

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

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

and

UNION OF CONCERNED SCIENTISTS,
1825 K Street NW, Suite 800
Washington, DC 20006

Plaintiffs,

v.

Case No. 20-cv-1259

U.S. DEPARTMENT OF AGRICULTURE,
1400 Independence Avenue SW
Washington, DC 20250

and

U.S. GENERAL SERVICES
ADMINISTRATION,
1800 F Street NW
Washington, DC 20405

Defendants.

COMPLAINT

1. Plaintiffs American Oversight and Union of Concerned Scientists bring this action against the U.S. Department of Agriculture and the U.S. General Services Administration under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 391(e).

4. Because Defendants the U.S. Department of Agriculture and the U.S. General Services Administration have failed to comply with the applicable time-limit provisions of FOIA, Plaintiffs are deemed to have exhausted their administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and are now entitled to judicial action enjoining the agencies from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Plaintiff Union of Concerned Scientists (UCS) is a nonprofit organization with the mission of conducting scientific analysis and research in the public interest. UCS combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy,

safe, and sustainable future. The organization is headquartered in Massachusetts and incorporated under the laws of the District of Columbia.

7. Defendant U.S. Department of Agriculture (USDA) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). USDA has possession, custody, and control of the records Plaintiffs have requested.

8. Defendant the U.S. General Services Administration (GSA) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Washington, DC. GSA has possession, custody, and control of the records that Plaintiffs seek.

STATEMENT OF FACTS

9. On March 4, 2020, American Oversight and Union of Concerned Scientists submitted several FOIA requests to Defendants seeking specified records related to the relocation of two USDA divisions—the Economic Research Service (ERS) and the National Institute of Food and Agriculture (NIFA) from Washington, D.C., to a privately owned building in Kansas City, Missouri, known as 805 Penn.

USDA Site Visit Request

10. On March 4, 2020, American Oversight and Union of Concerned Scientists submitted a FOIA request bearing internal tracking number USDA-20-0424 to USDA requesting:

All records reflecting site visits to the location finalists for the relocation of the USDA's Economic Research Service and National Institute of Food and Agriculture. This request includes, but is not limited to, the following:

- i. Records sufficient to identify all federal officials, employees, and/or contractors invited to attend each site visit;

- ii. Records sufficient to identify all federal officials, employees, and/or contractors who actually attended each site visit;
- iii. Any documents identifying the buildings visited;
- iv. Itineraries and/or agendas;
- v. Briefing or other informational materials;
- vi. Any hard copy materials provided to federal officials, employees, and/or contractors during the site visits;
- vii. Any handwritten or electronic notes taken during site visits;
- viii. Summaries of any site visits created after the fact; and
- ix. All email and text communications relating to the site visits, and attachments thereto.

11. American Oversight and Union of Concerned Scientists requested all responsive records for the period from May 3, 2019, through June 13, 2019.

12. By electronic mail dated March 5, 2020, USDA acknowledged receipt of the USDA Site Visit Request. USDA assigned this request the tracking number 2020-DA-02836-F.

13. On March 17, 2020, USDA routed part of the USDA Site Visit Request to the Research, Education and Economics (REE) Mission area. USDA explained that it has a decentralized FOIA program, and that the requested records are likely to fall under the purview of both USDA's Departmental FOIA Office (DFO), and the REE Mission area. Although the REE Mission area operates under the DFO, a different FOIA analyst would independently process the REE FOIA requests. By electronic mail the same day, REE assigned its portion of the FOIA request the tracking number 2020-REE-03063-F.

14. By electronic mail dated April 10, 2020, USDA's DFO asked American Oversight and Union of Concerned Scientists about potentially narrowing the scope of the USDA Site Visit Request. Specifically, the DFO asked whether the requesters would be amenable to (1) limiting the request to email correspondence and waiving all attachments thereto; and (2) waiving receipt of emails with overlapping custodians.

15. By electronic mail dated April 14, 2020, American Oversight responded that it did not agree to limit its request to email correspondence or waive attachments, but agreed that USDA could prioritize processing of responsive emails before other types of documents and making rolling productions. American Oversight also agreed that USDA could omit exact duplicates in the case of overlapping custodians.

16. American Oversight and Union of Concerned Scientists have not received any further communications from USDA regarding this FOIA request.

