 2018, FOE filed a timely administrative appeal. FOE's appeal explained that NOAA had entirely failed to substantiate its exemption claim, thus failing to carry its burden of justifying the withholding of records. Likewise, FOE explained that FOIA requires any agency that asserts an exemption to identify and release any reasonably segregable, non-exempt information, and that NOAA had entirely failed to do so.

22. On December 17, 2018, NOAA contacted FOE to confirm receipt of FOE's administrative appeal and to request that FOE narrow its FOIA request.

23. Also on December 17, 2018, FOE narrowed its request via an email to NOAA's FOIA Officer. FOE's narrowed request focused on "all records pertaining to any applications or proposals related to marine finfish aquaculture projects or activities that were selected for Sea Grant funding as part of the 2018 program." FOE further clarified that this request "would include the applications themselves (understanding that some redacting may need to take place) as well as all agency discussions of those applications (especially any environmental reviews, consultations, or assessments that were conducted or discussed)."

24. On April 19, 2019, the Department of Commerce issued a final response to FOE's administrative appeal. In that response, the Department of Commerce confirmed that FOE's appeal was timely. The Department of Commerce also explained that the 115 responsive records

identified and withheld in NOAA's response to FOE's FOIA request "represent the totality of proposals submitted for the grant" through the Sea Grant program in 2018. In other words, the Department of Commerce found that NOAA's identification of 115 responsive records was incorrect, as that number referred to all proposals submitted to Sea Grant—rather than to all records related to proposals for marine finfish aquaculture that were selected for Sea Grant funding, which was what Plaintiff FOE requested.

25. The Department of Commerce then explained that in 2018, Sea Grant received only 29 proposals related to finfish aquaculture and that the Department considered these 29 proposals to be the only ones responsive to FOE's FOIA request. The Department then found that 20 proposals related to finfish aquaculture were not selected for Sea Grant funding, and elected to withhold the entirety of those documents as "pre-decisional and deliberative, and protected in their entirety from disclosure by FOIA Exemption 5." In so reasoning, the Department of Commerce misconstrued FOE's FOIA request, as narrowed by FOE in emails with NOAA's FOIA officer. The narrowed request relates only to those finfish aquaculture proposals that were selected for funding. Accordingly, although the Department of Commerce is incorrect to assert FOIA Exemption 5 to withhold the unfunded requests in their entirety, FOE is not challenging that aspect of the Department's appeal response.

26. With regard to the 9 finfish aquaculture proposals that were selected for Sea Grant funding in 2018, the Department of Commerce granted FOE's administrative appeal. As to those proposals, the Department of Commerce agreed that NOAA acted unlawfully by withholding records in full. However, the Department asserted that Exemptions 4 and 5 of FOIA may apply to certain information in the records related to those 9 funded proposals. Accordingly, the Department of Commerce remanded the records related to those 9 funded proposals to NOAA

“for a fuller consideration of the segregability of exempt from non-exempt information, pursuant to FOIA Exemptions 4 and 5, and for a reanalysis of the foreseeable harm in releasing deliberative process material within the proposals.”

27. In responding to FOE’s appeal, the Department of Commerce did not identify the number of responsive records or explain which records the agencies would produce or withhold. Accordingly, the Department of Commerce’s response to FOE’s FOIA request does not constitute a “determination” of the type that FOIA requires in response to any FOIA request.

28. More than twenty working days have elapsed since the Department of Commerce remanded FOE’s FOIA request to NOAA for further processing. In that time, FOE has not received any communication from NOAA regarding the request at issue.

29. Neither NOAA nor the Department of Commerce has provided any information responsive to FOE’s FOIA request, nor a determination as to what information will be produced and what information will be withheld.

PLAINTIFF’S CLAIMS FOR RELIEF

30. By failing to provide FOE all non-exempt information that Plaintiff FOE has requested under FOIA, NOAA and the Department of Commerce are in violation of FOIA, 5 U.S.C. § 552(a)(3).

31. Plaintiff FOE has a right to obtain the requested information, and NOAA and the Department of Commerce have no lawful basis for withholding it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that NOAA and the Department of Commerce are in violation of FOIA;

2. Order Defendants to immediately release to Plaintiff all non-exempt information responsive to Plaintiff's FOIA request at issue in this case;
3. Award Plaintiff its costs and attorneys' fees; and
4. Award Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Elizabeth L. Lewis
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