

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENERGY & ENVIRONMENT LEGAL INSTITUTE)
2020 Pennsylvania Avenue, NW #186)
Washington, DC 20006)

FREE MARKET ENVIRONMENTAL)
LAW CLINIC)
9033 Brook Ford Road)
Burke, Virginia, 22015)

Plaintiffs,)

v.)

Civil Action No. 14-538

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, NW)
Washington DC 20460)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs ENERGY & ENVIRONMENT LEGAL INSTITUTE (“E&E Legal”) and FREE MARKET ENVIRONMENTAL LAW CLINIC (“FME Law”) for their complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), allege as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a FOIA request to EPA headquarters, seeking certain Agency records over a three-month period. These records concern the trace element selenium naturally present in soils, an unusual retroactive veto of a granted mining permit, and efforts to expand the Agency’s regulatory reach by regulating earth-moving activities on the grounds it inherently leads to pollution of streams.

2. The request is being blocked by the latest in a pattern of behavior by the Agency directed at plaintiffs, improperly denying the fee waiver provided by statute for non-profit groups that broadly disseminate public information of significant public interest.
3. The requested emails, text messages, etc., are “agency records” under federal record-keeping and disclosure laws. They are of significant public interest due to the ongoing controversy surrounding the EPA’s “war on coal.” Particularly, the EPA’s actions concerning mining activity through the regulation of selenium for its possible impact on insect populations are ongoing matters of public controversy.¹ An EPA “retroactive veto” of a previously issued permit, overturned by this Court but upheld by the D.C. Circuit, is nonetheless the target of strong criticism throughout impacted communities and across the political spectrum.² This is also related to a March 2014 expansion by EPA of its authority over the “waters of the United States” which, a separate FOIA request has revealed, EPA promoted through a campaign of “stakeholder outreach” limited to (vs. *including*) “key supporters”.³ Therefore, the broader public would benefit

¹ See e.g., Miguel Quiñones, “Lawsuits come and go, but debate over EPA veto rages on”, E&E News, March 28, 2014, <http://www.eenews.net/greenwire/2014/03/28/stories/1059996932>.

² See e.g., Sen. Jay Rockefeller, (D-W.Va), “The EPA never should have retroactively vetoed the permit.” “Supreme Court rejects mine appeal.” *Parkersburg News and Sentinel*, March 25, 2014. Available at: <http://www.newsandsentinel.com/page/content.detail/id/585404/Supreme-Court-rejects-mine-appeal.html?nav=5061>. Last retrieved 3/25/2014. See also, EPA’s move was “a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute.” *Mingo Logan Coal Co. v. U.S. EPA*, 850 F. Supp. 2d 133, 139 (D.D.C. 2012) (Berman Jackson, J.). *Rev’d*, *Mingo Logan Coal Co. v. United States EPA*, 714 F.3d 608 (D.C. Cir. 2013).

³ EPA HQ Power Point handout, “Waters of the U.S. Communications Overview”, provided to Regional Administrators at a February 2013 meeting, available at pages 37-43 (cited passage at p. 42) at https://www.dropbox.com/sh/lefhateu7603c25/7I1e9JKxI5/CEI%20FOIA%20RIF%20_%20fifteen.pdf; obtained under EPA FOIA number R9-2013-007631.

from further understanding of the EPA's process in dealing with these complicated and important issues.

4. Defendant EPA unjustly refuses to grant plaintiffs' waiver of fees under FOIA for any requested records, constructively denying their request for the underlying records on the facially inaccurate grounds that plaintiffs did not express an intention to broadly disseminate responsive information, ignoring at least four detailed explanations in the underlying FOIA request detailing plaintiffs' intention and ability to broadly disseminate, and then, upon administrative appeal, also denying that the request was in the public interest, contrary to clear precedent and common sense.
5. Imposing fee barriers against unwanted requesters is an EPA practice invoked against plaintiffs' recent requests.⁴ In response to the pattern of facially unsupportable responses, plaintiffs inserted a "chalkboard" in a request on which they wrote ten times, "We intend to broadly disseminate responsive information", in addition to extensively elaborating how and their pattern and practice of doing so. EPA promptly denied that request stating that plaintiffs failed to express an intention to broadly disseminate.
6. In the instant matter defendant EPA has repeatedly missed statutory deadlines such that it is denied the legal authority to assess fees. *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011). Thus, defendant's insistence on fees as a condition of processing plaintiffs' requests is arbitrary and capricious, contrary to the law, and not "in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities

