

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

ENERGY & ENVIRONMENT LEGAL INSTITUTE)
722 12th Street NW)
Suite 400)
Washington, DC 20005)

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

Plaintiffs,)

v.)

Civil Action No. 14-1329

TENNESSEE VALLEY AUTHORITY)
400 West Summit Hill Drive)
Knoxville, TN 37902)

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 TENNESSEE VALLEY AUTHORITY (“TVA” 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 made jointly by both plaintiffs.
2. The request sought the release of agency records sent to or from three high level officials within TVA.
3. Defendant TVA is a federal agency and is subject to FOIA. 18 C.F.R. §1301.

4. The request was sent to TVA via electronic mail on June 19, 2014. A response to the request was due on or by July 18, 2014.
5. Defendant TVA did not respond to the request until July 21, 2014. As a result of the delay defendant breached FOIA's statutory deadlines. 5 U.S.C.S. § 552(a)(6)(A)(i).
6. Defendant's response claimed that the request could not be completed within 20 days, thus TVA required additional time to process the request.
7. When an agency requires additional time to process a request it may take up to an additional 10 working days to process the request. §552(a)(6)(B)(i).
8. Defendant TVA claimed it required additional time on July 21, 2014. Ten working days from the date it owed plaintiffs its initial determination or otherwise substantive response was August 1, 2014. TVA provided no such response to requesters.
9. Further, requesters sought waiver of their fees in the original FOIA request. Fee waiver requests are subject to the same statutory time limits as the rest of FOIA requests. While some justifications as defined by §552(a)(6)(B)(iii) may permit delays in determining the scope of response records and issuing an initial determination, no similar reason justifies delaying a response to a fee waiver request.
10. Thus Defendant TVA owed requesters a response to their fee waiver request by July 18, 2014. However to date requesters have not received any response with regard to the fee waiver request. As such, defendant has waived any ability to seek fees by § 552(a)(4)(A)(viii). *See also* 5 U.S.C. § 552(a)(6)(A)(ii)(II).

11. By virtue of defendant's failure to respond either to plaintiffs' fee waiver request or FOIA request, plaintiffs have exhausted all administrative remedies. See §552(a)(6)(C)(i).
12. Accordingly, plaintiffs file this lawsuit to compel defendant TVA to comply with the law and to release the requested agency records.

PARTIES

13. Plaintiff Energy & Environment Legal Institute ("E&E Legal") is a nonprofit research, public policy and public interest litigation center incorporated in Virginia, with offices in Washington, DC, 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.
14. Plaintiff Free Market Environmental Law Clinic ("FME Law") is a nonprofit public policy based research, and public interest litigation center based in Virginia, with offices in Washington, DC, 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.
15. Defendant Tennessee Valley Authority ("TVA") is a federal corporation, created by the TVA Act, 16 U.S.C. § 831. TVA provides a large quantity of electric power to the

southeastern United States, meaning that the decisions TVA makes with regard to its power plants have large and lasting implications for the public. TVA is subject to FOIA. It may sue and be sued in its corporate name. 16 U.S.C. § 831c(b). The TVA Act provides that TVA is to construct projects "for the benefit of the people of the [region] as a whole" and that TVA shall provide power "at the lowest possible rates." 16 U.S.C. § 831j.

JURISDICTION AND VENUE

16. 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.
17. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) because FOIA grants the District Court of the District of Columbia jurisdiction and also because both plaintiffs and defendant TVA have offices in the District of Columbia.

FACTUAL BACKGROUND **Plaintiffs' FOIA request to TVA**

18. On June 19, 2014 plaintiffs sent defendant a FOIA request by electronic mail to its FOIA officer, at its FOIA email address FOIA@tva.gov.
19. The request sought agency records held by defendant. Specifically the request sought:
"copies of all emails, text messages and/or instant messages 1) sent to or from Marilyn Brown, Justin C. Maierhofer (Vice- President Government Relations), and/or John Myers (Director of Environmental Policy), 2) which emails, texts or IMs cite or use in either the To, From, cc:, bcc: or "Subject" fields, or their body, a) one or more of the words or terms 'Climate Action Plan', 'Gallatin', or 'GAF' (which represents an abbreviation for Gallatin Fossil Plant), 'retire', or 'retirement' and b) 'Sierra Club', or 'Sierra' which are c) dated from September 1, 2013 through March 31, 2014, inclusive."

19. Marilyn Brown is a member of the Board of TVA. All parties whose records were sought are high ranking officials with TVA
20. Plaintiffs sought a fee waiver for the request, and detail how they qualify. Fee waivers for similar requests have previously been granted to plaintiffs by TVA and by other federal agencies.

Defendant's Response

21. Defendant TVA assigned the request tracking number 4474.
22. Defendant owed plaintiffs a substantive response to their request by July 18, 2014.
23. On July 21, 2014, after the statutory deadline for a response had passed, defendant responded by email to requesters.
24. The response on July 21, 2014 informed requesters that “Your request cannot be completed within 20 business days from its receipt due to the need to obtain and review records from various TVA offices separate from this one. In addition, the information you have requested may contain confidential commercial and financial information submitted by an outside source.”
25. Under §552(a)(6)(B)(i) when an agency cannot process a request within the statutory period, the agency may be permitted an extension of up to an additional 10 working days in providing its response and initial determination.
26. Thus defendant TVA had until August 1, 2014 at the latest to issue its initial determination, however it has failed to do so.
27. Defendant did not include a response to the fee waiver request, nor did it claim that additional time was needed to evaluate the fee waiver request.