USDA Cost-Benefit Analysis Request

17. On March 4, 2020, American Oversight and Union of Concerned Scientists submitted a FOIA request bearing internal tracking number USDA-20-0426 to USDA requesting:

1. All records reflecting any cost-benefit analysis of relocating USDA employees outside of the National Capital Region.

Requesters believe that USDA is in the best position to identify the custodians of responsive records. However, we request that USDA search, at a minimum, records of Deputy Secretary Stephen Censky, Acting Deputy Assistant Secretary Donald Bice, and Chief Economist Robert Johansson.

Please provide all responsive records from January 1, 2018, through August 15, 2018.

2. The complete copy of the “NIFA and ERS Relocation: Cost Benefit Analysis,” the Executive Summary of which was published on June 13, 2019, in conjunction with the announcement of the Kansas City Region as the new location for the Economic Research Service and National Institute of Food and Agriculture.¹ This request includes any and all underlying records on which this Executive Summary was based.

¹ A copy of the Executive Summary is available at <https://www.usda.gov/sites/default/files/documents/062819-CBA.pdf>.

3. All electronic communications (including emails, email attachments, calendar invitations, calendar invitation attachments, or text messages) sent by (a) the USDA officials listed below to (b) any members of Congress or congressional staff, including anyone communicating with an email address ending in senate.gov or mail.house.gov.

USDA Officials:

- i. Stephen Censky, Deputy Secretary
- ii. Donald Bice, Acting Deputy Assistant Secretary for Administration
- iii. Robert Johansson, Chief Economist
- iv. Kristi Boswell, Senior Advisor
- v. Benny Young, Associate General Counsel
- vi. Courtney Knupp, Chief of Staff for Research, Education, and Economics
- vii. Brock Densel, Policy Advisor for Research, Education, and Economics
- viii. Robert MacGregor, former Director of Intergovernmental and External Affairs and current Senior Advisor

In an effort to accommodate USDA and reduce the number of responsive records to be processed and produced, Requesters have limited their request to emails sent by the listed USDA officials. To be clear, however, we still request that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both a USDA official's response to an email from a congressional staffer and the initial received message are responsive to this request and should be produced.

Please provide all responsive records from June 7, 2019, through June 14, 2019.

18. American Oversight and Union of Concerned Scientists requested all responsive records for the period from June 7, 2019, through June 14, 2019.
19. By electronic mail on March 5, 2020, USDA acknowledged receipt of the USDA Cost-Benefit Analysis Request. USDA assigned this request the tracking number 2020-DA-02838-F.

20. On March 17, 2020, USDA routed parts of the USDA Cost-Benefit Analysis Request to the REE Mission area. By electronic mail the same day, REE assigned its portion of this FOIA request the tracking number 2020-REE-03064-F.

21. By electronic mail dated May 11, 2020, USDA provided a partial interim response to the USDA Cost-Benefit Analysis request. USDA indicated that it had not located records responsive to one item of the request and was still processing the remaining items in the request.

22. American Oversight and Union of Concerned Scientists have not received any further communications from USDA regarding this FOIA request.

USDA Decision Memoranda Request

23. On March 4, 2020, American Oversight and Union of Concerned Scientists submitted a FOIA request bearing internal tracking number USDA-20-0427 to USDA requesting:

All final internal assessments, decision memoranda, or email communications memorializing final decisions, relating to the relocation of the Economic Research Service and National Institute of Food and Agriculture to the Kansas City Region.

Requesters ask that USDA search the files of the following custodians for records responsive to this request:

- i. Secretary Sonny Perdue, and anyone communicating on his behalf, such as executive assistants, personal assistants, or schedulers
- ii. Stephen Censky, Deputy Secretary
- iii. Donald Bice, Acting Deputy Assistant Secretary for Administration
- iv. Scott Hutchins, Deputy Under Secretary for Research, Education, and Economics
- v. Robert Johansson, Chief Economist
- vi. Chris Hartley, Acting Administrator of the Economic Research Service

- vii. J. Scott Angle, Director of the National Institute of Food and Agriculture
- viii. Robert MacGregor, former Director of Intergovernmental and External Affairs and current Senior Advisor
- ix. Kristi Boswell, Senior Advisor
- x. Anyone serving in the capacity of General Counsel
- xi. Anyone serving in the capacity of White House Liaison

24. American Oversight and Union of Concerned Scientists requested all responsive records for the period from June 1, 2019, through June 14, 2019.