⁴ See e.g., EPA FOIA request nos. EPA-HQ-2014-003658 ("chalkboard" request), HQ-2014- 000344, HQ-2014-001664, R10-2013-008285, HQ-2014-002006, R3-2014-004011.

which have been used by... agencies to deny waivers.”” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

7. Abuse of fee waiver to impose a financial barrier to non-profit groups’ access to public records is not limited to defendant EPA. However, defendant’s unique and selective employment of this practice has increased in recent years and is particularly pronounced against plaintiffs. Specifically, EPA denies fee waiver requests for groups that generally oppose EPA’s regulatory agenda while routinely granting them for ideologically aligned groups with which it works closely on shared agenda, which is the subject of an ongoing EPA Office of Inspector General (OIG) inquiry.⁵
8. Previously, these “initial determinations”, both constructive and express, were routinely overturned on administrative appeal. In recent months, defendant has begun denying the appeals as well, further delaying access to public records and requiring plaintiffs to sue to obtain their statutorily provided fee waiver and responsive information.
9. FOIA delayed is FOIA denied and by denying a fee waiver, EPA has effectively withheld documents without specifying a substantive basis for the withholding.

⁵ See, e.g., Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env’tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm’r and Chief Information Officer, Office of Environmental Information, U.S. Env’tl. Prot. Agency, Notification of Evaluation of EPA’s Freedom of Information Act Fee Waiver Process (Jun. 19, 2013) available at: http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf, last retrieved 3/25/2014. Requesters are aware through undersigned counsel Horner, who interviewed with EPA’s OIG as part of the inquiry, that EPA’s OIG has “randomly” decided to not consider EPA’s treatment of either of the instant plaintiffs in its inquiry, although plaintiffs were two of the three groups whose revelations prompted Congress to request the inquiry.

10. EPA also employs a practice of broadly withholding documents in whole or substantial part once it does begin producing under FOIA requests it resisted; on information and belief, plaintiffs allege defendant intends to similarly withhold under the instant request.
11. Accordingly, plaintiffs file this lawsuit to compel EPA to comply with the law both with regard to fee waivers and improper withholding of public records.

PARTIES

12. Plaintiff Energy & Environment Legal Institute is a nonprofit research, public policy and public interest litigation center incorporated in Virginia and dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. E&E Legal's programs include analysis, publication and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
13. Plaintiff Free Market Environmental Law Clinic is a nonprofit research, public policy based, and public interest litigation center based in Virginia and dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. FME Law's programs include research, publication and litigation and include a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
14. Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

15. 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.
16. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because defendant EPA is a federal agency operating in the District of Columbia and a substantial part of the events or omissions giving rise to the claim occurred in the District of Columbia.

FACTUAL BACKGROUND

Plaintiffs' FOIA Request EPA-HQ-2014-001664

17. In December 5, 2013, plaintiffs submitted a FOIA request by electronic mail to EPA's Headquarters FOIA office (EPA-HQ-2014-001664), seeking from the relevant office (emphases in originals):

“Copies of all emails, text messages and/or instant messages sent to or from anyone in EPA Headquarters Office of Water, citing or using the following seven words or terms: the ‘United Company’, Arch, Spruce, Mingo, Logan, selenium, and/or MTM, dated from November 1, 2010 through January 30, 2011, inclusive.”

18. Plaintiffs expressed their intention to broadly disseminate the information requested, explaining in detail their mission and practice of dissemination, intention to disseminate, including, specifically (underscore in original, bold added; citations omitted):

“Both entities are nonprofit public policy and/or legal institutes organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as 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 records and freedom of information laws...

Contribution to an understanding by the general public. Requesters have a record of obtaining and producing information as would a news media outlet and as a **legal/policy organization that broadly disseminates information** on important energy and environmental policy related issues. Both requesters have ongoing efforts toward publication on national and state regulatory programs and their environmental and economic consequences. In addition to being functionally a news outlet, both requesters have disseminated their work in a manner that results in coverage by national news outlets on television, in national newspapers, and in policy newsletters from state and national policy institutes. Professionals affiliated with both requesters also have been cited by congressional committees and have been asked to testify on their work. ... These individuals will lead the study team and are capable of translating highly technical information into a report that is accessible to the public at large. ... they and their staffs' publications demonstrate **requesters have the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”** (Request, at pages 1, 6).

19. Plaintiffs requested waiver of their fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii)

(“Documents shall be furnished without any charge...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 government and is not primarily in the commercial interest of the requester”).

20. Plaintiffs detailed the public interest specific to the records sought and their intention to disseminate in their request pages 2-3, 8-11, and 14.

