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7 RP AUTOMOTIVE INC. d/b/a
8 SOCAL PENSKE DEALER GROUP

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

11 RP AUTOMOTIVE, INC. d/b/a
12 SOCAL PENSKE DEALER GROUP,

13 Plaintiff,

14 v.

15 UNITED STATES GENERAL
16 SERVICES ADMINISTRATION,

17 Defendant.
18

CASE NO. 2:19-cv-07473

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF FOR
VIOLATION OF
FREEDOM OF INFORMATION
ACT, 5 U.S.C. § 552**

19
20 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

21 1. Plaintiff RP AUTOMOTIVE, INC. doing business as SOCAL
22 PENSKE DEALER GROUP (“Plaintiff” or “Penske”) brings this action under the
23 Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Declaratory
24 Judgment Act, 28 U.S.C. §§ 2201 and 2202, for declaratory, injunctive and other
25 appropriate relief to enforce its right to federal agency records in the possession of
26 Defendant UNITED STATES GENERAL SERVICES ADMINISTRATION
27 (“GSA”). On February 23, 2018, Penske sought records related to its litigation
28 against Fleet Vehicle Source, Inc. doing business as US Fleet Source (“US Fleet”),

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1 in which Penske asserts, *inter alia*, that US Fleet and its agents have engaged in
2 unfair competition. The GSA violated FOIA by failing to properly respond to
3 Penske’s records requests within the statutorily prescribed time limits, failing to
4 disclose the requested documents, and unlawfully withholding the requested
5 information. At this time—eighteen months after Penske submitted its FOIA
6 requests—the GSA has not provided the requested records or fulfilled its legal
7 obligations under FOIA. Penske now asks the Court to order the GSA to respond
8 to the requests and to disclose all responsive records improperly withheld.

9 **JURISDICTION AND VENUE**

10 2. This Court has jurisdiction over this action pursuant to FOIA,
11 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action as a
12 federal question under 28 U.S.C. § 1331.

13 3. This Court has authority to grant declaratory relief pursuant to the
14 Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

15 4. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391,
16 which provide for venue in the district where the plaintiff has its principal place of
17 business.

18 **PARTIES**

19 5. Plaintiff Penske is a corporation duly organized and existing under the
20 laws of the State of California, with its principal place of business in Downey,
21 California. Penske is engaged in the highly competitive automobile industry and
22 operates a group of car dealerships located throughout Southern California. As
23 part of its business, Penske provides fleet services and the sale of light vehicles to
24 federal, state, and local government agencies.

25 6. Defendant GSA is an independent agency established in the Executive
26 Branch of the United States Government. GSA provides centralized procurement
27 of products and services for the federal government. GSA is an agency within the

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1 meaning of 5 U.S.C. § 552(f)(1). GSA is headquartered at 1800 F Street,
2 Northwest, Washington, DC 20405.

3 **STATUTORY FRAMEWORK**

4 7. FOIA promotes transparency and open government by providing
5 every person with a right to request and receive federal agency records. 5 U.S.C. §
6 552(a)(3)(A) and *Dep't of the Air Force v. Rose*, 425 U.S 352, 361 (1976).

7 8. In furtherance of its purpose to encourage open government, FOIA
8 imposes strict deadlines on agencies to provide responsive documents to FOIA
9 requests. 5 U.S.C. § 552(a)(6)(A).

10 9. An agency must comply with a FOIA request by issuing a
11 determination within 20 business days after receipt of the request, including the
12 date of receipt. 5 U.S.C. § 552(a)(6)(A)(i).

13 10. An agency may be entitled to one extension of ten business days to
14 respond to a FOIA request if it provides written notice to the person making such a
15 request explaining the “unusual circumstances” that warrant additional time along
16 with a date on which a determination is expected to be dispatched. 5 U.S.C. §
17 552(a)(6)(B)

18 11. Upon making its determination within the statutorily prescribed
19 deadlines, an agency must immediately notify the person making the FOIA request
20 of the agency’s determination whether to comply with a request, and the reasons
21 for it, and of the right of such person to appeal an adverse determination. 5 U.S.C.
22 § 552(a)(6)(A)(i).

23 12. The determination “must at least inform the requester of the scope of
24 the documents that the agency will produce, as well as the scope of the documents
25 that the agency plans to withhold under any FOIA exemptions.” *Citizens for*
26 *Responsibility & Ethics in Wash. v. Fed. Election Commission*, 711 F.3d 180, 186
27 (D.C. Cir. 2013).