25. By electronic mail dated March 5, 2020, USDA acknowledged receipt of the USDA Memorandum Request. USDA assigned this request the tracking number 2020-DA-02842-F.

26. On March 17, 2020, USDA routed parts of the USDA Decision Memoranda Request to the REE mission area. By electronic mail the same day, REE assigned its portion of this FOIA request the tracking number 2020-REE-03065-F.

27. By phone conversation and electronic mail on April 23, 2020, USDA's DFO and American Oversight clarified the scope of the request. Specifically, American Oversight clarified "[a]ll final internal assessments" to mean the last documents, near-final versions of documents, or final facts, if any, that were prepared and/or presented so that the USDA could make a final decision regarding the relocation. In addition, the word "final" also applies to the "decision memoranda" asked for in the initial FOIA request.

28. American Oversight and Union of Concerned Scientists have not received any further communications from USDA regarding this FOIA request.

GSA Site Visit Request

29. On March 4, 2020, American Oversight and Union of Concerned Scientists submitted a FOIA request bearing internal tracking number GSA-20-0425 to GSA requesting:

All records reflecting site visits to the location finalists for the relocation of the USDA's Economic Research Service and National Institute of Food and Agriculture. This request includes, but is not limited to, the following:

- i. Records sufficient to identify all federal officials, employees, and/or contractors invited to attend each site visit;
- ii. Records sufficient to identify all federal officials, employees, and/or contractors who actually attended each site visit;
- iii. Any documents identifying the buildings visited;
- iv. Itineraries and/or agendas;
- v. Briefing or other informational materials;
- vi. Any hard copy materials provided to federal officials, employees, and/or contractors during the site visits;
- vii. Any handwritten or electronic notes taken during site visits;
- viii. Summaries of any site visits created after the fact; and
- ix. All email and text communications relating to the site visits, and attachments thereto.

30. American Oversight and Union of Concerned Scientists requested all responsive records for the period from May 3, 2019, through June 13, 2019.

31. By electronic mail dated March 6, 2020, GSA acknowledged receipt of the GSA Site Visit Request. GSA assigned this request the tracking number GSA-2020-000596.

32. By electronic mail dated March 17, 2020, GSA stated that it forwarded the GSA Site Visit Request to the agency's Heartland Region, Kansas City, Missouri Program Office.

33. American Oversight and Union of Concerned Scientists have not received any further communications from GSA regarding this FOIA request.

Exhaustion of Administrative Remedies

34. As of the date of this Complaint, Defendants have failed to (a) notify Plaintiffs of any determination regarding its FOIA requests, including the scope of any responsive records

Defendants intend to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

35. Through Defendants' failure to respond to Plaintiffs' FOIA requests within the time period required by law, Plaintiffs have constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

36. Plaintiffs American Oversight and Union of Concerned Scientists repeat the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

37. Plaintiffs properly requested records within the possession, custody, and control of Defendants.

38. Defendants are agencies subject to FOIA, and they must therefore make reasonable efforts to search for requested records.

39. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to Plaintiffs' FOIA requests.

40. Defendants' failure to conduct adequate searches for responsive records violates FOIA and applicable regulations.

41. Plaintiffs American Oversight and Union of Concerned Scientists are therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to Plaintiffs' FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

42. Plaintiffs repeat the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

43. Plaintiffs properly requested records within the possession, custody, and control of Defendants.

44. Defendants are agencies subject to FOIA, and they must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

45. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiffs by failing to produce non-exempt records responsive to its FOIA requests.

46. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiffs by failing to segregate exempt information in otherwise non-exempt records responsive to Plaintiffs' FOIA requests.

47. Defendants' failure to provide all non-exempt responsive records violates FOIA and applicable regulations.

48. Plaintiffs are therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to Plaintiffs' FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight and Union of Concerned Scientists respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to Plaintiffs' FOIA requests;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiffs' FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiffs' FOIA requests;
- (4) Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant Plaintiffs such other relief as the Court deems just and proper.

Dated: May 13, 2020

Respectfully submitted,

/s/ Khahilia Y. Shaw

Khahilia Y. Shaw

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/s/ Christine H. Monahan

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