Defendant's Reply and Subsequent Proceedings
Plaintiffs' FOIA Request EPA-HQ-2014-001664

21. EPA assigned this request identification number EPA-HQ-2014-001664.
22. By letter delivered by electronic mail on December 13, 2013, EPA denied plaintiffs' fee waiver, disputing that the above excerpts and related elaboration asserted an intention to broadly disseminate responsive records. Specifically, EPA stated in pertinent part, "You have not expressed a specific intent to disseminate the information to the general public". (Denial letter, p. 1).
23. As affirmed, *supra*, this is facially untrue and represents the latest in a demonstrated pattern of improper EPA use of express or constructive denial of fee waiver to delay and thereby deny access to public records for certain requests and particularly from certain requesters. By demanding fees as a condition to processing plaintiffs' request, asserting that plaintiffs failed to express an intent to broadly disseminate, defendant improperly denied the fee waiver and thereby the request.
24. On December 20, 2013, plaintiffs administratively appealed EPA's initial determination, elaborating on their already expressed intention and ability to disseminate information.
25. By a letter dated March 7, 2014, more than two months later and therefore well past the 20 days allowable under 5 U.S.C. § 552(a)(6)(A)(ii) and any permissible extensions of time to respond, EPA's Office of General Counsel denied plaintiffs' appeal and fee waiver, refusing to process the request unless plaintiffs made a promise of payment.

26. Both by defendant's failure to respond to plaintiffs' administrative appeal in the statutorily required time, and by the substantive impropriety of that belated denial of plaintiffs' appeal, plaintiffs have exhausted the administrative process as regards this request.
27. Further, however, on December 20, 2013, plaintiffs and defendant also began discussing narrowing of plaintiffs' request. EPA assigned program officer Laura Bachle to manage the request. On January 14, 2014, after two telephone conversations and follow-up correspondence the parties agreed to a narrowed request.
28. The parties confirmed this in writing the same day, with EPA's Ms. Bachle setting forth the agreed parameters, and writing in pertinent part, "Given these parameters, I am confident we will be able to produce a first batch of responsive documents to you by March 31, 2014. It is possible that all the responsive documents will be gathered by then. Please let me know if this revised date is agreeable to you. Given these revised search terms, I can also direct preparation of an administrative cost estimate and assurance of payment letter."
29. The same day, plaintiffs' counsel responded in writing, by email, *in toto*, "Yes, thank you, that is the narrowing we agreed to and the time-frame for processing."
30. This ended the tolling of the statutory period and restarted defendant's 20-day clock to substantively respond, and to provide a fee estimate.
31. The required, promised fee estimate did not come. On March 12, 2014, after receiving no fee assessment to agree to after eight weeks, plaintiffs' counsel informed defendant (Ms. Bachle) by email:

“We did not receive the cost estimate based on the scope of potentially responsive records, discussed below, which was due to us by February 11, 2014 [sic]. As that step is no longer relevant I write to reaffirm the anticipated production in this matter by the end of the month without that step. Under the 2007 FOIA amendments EPA waived any opportunity to seek fees by not providing the required response within 20 days after we agreed to the search parameters.

To recapitulate, we worked together to narrow the search parameters and minimize the search and production; on January 14, 2014 you and I agreed to those terms, ending the tolling under either §§ 552(a)(6)(A)(ii)(I) or (II). The 20 day clock for a response under began on that date (see, *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)). Taking into account weekends and holidays, EPA had a statutory duty to provide its cost estimate/a ‘CREW’ response on its estimated production details discussed on January 14, 2014, by February 11, 2014, or one month ago.

Because EPA ‘fail[ed] to comport with FOIA's requirements’ the FOIA does not allow EPA to assess fees. See, 5 U.S.C. § 552(a)(4)(A)(viii), and see, *Bensman v. National Park Service*, 806 F. Supp. 2d 31, 38 (D.D.C. 2011).

As such, we continue to look forward to the Agency's production of responsive records.”

32. On March 21, 2014, defendant responded through Ms. Bachle that, “We are, voluntarily, continuing preparatory work on your request so we can quickly begin processing your request following adequate assurance of payment.” By this time defendants still had not provided the required, and fee estimate for the narrowed request for plaintiffs to agree to (or challenge), long overdue and promised nearly ten weeks and more than forty working days prior (January 14, 2014).

31. In response, on March 22, 2014, plaintiffs informed defendant:

“The clock did toll at the time EPA sought to clarify the scope of our request, but restarted upon the narrowing agreed January 14, when EPA correspondingly asserted it would provide the required fee estimate for that narrowed request.