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1 Penske’s Contract Manager, and was responsible for placing bids on annual fleet
2 contracts. Penske further alleges in the Arbitration that Mr. Durham, while
3 employed by Penske, abused his position of trust and confidence by starting and
4 operating a competing business known as US Fleet. Penske further alleges in the
5 Arbitration that Mr. Durham engaged in direct competition with Penske by
6 diverting existing customers and business opportunities to US Fleet for financial
7 gain and without the knowledge, authorization or consent of Penske. Penske
8 further alleges in the Arbitration that during Mr. Durham’s employment with
9 Penske, and with the assistance of Mr. Clauss, Mr. Durham caused US Fleet to
10 place a bid with the GSA to source light vehicles in 2018, intentionally failed to
11 place a bid with the GSA on behalf of Penske to source the same vehicles, and that
12 the GSA contract was subsequently awarded to US Fleet. Both Mr. Durham and
13 Mr. Clauss worked for Penske until January 2018.

14 19. On or about December 28, 2018, Mr. Durham and Mr. Clauss each
15 filed a complaint against Penske in Superior Court for the County of Los Angeles,
16 Case Nos. 18STCV10010 and 18STCV10021, based primarily on purported
17 violations of California’s labor statutes. On or about February 25, 2019, Penske
18 filed cross-complaints in both actions against Mr. Durham, Mr. Clauss and their
19 new employer, US Fleet, asserting the same claims it had asserted in the
20 Arbitration.

21 20. On or about June 13, 2019, the parties to Los Angeles Superior Court
22 Case Nos. 18STCV10010 and 18STCV10021 filed a stipulation to submit all
23 claims to binding arbitration. On or about August 8, 2019, Mr. Durham and Mr.
24 Clauss filed a demand for arbitration with JAMS, submitting a Consolidated
25 Complaint for Damages against Penske and others. (“Consolidated Action”).

26 21. In anticipation of obtaining crucial evidence relating to the
27 Consolidated Action, on February 23, 2018, Penske submitted to GSA a FOIA
28 request for records concerning the bids and responses to Requests for Proposals

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1 (“RFPs”) that US Fleet submitted to GSA, contracts the GSA had awarded to US
2 Fleet and related communications with US Fleet (“FOIA Request”). A true and
3 correct copy of Penske’s FOIA Request is attached hereto as Exhibit 1 and
4 incorporated herein by this reference. Penske’s FOIA Request consists of six (6)
5 reasonably described categories of records, each of which concerns documents and
6 communications exchanged between the GSA and US Fleet. *Id.*

7 22. Over three months after Penske had submitted the FOIA Request, on
8 May 31, 2018, the GSA, by way of GSA Contracting Officer Dallas W. Brewer,
9 sent its first response. A true and correct copy of the GSA’s May 31, 2018
10 response is attached hereto as Exhibit 2 and incorporated herein by this reference.
11 The GSA’s May 31, 2018 email purported to seek clarification of certain aspects of
12 Penske’s Request. The GSA’s May 31, 2018 email advised that the requested
13 “clarifications are necessary to determine if any documents or communications
14 would be protected by the Procurement Integrity Act or other applicable statute,
15 and whether any reproduction fees will apply depending on the actual scope of the
16 request.” The GSA made clear in its May 31, 2018 email that Penske needed to
17 provide the requested clarifications by June 14, 2018, otherwise the GSA would
18 interpret Penske’s failure to timely respond as Penske “no longer being interested
19 in the matter and [its] FOIA request will be canceled without further notification.”
20 Finally, the GSA explained that its request for clarification “does not constitute a
21 denial of your request.” *Id.*

22 23. On June 6, 2018, Penske sent the GSA a comprehensive response to
23 each of the clarifications the GSA requested in its May 31, 2018 email. A true and
24 correct copy of Penske’s June 6, 2018 response is attached hereto as Exhibit 3 and
25 incorporated herein by this reference. Thereafter, GSA Contracting Officer Dallas
26 Brewer requested a telephone conference with Penske to further discuss the scope
27 of the FOIA Request.

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1 24. On or about June 14, 2018, Penske and GSA discussed the FOIA
2 Request. The GSA proposed that Penske agree to limit the scope of the
3 communications requested in Request Nos. 3 and 6 due to the GSA’s concern that
4 providing a complete response to those requests might be burdensome and require
5 significant time and expense owing to the volume of responsive communications.
6 Specifically, Request No. 3 sought all “communications” with US Fleet concerning
7 “Solicitation No. QMAA-F6-170011-D” and/or “Contract Award No. GS-30F-
8 HA007.” *See* Exhibit 1. Request No. 6 sought all “communications” with US
9 Fleet regarding “any other solicitations or RFP requests of the Agency during the
10 last (12) months.” *Id.* The GSA proposed that Penske limit the scope of Request
11 Nos. 3 and 6 such that the GSA would only need to produce “pre-award”
12 communications it had with US Fleet, instead of producing communications both
13 before and after the dates the GSA had awarded contracts to US Fleet.

