

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INSTITUTE FOR ENERGY RESEARCH)
1155 15th Street, NW, Suite 900)
Washington, D.C. 20005)

Plaintiff,)

v.)

Civil Action No. 19-2654

UNITED STATES DEPARTMENT OF)
AGRICULTURE)
1400 Independence Avenue, SW)
Washington, DC 20250-0706)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff INSTITUTE FOR ENERGY RESEARCH (“IER”) for its complaint against Defendant UNITED STATES DEPARTMENT OF AGRICULTURE (“USDA” or “the Department), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under an April 2019 FOIA request for certain described agency records.
- 2) These records are central to a matter of timely, current political deliberation and of great public interest, to which request defendant has not provided any of the statutorily required responses and therefore has denied.
- 3) The records requested include and involve the correspondence of a high-ranking USDA official as it relates to decision-making that will have an impact on his former employer.
- 4) USDA has failed to provide plaintiff with either the requisite records or the required determination in response to plaintiff’s request informing it of the number of responsive

records it intends to release or withhold. USDA was required to provide such a determination within the 20-day time limit established under 5 U.S.C. § 552(a)(6)(A)(i), as articulated in *CREW v. Federal Election Commission*, 711 F.3d 180 (D.C. Cir. 2013). Under *CREW*, agencies must “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” within the statutory deadline of 20 working days.

5) Defendant USDA’s failure to respond in the required way, or any meaningful way, despite the passage of five months has constructively exhausted all of plaintiff’s administrative remedies, leaving plaintiff no choice but to file this lawsuit to compel USDA to comply with the law with regard to release of agency records.

PARTIES

6) Plaintiff Institute for Energy Research is a non-profit public policy institute in Washington, D.C. organized under section 501(c)(3) of the tax code, with research, publication and other media functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open record and freedom of information laws.

7) Defendant United States Department of Agriculture is a federal agency headquartered in Washington, DC.

JURISDICTION AND VENUE

8) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.

9) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the plaintiff resides in the District of Columbia and defendant USDA is a federal agency.

FACTUAL AND STATUTORY BACKGROUND

10) On April 9, 2019, plaintiff submitted a FOIA request to USDA. Plaintiff requested expedited treatment on the basis of its status as a media outlet.

11) On May 15, 2019, USDA acknowledged receipt of this request by email and assigned this request tracking number 2019-DA-03923-F.

12) IER's request was specific and clearly defined, requiring no subjective analysis and allowing for ready assessment of the population of potentially responsive records.

13) Specifically, using USDA's own record titles, definitions (e.g., of the term "Renewable Fuel Standard"), and terms of art, plaintiff requested (citations omitted):

I. Copies of all records and their accompanying information - subject to the below exclusion - including also any attachments, where were a) sent to or from (including also copying, whether as cc: or bcc:) **Stephen Censky, Deputy Secretary**, U.S. Department of USDA, b) which use one or more of the following, *anywhere*: i) SRE (as a stand-alone acronym), ii) RFS (as a stand-alone acronym), iii) RVO (as a stand-alone acronym), iv) Renewable Fuel Standard, and/or Refiner (which also includes in "refiners", "refinery", "refineries", "Small Refiner Exemption (or the plural "Exemptions"))....

II. Also, please provide us copies of all billing records for any mobile telephone(s) provided by the Department to Deputy Secretary Censky.

14) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days that the agency intends to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Within that deadline, the agency must also "determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents," and "inform the requester that it can appeal whatever portion of" the agency's "determination" is adverse to the requester. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

15) 5 U.S.C.S. § 552(a)(6)(A) prescribes that the 20-day 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 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). In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period. Neither apply here as USDA did not seek additional information from plaintiff regarding the request at issue in this suit.

16) USDA owed IER a "CREW" response to the request by June 12, 2019. USDA has provided no substantive response.

17) 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*).

18) USDA is now past its statutory deadline for issuing such determinations on the above-described request, without providing any substantive response to plaintiff's request.

19) Defendant USDA is thereby improperly denying plaintiff access to agency records in violation of FOIA.

FIRST CLAIM FOR RELIEF

Duty to Produce Records – Declaratory Judgment

20) Plaintiff re-alleges paragraphs 1-19 as if fully set out herein.

- 21) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 22) Plaintiff has a statutory right to the information it seeks and that defendant has unlawfully withheld.
- 23) Plaintiff is not required to further pursue administrative remedies.
- 24) Plaintiff asks this Court to enter a judgment declaring that:
 - a. Plaintiff is entitled to records responsive to its FOIA request described above, and any attachments thereto, but USDA failed to provide them;
 - b. USDA's response to plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy USDA's obligations under FOIA;
 - c. USDA must now produce records responsive to plaintiff's request.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

- 25) Plaintiff re-alleges paragraphs 1-24 as if fully set out herein.
- 26) Plaintiff is entitled to injunctive relief compelling USDA to produce the records responsive to the FOIA request described in this pleading.
- 27) Plaintiff asks the Court to enter an injunction ordering USDA to produce to plaintiff, within 10 business days of the date of the order, the requested records sought in plaintiff's FOIA request described above, and any attachments thereto.
- 28) Plaintiff asks the Court to order the Parties to consult regarding any withheld documents and to file a status report to the Court within 30 days after plaintiff 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, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 29) Plaintiff re-allege paragraphs 1-28 as if fully set out herein.
- 30) 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.
- 31) This Court should enter an injunction ordering the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

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

Respectfully submitted this 4th day of September, 2019,

By Counsel:

_____/s/_____

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