EPA cannot claim the deadline was tolled during that entire period. The pertinent statutory language reads, ‘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.’ The law clearly indicates that tolling occurs while EPA awaits our response, not while we await the Agency’s. To allow it to continue to toll while the Agency prepares or holds out a promise of a fee estimate, of course, would permit an agency to simply endlessly toll the deadline by withholding the fee estimate, an absurd result no court would ever read into the law.

Even accepting an overly generous interpretation of the twenty day period “tolling” -- one not provided for in the law -- that the period started anew (vs. resumed) with the January 14 agreement to the narrowed scope and promise to provide the fee estimate, EPA had a limited period to provide the required response that is part of its obligation under 5 U.S.C. 552(a)(6)(A)(i). Unlike providing a belated, substantive CREW response, that waiver is not one that can be cured. Under the 2007 FOIA amendments and subsequent precedent I cited previously, EPA waived, and must continue with the promised production it indicated it has the ability and intention to satisfy (that is, by March 31).

Given the failure to meet statutory deadlines to provide a necessary response, EPA has waived any right to seek fees in this situation per 5 U.S.C. § 552(a)(4)(A)(viii). If EPA fails to produce as indicated then the agency will be well beyond any fair reading of the statutory dead-lines. So, we continue operating pursuant to our prior correspondence, telephone communications, and the statute, and look forward to the production as described. If that does not proceed we are free to seek to compel production and we reserve the right to do so.”

33. On March 25, 2014, EPA demanded fees of \$2,000.00 as a condition plaintiffs must agree to before defendant would process plaintiffs' request, and a similar request to another EPA office that defendant has chosen to process together with this request and for which defendant has also denied plaintiffs' fee waiver (EPA FOIA R3-2014-004011).
34. Under § 552(a)(6)(A)(ii)(VIII), if an agency has missed any deadline under that section's paragraph 6, the agency shall no longer be able to assess fees. Since EPA waived by not timely replying to plaintiffs' appeal of December 20, 2013, which response would have been due by January 22, 2014 under § 552(a)(6)(A)(ii), it did not respond within the statutorily required deadline. It has thus waived the right to assess fees.
35. Similarly, since EPA waived by not providing the fee estimate to plaintiffs' narrowed request of January 14, 2014, which estimate would have been due by January 30, 2014 under § 552(a)(6)(A)(i), it did not respond within the statutorily required deadline. It has thus waived the right to assess fees.
36. These waivers are in addition to the improper if belated denial of plaintiffs' fee waiver.
37. On March 31 defendant sent plaintiffs a nominal "interim production" of published papers, regulatory comments, a Government Accountability Office (GAO) report and otherwise publicly available documents not covered by FOIA, approximately 600 pages from Excel spreadsheets converted for some reason from the native format into useless and often blank pages, and reiterating its insistence that it would not process plaintiffs' request without assurance of payment of fees.
38. While the defendant's Ms. Bachle stated that responsive records would be provided beginning on March 31, defendant instead produced unresponsive records, did not

indicate any intention to process an estimated quantity of records by an estimated date, and refused to process plaintiffs' request without receiving a payment to which defendant is not entitled.

39. As such, defendant has missed its statutory deadline to substantively respond, failed to act as promised in, and then withdrawn, the response it did provide; waived its right to seek fees by failing to provide the required and promised fee estimate within the required time; and waived its right to seek fees by failing to respond to plaintiffs' administrative appeal in the required time.

LEGAL ARGUMENTS

Defendant EPA has Arbitrarily and Capriciously Denied Plaintiffs' Fee Waiver

40. Plaintiffs requested waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A) (iii) ("Documents shall be furnished without any charge...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 government and is not primarily in the commercial interest of the requester"); also 40 C.F.R. §2.107(l), and (c).
41. Plaintiffs do not seek these records for a commercial purpose. Plaintiffs are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations and public charities. As such, plaintiffs also have no commercial interest possible in these records. When no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.
42. As non-commercial requesters, plaintiffs are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans*

Affairs, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). See also *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987)(the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.”).

43. A fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286. See also, “A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness). The requested information meets that description as specified in plaintiffs’ original request and administrative appeal.
44. Under the Freedom of Information Act, after an individual submits a request, an agency must determine within 20 working days after the receipt of any such request whether to comply with such request. 5 U.S.C.S. § 552(a)(6)(A)(i). Under *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), that response must provide particularized assurance of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. This 20-working-day time limit also applies to any appeal. § 552(a) (6)(A)(ii).