14 25. In evaluating the GSA’s request to narrow the scope of the two
15 records requests, Penske asked the GSA to ascertain whether US Fleet had
16 submitted any other bids or RFP responses to the GSA during the relevant
17 timeframe. GSA did not respond to this question. Nonetheless, on June 25, 2018,
18 in an effort to expeditiously obtain some responsive documents, Penske
19 communicated to the GSA its agreement to limit the scope of Request No. 3 to pre-
20 award communications, reserving its right to later seek post-award
21 communications responsive to Request No. 3. A true and correct copy of Penske’s
22 June 25, 2018 email is attached hereto as Exhibit 4 and incorporated herein by this
23 reference. With respect to Request No. 6, Penske again requested that the GSA
24 advise whether US Fleet had submitted any RFP responses other than that relating
25 to the specific solicitation/contract identified in Request No. 3. The GSA did not
26 respond to that question. Instead, it responded on June 26, 2018 that it would
27 “proceed with the process to provide the information as requested.”

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26. On or about July 16, 2018, Penske sent an email to the GSA asking for a date by which the GSA would produce documents responsive to the narrowed FOIA Request. On or about July 17, 2018, the GSA responded by email:

My team is in the process of compiling the documents on file to respond to the amended request. Additionally, I have submitted a request for email pulls (electronic communication w/ U.S. Fleet Source and its agents) to the Chief FOIA Officer for submission to the OCIO's office. I do not know how long it will take for the email pull to be completed. I will follow up with the FOIA office later this week to attempt to get an answer for that element. Once the email pull is completed, the Contracting Officer must scrub the emails to determine what information can be released. Additionally, U.S. Fleet will have an opportunity to review the documents that we anticipate submitting to you to establish potential areas for redaction pursuant to established FOIA exemptions. I will be in touch with you later in the week to report on our progress.

A true and correct copy of the GSA's July 17, 2018 email is attached hereto as Exhibit 5 and incorporated herein by this reference.

27. On or about August 3, 2018, Penske again asked for a date by which the GSA intended to respond to the amended FOIA Request. That same date, GSA Contracting Officer Dallas Brewer responded by email:

Joe submitted the request for the email pull from GSA's CIO's office. To my knowledge, we have not been provided the results of that request. GSA advised that specific request would take time to complete as we would then need to review the documentation upon receipt, review for any exempted information, provide the contractor the right to review any recommended exemptions, and then we can provide to complete the FOIA request.

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1 A true and correct copy of the GSA’s August 3, 2018 email is attached hereto as
2 Exhibit 6 and incorporated herein by this reference.

3 28. Having heard nothing from the GSA since its August 3, 2018 email,
4 Penske sent another email to the GSA on or about October 2, 2018 explaining that
5 the records sought in the FOIA Request are directly relevant to litigation between
6 Penske and US Fleet. A true and correct copy of Penske’s October 2, 2018 email,
7 and the GSA’s October 2, 2018 and November 28, 2018 responses thereto, is
8 attached hereto as Exhibit 7 and incorporated herein by this reference. Penske’s
9 October 2, 2018 email requested that the GSA: (a) provide a timeline for
10 processing responsive documents and (b) immediately produce any “reasonably
11 segregable portion” of the records that are not subject to the FOIA’s exemptions
12 set forth in 5 U.S.C. § 552(b). Penske copied GSA’s FOIA Public Liaison, Audrey
13 Corbett Brooks, on this particular email for the purpose of ensuring the GSA
14 would comply with its statutory obligations. On or about October 2, 2018, the
15 GSA responded by email:

The OCIO’s office still has not given us the emails to review per the original request. That process is not something we can control. We will look tomorrow to review the other items if they can be provided while we wait for the email pull.

20 *See Exhibit 7.*

21 29. Eight weeks later, on or about November 28, 2018, Penske received
22 an email from GSA Contracting Officer Dallas Brewer stating:

Just wanted to give you an update on where we are. The OCIO’s office just today gave us the requested email communications. We have a meeting scheduled for tomorrow to review and at that time GSA will determine a final cost based on the amount of data involved and the man hours needed to review, so we can be responsive to your request. We can then determine if/what parts of the response can be broken out into segregable portions.

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1 Thank you for your patience and will [sic] be in touch by
2 the end of the week.