LEGAL ARGUMENTS

28. Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against agencies failing to live up to their legal recordkeeping and disclosure obligations.
29. Attorney General Holder states, *inter alia*, “On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA ‘should be administered with a clear presumption: In the face of doubt, openness prevails.’” OIP Guidance, *President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a “New Era of Open Government,”* <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. This and a related guidance elaborate on President Obama’s memorandum.
30. 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 be substantive, e.g., 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. (*emphasis added*) This 20-working-day time limit also applies to any appeal. § 552(a) (6)(A)(ii).

31. 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. Defendant did not request additional information in this instance.
32. Under § 552(a) (6)(B)(i) the agency may extend the period in which to issue its initial determination by up to 10 days when it cannot process the request within the 20-day deadline. However the agency must notify the requesters by writing within the 20 day statutory period for giving a response. Further the agency may not take an extension that goes beyond 10 days.
33. Defendant failed to notify requesters of the need for additional time until after the statutory period had expired, and regardless has since also failed to provide the required response even after that 10 days. It has not otherwise sent requesters any additional communication since it gave requesters such notification.
34. Defendant TVA never contacted requesters for information or to clarify issues related to requesters' fee waiver. Thus there was no tolling of the statutory 20 day deadline for TVA to provide a fee waiver response to requesters. Nor did defendant notify plaintiffs that the deadline had to be extended due to unusual or exceptional circumstances per § 552(a)(6) (B).

35. An agency may not assess search fees under § 552(a)(4)(A)(viii) if the agency fails to comply with any time limit, unless it informs requesters that unusual or exceptional circumstances apply.
36. 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.”
37. Defendant TVA, with regard to the request at issue here, waived its ability to assess fees under § 552(a)(4)(A)(viii) by failing to respond to plaintiffs within the statutory deadline. Defendant TVA did not claim that additional time was needed for its initial determination until after the statutory deadline had passed.
38. Further Defendant TVA failed to respond to requesters request for a fee waiver. The reasons given in its July 21, 2014 letter as to why it needed an extension in providing the initial determination do not apply to TVA’s evaluation of requesters fee waiver. Nor did Defendant ever claim additional time was needed to evaluate or decide upon requester’s fee waiver. In failing to respond to requesters fee waiver request in a timely fashion, Defendant has violated the statutory deadlines of FOIA and cannot assess fees under § 552(a)(4)(A)(viii).
39. TVA must therefore waive all fees and produce the requested documents as required by law.

FIRST CLAIM FOR RELIEF

**Duty to Produce Documents Without Fees for Plaintiffs' FOIA Request –
Declaratory Judgment**

40. Plaintiffs re-allege paragraphs 1-39 as if fully set out herein.
41. Defendant failed to provide a substantive response to plaintiffs' request within the deadline(s) provided by 5 U.S.C.S. § 552(a)(6)(A) and § 552(a)(6)(B)(i), therefore it is statutorily barred from assessing fees § 552(a)(4)(A)(viii).
42. Defendant has also failed to respond to the request for a fee waiver made by plaintiffs within the deadline(s) provided by 5 U.S.C.S. § 552(a)(6)(A) and § 552(a)(6)(B)(i), therefore it is statutorily barred from assessing fees.
43. Plaintiffs are entitled to have their fees waived for requested records.
44. Plaintiffs ask this Court to enter a judgment declaring that:
 - a. Plaintiffs are entitled to a waiver of their fees for responsive records as specifically described in plaintiffs' request; and
 - b. TVA must not assess or seek costs and fees for this request.

SECOND CLAIM FOR RELIEF

**Duty to Produce Documents Without Fees for Plaintiffs FOIA Request – Injunctive
Relief**

44. Plaintiffs re-allege paragraphs 1-43 as if fully set out herein.
45. Plaintiffs are entitled to declaratory relief that defendant has waived its right to request fees and/or that defendant must grant plaintiffs a fee waiver for this request.
46. Plaintiffs ask the Court to enter an injunction ordering defendant to grant plaintiffs' fee waiver, or to agree not to seek fees within 10 business days of the date of the order.

THIRD CLAIM FOR RELIEF

Duty to Release Records Described in Plaintiffs' FOIA Request — Declaratory Judgment

47. Plaintiffs re-allege paragraphs 1-46 as if fully set out herein.
48. FOIA requires that covered agencies provide records responsive to legitimate requests reasonably describing records sought, subject to one of nine enumerated exemptions.
49. Defendant TVA is a covered agency.
50. Plaintiffs have sought and been denied production of responsive records reflecting the conduct of official business.
51. Plaintiffs have a statutory right to the information they seek and defendant has unlawfully failed to provide responsive records.
52. Plaintiffs have exhausted the administrative process and have no requirement to further pursue administrative remedies.
53. The requested records are of great and timely public interest.
54. Plaintiffs ask this Court to enter a judgment declaring that:
 - a. TVA correspondence as specifically described in plaintiffs' FOIA request, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
 - b. TVA must release those requested records or segregable portions thereof subject to legitimate exemptions;
 - c. Plaintiffs are entitled to reasonable attorney's fees and costs; and
 - d. the Parties shall consult regarding withheld documents and 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 defendants' withholdings and any other remaining issues.

FOURTH CLAIM FOR RELIEF

Duty to Release Records Described in Plaintiffs FOIA Request — 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 produce all records in its possession responsive to plaintiffs' FOIA request, subject to legitimate withholdings.
57. Plaintiffs ask this Court to order defendant to produce to plaintiffs, within 10 business days of the date of the order, the requested records described in plaintiffs' FOIA request, and any attachments thereto, subject to legitimate withholdings.
58. 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 defendants' withholdings and any other remaining issues.

FIFTH CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

59. Plaintiffs re-allege paragraphs 1-58 as if fully set out herein.
60. 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.

61. Plaintiffs are statutorily entitled to recover fees and costs incurred as a result of defendant's refusal to fulfill the FOIA requests at issue in this case.

62. 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 4th day of August, 2014,

_____/s/_____
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