



## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

### I. NATURE OF ACTION

1. The Center for Food Safety (CFS)—a nonprofit public interest and environmental advocacy organization working to protect public health and the environment—brings this civil action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging the U.S. Environmental Protection Agency (EPA)'s unlawful withholding of records concerning the nature of EPA's decision-making process in regards to its registration of XtendiMax.

2. CFS filed a FOIA request with EPA to gain a better understanding of EPA's regulatory decisions pertaining to the registration, use, and labeling of pesticides generally, and XtendiMax specifically. The goal of the request was to open the operations and activities of government to public scrutiny and contribute significantly to the public's understanding of the agency's actions.

3. EPA is violating FOIA by failing to produce records in response to CFS's FOIA request, failing to conduct an adequate search for responsive records, and by failing to provide both an initial determination as to the scope of the records to be produced or withheld, and an estimated date by which the agency's search will be complete.

4. EPA's unlawful withholding of public records undermines FOIA's basic purpose of government transparency. Because prompt access to these records is necessary to effectuate FOIA's purpose, CFS seeks declaratory relief establishing that EPA is in violation of FOIA, and injunctive relief directing EPA to provide responsive records without any further delay.

## **II. JURISDICTION AND VENUE**

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which expressly provides a venue for FOIA cases in the District Court of the District of Columbia.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201.

8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

## **III. PARTIES**

9. Plaintiff CFS is a national 501(c)(3) nonprofit public interest and environmental advocacy organization that empowers people, supports farmers, and protects the environment. CFS is a membership based nonprofit organization with over 970,000 members that works to address the impacts of the food system on public health, animal welfare, and the environment. Through nearly two decades of involvement in public interest and environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS employs science and policy experts who have analyzed FOIA, other federal environmental laws, and other environmental and scientific reports for their entire careers. CFS puts out reports on a range of food and agricultural topics, including specifically pesticides and other topics that tend to be difficult for the layperson to understand without

professional assistance. CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms of pesticides, including specific Xtendimax and dicamba pesticides, to pollinators, public health, and the environment. CFS and its members are harmed by EPA's violations of FOIA, as such violations preclude CFS from gaining a full understanding of the decision-making process regarding the underlying agency actions, and prevent CFS from disseminating information to the public concerning EPA's oversight of the registration, use, and labeling of pesticides.

10. Defendant EPA is an agency within the Executive Branch of the United States Government. EPA is in possession and control of the records that CFS seeks, and is an agency within the meaning of 5 U.S.C. § 552(f)(1). EPA is therefore subject to FOIA.

#### **IV. LEGAL BACKGROUND**

11. The basic purpose of FOIA is to promote government transparency and public oversight of agency action. The statute effectuates this objective by establishing the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed exemptions. 5 U.S.C. § 552(b)(1)-(9).

12. FOIA imposes stringent deadlines on federal agencies with regard to making initial determinations in response to FOIA requests. Within twenty working days of receiving a FOIA request, an agency must determine whether it will release the requested records, and must notify the requester of its determination, the reasons for its decision, and the requester's right to appeal an adverse decision to the head of the agency. *Id.* § 552(a)(6)(A).

13. Congress has specified certain limited instances in which federal agencies may extend this twenty-working-day deadline. First, an agency may toll the deadline to

seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii). Second, in “unusual circumstances” an agency may extend the deadline no more than ten additional working days by providing written notice to the requester that sets forth the circumstances justifying the extension. *Id.* § 552(a)(6)(B)(i).

14. FOIA requires that a determination under 5 U.S.C. § 552(a)(6)(A) “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

15. For a determination to trigger the administrative exhaustion requirement, the agency must at least “(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* at 188.

16. If the agency fails to respond within the applicable time limit, the requester “shall be deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

17. Such constructive exhaustion<sup>1</sup> “allows immediate recourse to the courts to compel the agency’s response to a FOIA request.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 62, 64 (D.C. Cir. 1990).

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<sup>1</sup> “Constructive exhaustion is determined by the actions (or lack thereof) an agency has taken by the time a suit is filed in the district court.” *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 113 (D.D.C. 2017) (citing *Oglesby*, 920 F.2d at 64).

18. The court “then has the authority to oversee and supervise the agency’s progress in responding to the request.” *Seavey v. DOJ*, Case No. 15–1303, 2017 WL 3112816, at \*2 (D.D.C. July 20, 2017) (citing *Citizens for Responsibility and Ethics in Washington*, 711 F.3d at 189); *see also Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (a court “may use its equitable powers to require the agency to process documents according to a court-imposed timeline.”).

19. FOIA requires each agency to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

20. With regard to production of responsive records, “FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Responsibility and Ethics in Washington*, 711 F.3d at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)).

21. In certain limited instances, an agency may withhold records or portions of records pursuant to nine specific exemptions. 5 U.S.C. § 552(b). These exemptions must be “construed narrowly in keeping with FOIA’s presumption in favor of disclosure.” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

22. FOIA places the burden on the agency to prove that it may withhold responsive records or portions of records from a requester. 5 U.S.C. § 552(a)(4)(B).

23. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

24. In addition, FOIA provides a waiver for fees associated with the procurement of documents subject to FOIA requests. Such fee waivers are granted “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii).

25. Finally, FOIA requires that the agency provide “information about the status of a request . . . including . . . an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii).

## V. FACTUAL BACKGROUND

26. CFS, through its Pollinators & Pesticides Campaign, works to protect pollinators, public health, and the environment from the harm of toxic pesticide use in industrial agriculture, including dicamba and its iteration XtendiMax.

27. On August 31, 2018, CFS submitted a FOIA request to EPA, seeking “[a]ny and all documents, from January 2018 to present, related to any communications between EPA, EPA Acting Administrator Andrew Wheeler, or any other EPA staff with Monsanto Company regarding XtendiMax” (August 31 FOIA Request). CFS explained that release of the requested records was in the public’s best interest because disclosure would significantly contribute to public understanding of the operations or activities of government, and because obtaining the information was of no commercial interest to CFS.

28. An initial determination on the August 31 FOIA Request was due by October 1, 2018, twenty working days after the date CFS submitted the request.

29. On September 10, 2018, EPA granted CFS’s fee waiver request in full.

30. On October 5, 2018, EPA's Office of Pesticide Programs (OPP) sent by email a letter requesting for CFS to clarify or modify its August 31 FOIA Request, reasoning that:

[EPA] will not be able to conduct an electronic console search for the information as [CFS] described. [CFS is] required to identify the EPA staff [CFS] require[s] the Agency to search their personnel emails for potentially responsive records. The IT staff cannot search all [EPA] personnel emails for any specific outside email addresses alone, even for a limited period. [CFS's] request as written would be an undue burden on [EPA's] limited resources. [EPA is] hoping [CFS] could provide names of EPA staff/offices in which [EPA] could limit [its] search for emails and other communications records.

31. On October 10, 2018, CFS replied to EPA's request for clarification or modification of the August 31 FOIA Request with six specific custodians as well as a request for EPA's subject matter experts (SMEs) to provide additional names of staff that would most likely have responsive records. In response, on October 10, 2018, EPA replied that the agency would have its SMEs provide additional staff that would likely have records and get back to CFS when EPA received the additional staff names.

32. CFS sent a follow-up email to EPA on November 2, 2018, asking EPA if the agency had "any additional custodians they thought would be in possession of documents responsive to" CFS's August 31 FOIA Request after EPA failed to provide additional staff.

33. On November 6, 2018, EPA responded apologizing for the delay, provided thirteen additional custodians, and stated that EPA received an "initial evaluation electronic search of emails that has resulted in 6,000 to 10,000 (email families) potentially responsive records." EPA added that it would take six to eight months to process this collection of records if CFS did not narrow its list of nineteen custodians further.

34. On April 15, 2019, CFS emailed EPA to let the agency know that CFS had a new point person for its August 31 FOIA Request. In the same email, CFS requested that



the agency narrow the scope of this request from the list of nineteen custodians to only four custodians: Erik Baptist, Nancy Beck, Charlotte Bertrand, and Andrew Wheeler. Additionally, CFS requested that EPA provide a new estimated date of production given that CFS drastically narrowed the scope of its request to only four custodians.

35. On April 19, 2019, EPA acknowledged receiving CFS's email requesting the agency to narrow the scope of its August 31 FOIA Request to the four named custodians listed above. EPA stated that it would update and work on CFS's request the following week.

36. On May 1, 2019, CFS sent EPA another email following up on this request to narrow its August 31 FOIA Request to those four custodians and again asked that the agency provide CFS with an update and an estimated date of production of responsive records.

37. On May 2, 2019, EPA informed CFS that it narrowed CFS's request to those four custodians and re-conducted the IT search of records that yielded 2,849 records. EPA stated that these records still needed to undergo a FOIA exemption review to determine what records can be released under FOIA and anticipated that this review process would take six months.

38. Over ten months have passed since EPA received the August 31, 2018 FOIA Request, yet EPA has not provided an initial determination in response to the August 31, 2018 FOIA Request, supplied an estimated date of completion, or produced any responsive records.

39. As of the date of this complaint, CFS has received no further communications from EPA.

40. None of FOIA's nine exemptions to the statute's disclosure mandate apply to the records that responsive to the August 31 FOIA Request.

41. CFS has been required to expend resources to prosecute this action.

## **VI. CAUSES OF ACTION**

### **FIRST CAUSE OF ACTION**

#### **Defendant Failed to Comply with FOIA's Mandatory Determination Deadline**

1. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

2. EPA violated FOIA by failing to make a determination on CFS's August 31 FOIA Request. 5 U.S.C. § 552(a)(6).

3. CFS has a statutory right to receive a determination within the congressionally mandated deadline of twenty working days. *Id.*

4. To date—over ten months since CFS filed the August 31 FOIA Request—EPA has not provided a determination, notwithstanding the requirement of 5 U.S.C. § 552(a)(6)(A) of an agency response within twenty working days detailing the scope of the records the agency intends to produce and withhold, the reasons for making that determination, and an explanation of the process by which a requester can administratively appeal that determination.