45. 5 U.S.C.S. § 552(a)(6)(A) proclaims 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.
46. 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 by Bensman court* (JEB). In other words, the amendments were created to prevent precisely the kind of behavior that the EPA is engaging in by continuing to unjustly and unlawfully deny fee waivers after it has waived its ability to assess fees by not following the statutory deadline, constructively denying the request.
47. Since defendant EPA, with regard to the request at issue in this Complaint, waived its ability to assess fees under § 552(a)(6)(A)(ii)(VIII) by not responding to plaintiffs' appeal by the statutory deadline, thereby rendering the question moot, and by failing to

provide a fee estimate within the required time even after plaintiffs agreed to narrowing, EPA must waive fees and produce the requested documents as required by law.

48. Since defendant EPA also improperly denied the fee waiver at issue in this Complaint, EPA must grant the fee waiver and produce the requested documents as required by law.

FIRST CLAIM FOR RELIEF

**Duty to Grant a Fee Waiver for FOIA EPA-HQ-2014-001664
– Declaratory Judgment**

49. Plaintiffs re-allege paragraphs 1-48 as if fully set out herein.
50. Defendant failed to provide a substantive response within the deadline(s) provided by 5 U.S.C.S. § 552(a)(6)(A), therefore it is statutorily barred from assessing fees by § 552(a)(6)(A)(ii)(VIII).
51. Plaintiffs are entitled to have their fees waived for requested EPA records.
52. Defendant has wrongly denied plaintiffs' fee waiver request for these records.
53. Plaintiffs have no requirement to further pursue their administrative remedies.
54. Plaintiffs ask this Court to enter a judgment declaring that:
- a. Plaintiffs are entitled to a waiver of their fees for correspondence as specifically described in plaintiffs' request FOIA EPA-HQ-2014-001664, and any attachments thereto;
 - b. EPA must grant plaintiffs' fee waiver request; and
 - c. EPA's refusal to grant this request is unlawful.

SECOND CLAIM FOR RELIEF

Duty to Grant Fee Waiver for FOIA EPA-HQ-2014-001664 – Injunctive Relief

55. Plaintiffs re-allege paragraphs 1-54 as if fully set out herein.

56. Plaintiffs are entitled to injunctive relief compelling defendant to grant its request to have its fees waived.
57. Plaintiffs' ask the Court to enter an injunction ordering the defendant to grant plaintiffs' fee waiver within 10 business days of the date of the order.

THIRD CLAIM FOR RELIEF

Duty to Release Certain Described Records FOIA EPA-HQ-2014-001664

– Declaratory Judgment

58. Plaintiffs re-allege paragraphs 1-57 as if fully set out herein.
59. FOIA requires that covered agencies provide records responsive to legitimate requests reasonably describing desired records, subject to one of nine enumerated exemptions.
60. Defendant EPA is a covered agency.
61. Plaintiffs have sought and been denied production of responsive records reflecting the conduct of official business.
62. Plaintiffs have a statutory right to the information they seek and defendant has unlawfully failed to provide responsive records.
63. Plaintiffs have no requirement to further pursue administrative remedies.
64. The requested records are of great and timely public interest.
65. Plaintiffs ask this Court to enter a judgment declaring that:
 - a. EPA correspondence as specifically described in plaintiffs' FOIA request EPA-HQ-2014-001664, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
 - b. EPA must release those requested records or segregable portions thereof subject to legitimate exemptions; and

- c. EPA's refusal to provide records without plaintiffs assuring payment, after missing the statutory deadline, being barred by statute to assess fees, and on the claim that plaintiffs have not made the case or do not merit fee waiver, is unlawful.

FOURTH CLAIM FOR RELIEF

Duty to Release Certain Described Records FOIA EPA-HQ-2014-001664
– Injunctive Relief

66. Plaintiffs re-allege paragraphs 1-65 as if fully set out herein.
67. Plaintiffs are entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiffs' FOIA request, subject to legitimate withholdings.
68. Plaintiffs ask the Court to order the defendant to produce to plaintiffs, within 10 business days of the date of the order, the requested records described in plaintiffs' FOIA request EPA-HQ-2014-001664, and any attachments thereto, subject to legitimate withholdings; and,
69. Plaintiffs ask the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 30 days after plaintiffs receive 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 and any other remaining issues.

FIFTH CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

70. Plaintiffs re-allege paragraphs 1-69 as if fully set out herein.

71. 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.

72. Plaintiffs ask the Court to order the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

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

Respectfully submitted this 1st day of April, 2014,

_____/s/_____
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