3 *See Exhibit 7.*

4 30. Penske received no response from the GSA by the end of the week.
5 Instead, over a month later, on or about December 31, 2018, Penske received an
6 email from Katherine Cartoski, the Contract Specialist for the QMAAA:

7 Please be advised that we are compiling the final data for
8 review of your FOIA request GSA-2018-000823 and will
9 follow up with a Fee Assurance letter in the next week.

10 A true and correct copy of the GSA’s December 31, 2018 email is attached hereto
11 as Exhibit 8 and incorporated herein by this reference.

12 31. Penske received no Fee Assurance Letter from the GSA during
13 January of 2019. Penske’s next communication from the GSA was an automatic
14 email message sent to Penske’s counsel from no-reply@foiaonline.gov on
15 February 21, 2019 purporting to summarily dispose of the FOIA Request. That
16 February 21, 2019 message read in pertinent part:

17 Mr. Chris Conti FOIA request GSA-2018-000823 did not
18 respond to the Fee Assurance Letter forwarded to him on
19 January 28, 2019. Specifically, GSA did not receive
20 payment by the due date of February 19, 2019. Since the
21 requester did not respond in a timely manner, the FOIA
22 request has been cancelled.

23 A true and correct copy of the GSA’s February 21, 2019 email as well as the email
24 that Penske sent to Ms. Cartoski of the GSA on the same date, is attached hereto as
25 Exhibit 9 and incorporated herein by this reference.

26 32. Upon receiving the GSA’s erroneous automatic message, Penske
27 immediately forwarded the message to GSA’s Contract Specialist, Katherine
28 Cartoski, on February 21, 2019, advising that Penske had never received the

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1 referenced Fee Assurance Letter and demanding that it be provided a copy of that
2 letter and the opportunity to submit payment. *See* Exhibit 9.

3 33. On February 21, 2019, Penske received an email from Calvin Pittman
4 of the GSA FOIA Office. A true and correct copy of Mr. Pittman’s February 21,
5 2019 email is attached hereto as Exhibit 10 and incorporated herein by this
6 reference. Mr. Pittman apologized for the error and advised that he would “re-
7 open the FOIA request today, re-establish the timeline for 15 business days to
8 reply, and forward the [Fee Assurance Letter/Fee Determination documents to
9 Penske] immediately.” Mr. Pittman further represented that “[o]nce GSA receives
10 a reply from you regarding the fee, the Program Office responding to your FOIA
11 request will begin in full-filling [sic] your FOIA request.” *Id.*

12 34. After receiving the GSA’s Fee Assurance Letter/Fee Determination
13 documents, and in reliance on Mr. Pittman’s assurance that the GSA would begin
14 fulfilling the FOIA request upon receiving the requested payment, Penske
15 promptly tendered payment by check in the requested amount of \$2,161.00 on or
16 about February 28, 2019. Approximately a month later, on or about March 26,
17 2019, Penske received a voicemail from the GSA advising for the first time that the
18 GSA’s response to the FOIA Request had been recently revised and that the GSA
19 was working through the responses and wanted to give Penske an update with
20 respect to the timeline for the GSA’s response. Penske attempted to return the
21 GSA’s call, but could not reach anyone. Penske then sent an email to the GSA on
22 or about April 1, 2019 reminding the GSA that Penske had already paid the
23 requested fee, requesting that the GSA commence production of responsive records
24 on a rolling basis, and asking the GSA to advise regarding (a) the scope of the new
25 “revisions” mentioned during the March 26, 2019 voicemail and (b) a timeframe
26 for completing production of the requested records.

27 35. In April and May of 2019, Penske had multiple telephone discussions
28 with the GSA, during which the GSA represented that it aimed to produce

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1 responsive records by May 24, 2019. On or about May 21, 2019, Penske had a
2 telephone discussion with Katherine Cartoski of the GSA. During that call, Ms.
3 Cartoski advised that the GSA would not be able to meet its production deadline of
4 May 24, 2019, but would produce records on or before May 28, 2019.

5 36. Having received no records from the GSA by the close of business on
6 May 28, 2019, on the evening of May 28, 2019, Penske sent another email to
7 GSA’s Contract Specialist, Ms. Cartoski. A true and correct copy of Penske’s
8 May 28, 2019 email, as well as the GSA’s May 29, 2019 response thereto, is
9 attached hereto as Exhibit 11 and incorporated herein by this reference. Penske
10 again asked the GSA to advise as to when Penske would receive responsive
11 records and by what means those records would be transmitted. Further, Penske
12 explained that the ongoing delays in the GSA complying with its FOIA obligations
13 were resulting in extreme prejudice to Penske. *Id.*

14 37. Penske received an email from GSA’s Contract Specialist, Ms.
15 Cartoski, on or about May 29, 2019:

I’ve reached out to our legal team for a status update on
the release of the FOIA documents to you. I’m waiting
to hear back, and I’ll send you an update on the FOIA
request once I do. I apologize for the delay in response.