5. Even accounting for a ten-working-day extension, EPA has still failed to meet the deadline by which an initial determination is required.

6. EPA's failure to make an initial determination with regard to the August 31 FOIA Request, thus unlawfully delaying its response beyond the deadline that FOIA mandates, has prejudiced CFS's ability to timely obtain public records. *Id.* § 552(a)(6)(A)(i).

7. As such, CFS has exhausted the applicable administrative remedies with respect to the August 31 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

8. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

9. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

10. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

**SECOND CAUSE OF ACTION**  
**Defendant Failed to Conduct an Adequate Search for Responsive Records**

11. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

12. EPA violated FOIA by failing to conduct an adequate search for responsive records pursuant to 5 U.S.C. § 552(a)(3)(C)-(D).

13. CFS has a statutory right to have EPA process its August 31 FOIA Request in a manner that complies with FOIA. *Id.*

14. EPA violated CFS's right when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the August 31 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

15. CFS has exhausted the applicable administrative remedies with respect to the August 31 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

16. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

17. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

18. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

**THIRD CAUSE OF ACTION**  
**Defendant Unlawfully Withheld All Responsive Records**

19. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

20. EPA violated FOIA by failing to promptly disclose records that are responsive to CFS's August 31 FOIA Request. 5 U.S.C. § 552(a)(4)(B).

21. CFS has a statutory right to the records it seeks, and there are no applicable exemptions under FOIA that provide a legal basis for EPA to withhold these records from CFS. *See id.* § 552(b)(1)-(9).

22. To date, EPA has not provided any records requested by CFS in the August 31 FOIA Request, notwithstanding the requirement of 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(C) to make agency records "promptly available."

23. As such, EPA is wrongfully withholding disclosure of information sought by CFS, information to which it is entitled and for which no valid disclosure exemption has been claimed. EPA's unlawful withholding prejudices CFS's ability to timely obtain public records.

24. CFS has exhausted the applicable administrative remedies with respect to the August 31 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

25. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

26. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

27. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

**FOURTH CAUSE OF ACTION**  
**Defendant Failed to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records**

28. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

29. EPA violated FOIA by failing to take reasonable steps to segregate and release nonexempt portions of lawfully exempt records in response to the August 31 FOIA Request. 5 U.S.C. § 552(a)(8)(A)(ii)(II).

30. CFS has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. *Id.*

31. To date, EPA has failed to disclose any records to CFS, including nonexempt information that could be reasonably segregated and released in response to the August 31 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

32. CFS has exhausted the applicable administrative remedies with respect to the August 31 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

33. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

34. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

35. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

**FIFTH CAUSE OF ACTION**  
**Defendant Failed to Provide an Estimated Date of Completion as Required by FOIA**

36. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

37. EPA violated FOIA by failing to provide CFS with an estimated date of completion as required by 5 U.S.C. § 552(a)(7)(A)-(B).

38. CFS has a statutory right to have EPA process its August 31 FOIA Request in a manner which complies with FOIA. EPA has violated Plaintiff's rights in this regard by its failure to provide—by any means—an estimated completion date for its response to the August 31 FOIA Request as required by FOIA. 5 U.S.C. § 552(a)(7)(A)-(B).

39. EPA's failure to inform CFS of an estimated completion date for the August 31 FOIA Request has prejudiced CFS's ability to timely obtain public records.

40. CFS has exhausted the applicable administrative remedies with respect to the August 31 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

41. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

42. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

43. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

**REQUESTS FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Defendant to provide a lawful initial determination on Plaintiff's FOIA request as required by FOIA by a date certain;
2. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's August 31 FOIA Request with the cut-off date for searches being the date the searches are conducted, and to provide to Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.
3. Declare that Defendant unlawfully failed to make and communicate an initial determination on Plaintiff's August 31 FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).
4. Declare that Defendant unlawfully failed to undertake a search and disclosure of all records responsive to Plaintiff's August 31 FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).
5. Declare that Defendant unlawfully failed to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption as required by 5 U.S.C. § 552(a)(7)(b).
6. Declare that Defendant unlawfully failed to provide Plaintiff with an estimated date of completion as to the search and production of Plaintiff's August 31 FOIA Request as required by 5 U.S.C. § 552(a)(7)(B)(ii).
7. Provide for expeditious proceedings in this action.
8. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.
9. Grant such other relief as the Court may deem appropriate.

Dated this 3rd day of July, 2019.

Respectfully submitted,

CENTER FOR FOOD SAFETY,

/s/ George A. Kimbrell

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