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20 *See* Exhibit 11. Ms. Cartoski’s May 29, 2019 email is the most recent
21 communication that Penske received from the GSA concerning the FOIA Request.

22 38. As of the date of this Complaint, Penske has not received a single
23 record from the GSA. As of the date of this Complaint, Penske has not received
24 any indication from the GSA that the GSA is withholding records on the basis that
25 any record falls within one of the exemptions set forth in 5 U.S.C. § 552(b). As of
26 the date of this Complaint, GSA has not notified Penske of any determination
27 regarding the scope of the records that GSA will produce in response to the FOIA
28 Request. A true and correct copy of a screenshot of the information reflected on

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1 the GSA’s FOIAonline Data System as of July 12, 2019 concerning the FOIA
2 Request is attached hereto as Exhibit 12 and incorporated herein by this reference.
3 The Final Disposition for the FOIA Request is that it is “Undetermined,” and the
4 Description provides that the “request is under agency review.” Notably, GSA’s
5 Estimated Date of Completion is listed as 05/24/2018. *Id.*

6 39. Through GSA’s failure to respond to the FOIA Request within the
7 time period required by law, Penske has constructively exhausted its administrative
8 remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and seeks immediate judicial
9 review.

10 40. Pursuant to 5 U.S.C. § 552, Penske has a legal right to the requested
11 records. GSA has improperly withheld those records, forcing Penske to file suit to
12 enforce its rights under FOIA.

13 41. As a party to the Consolidated Action, Penske has a compelling and
14 immediate need for the records requested.

15 **FIRST CLAIM FOR RELIEF**

16 **(Failure to Make A Determination Within Statutorily Prescribed Time**
17 **Period)**

18 42. Plaintiff re-alleges and incorporates the foregoing paragraphs as if set
19 forth in full.

20 43. GSA failed to properly respond to Plaintiff’s FOIA Request within the
21 statutorily mandated timeframe, in violation of 5 U.S.C. § 552(a)(6).

22 44. GSA’s disregard of its duty to timely respond to Plaintiff’s FOIA
23 Request has harmed and will continue to harm Plaintiff until GSA is compelled to
24 comply with FOIA.

25 45. Plaintiff is entitled to its reasonable attorneys’ fees and costs pursuant
26 to 5 U.S.C. § 552(a)(4)(E).

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SECOND CLAIM FOR RELIEF

(Failure To Produce Responsive Records)

46. Plaintiff re-alleges and incorporates the foregoing paragraphs as if set forth in full.

47. GSA failed to make reasonable efforts to search for records responsive to the FOIA Request, in violation of 5 U.S.C. § 552(a)(3)(C).

48. GSA failed to make available to Plaintiff or to produce to Plaintiff any records responsive to the FOIA Request, in violation of 5 U.S.C. §§ 552(a)(3)(A) and 552(a)(3)(B).

49. GSA failed to disclose and produce records responsive to the FOIA Request without a legal basis for withholding such records, in violation of 5 U.S.C. §§ 552(a)(3)(A) and 552(a)(6)(A).

50. GSA’s disregard of its duty to release the records requested in Plaintiff’s FOIA Request has harmed and will continue to harm Plaintiff until GSA is compelled to comply with FOIA.

51. Plaintiff is entitled to its reasonable attorneys’ fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Penske respectfully requests that this Court:

- A. Expedite its consideration of this action pursuant to 28 U.S.C. § 1657;
- B. Issue a declaration that Defendant GSA violated FOIA as alleged herein;
- C. Order Defendant GSA to conduct a reasonable search for and promptly disclose all records responsive to Plaintiff Penske’s FOIA Request within 10 days, or by such other date as the Court deems appropriate, along with a *Vaughn* index or indices demonstrating with sufficient specificity the GSA’s withholding of any responsive records or portions thereof under claim of exemption;

- 1 D. Retain jurisdiction over this case to ensure Defendant GSA’s
- 2 compliance with this Court’s decree;
- 3 E. Award Plaintiff Penske its attorneys’ fees and costs; and
- 4 F. Grant such other relief as this Court deems just and proper.

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6 Dated: August 28, 2019 KYLE HARRIS LLP

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8 By: /s/John S. Kyle

9 John S. Kyle

10 Laura K. Gantney

11 Attorneys for Plaintiff

12 RP AUTOMOTIVE, INC. d/b/a

13 SOCIAL PENSKE DEALER GROUP

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