

FILED

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

2015 MAR 30 P 4: 01

ENERGY & ENVIRONMENT LEGAL )  
INSTITUTE )  
722 12th Street NW, 4th Floor )  
Washington, DC 20005 )

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

and )

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

C.A. No. 15- 1:15 CV 423  
LO/TCB

Plaintiffs, )

v. )

UNITED STATES DEPARTMENT OF STATE )  
2201 C Street NW )  
Washington, DC 20520 )

Defendant. )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs ENERGY & ENVIRONMENT LEGAL INSTITUTE and FREE MARKET ENVIRONMENTAL LAW CLINIC for their complaint against Defendant UNITED STATES DEPARTMENT OF STATE ("STATE"), allege as follows:

- 1) This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production under two FOIA requests for certain described agency records, compiled, edited, and accessed by agency employees and controlled by or otherwise

accessible to the agency, to which request defendant has provided no substantive response and therefore denied.

- 2) The first request, sent via facsimile on January 28, 2015, sought records relating to the Office of Marine Conservation, Bureau of Oceans and Environmental and Scientific Affairs, and the Office of the Special Envoy for Climate Change.
- 3) State acknowledged plaintiffs' first request, granted a fee waiver, and assigned it a tracking number (F-15-02212) on February 5, 2015.
- 4) The second request, sent via facsimile on February 2, 2015, sought one item of correspondence from Day Mount, a state department employee, which was sent on November 15, 1995.
- 5) State acknowledged plaintiffs' second request, granted a fee waiver, and assigned it a tracking number (F-15-02392) on February 5, 2015.
- 6) Defendant State has subsequently failed to provide an initial determination of the number of responsive records it intends to release or withhold within the 20-day time limit established under 5 U.S.C.S. § 552(a)(6)(A)(i) or to provide any records responsive to either request.
- 7) Defendant's failure to respond has constructively exhausted all of plaintiffs' administrative remedies leaving plaintiffs no choice but to file this lawsuit to compel State to comply with the law with regard to release of agency records. See *Coleman v. Drug Enforcement Admin.* 714 F.3d 816 (4th Cir. 2013).

**PARTIES**

- 8) Plaintiff Energy & Environment Legal Institute (E&E Legal) 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.
- 9) Plaintiff Free Market Environmental Law Clinic (FME Law) is a nonprofit research, public policy based, and public interest litigation center incorporated in Virginia, with its principal place of business located in Fairfax County. FME Law is 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
- 10) Defendant State is a federal agency headquartered in Washington, DC.

**JURISDICTION AND VENUE**

- 11) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the Eastern District of Virginia and FME Law maintains its principal place of business in the Eastern District of Virginia. Moreover, plaintiff E&E Legal is a Virginia Corporation and therefore a legal citizen of Virginia.
- 12) This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question

13) Venue is proper in the Alexandria Division pursuant to Local Rule 3 (B) (1) and 3 (C).

**FACTUAL BACKGROUND**

**Plaintiffs' January 28, 2015 Request**

14) In a January 28, 2015 FOIA request sent via facsimile to State, plaintiffs requested certain identified records, including:

1) Copies of all *emails or text messages* that were (a) sent to or from Kerri-Ann Jones, Daniel Reifsnyder, William Gibbons-Fly, David A. Balton, or Todd Stern (whether as to, from, cc: or bcc:), (b) to or from any individual(s) with an email address ending in (including as to, from, cc: or bcc:), or includes such correspondence anywhere in the email thread:

- i) "wwfus.org"
- ii) "nrdc.org"
- iii) "greenpeace.org" or "gpfdn.com", and/or
- iv) "sierraclub.org"

2) Copies of all *emails or text messages — only responsive correspondence, not attachments* — that were (a) sent to or from any of the five State Department employees listed in item (1)(a) above, (b) which use one or more of the following terms anywhere in the email including in the body and/or the To:, From:, cc:, bcc: or Subject fields:

- i) "Global warming"
- ii) "Climate change"
- iii) "Paris"
- iv) "UNCCC"
- v) "UNFCCC"
- vi) "Kyoto", and/or
- vii) "APEC."

**Plaintiffs' February 2, 2015 Request**

15) In a February 2, 2015 FOIA request sent via facsimile to State, plaintiffs requested correspondence from Day Mount, who at the relevant time was a State employee working in

the Bureau of Oceans and Environmental and Scientific Affairs, to the IPCC Working Group, which correspondence was dated November 15, 1995.

**Defendant's Failure to Substantively Respond**

- 16) State acknowledged both requests and granted a fee waiver for production of responsive documents in two separate letters dated February 5, 2015. State issued FOIA numbers to both requests, labeling the January 28 request as F-15-02212 and the February 2 request as F-15-02392
- 17) Under FOIA State owed a substantive initial determination to request F-15-02212 by February 26, 2015.
- 18) Under FOIA State owed a substantive initial determination to request F-15-02212 by March 4, 2015.
- 19) State has failed to provide such initial determinations of the estimated volume of responsive records to be processed and otherwise manifest its intention to process plaintiffs' requests, and to provide assurance was actually processing such requests, as required within 20 days by 5 U.S.C.S. § 552(a)(6)(A)(i).
- 20) State has continued to fail to provide any substantial response or any actual records responsive to plaintiffs' requests.

**LEGAL ARGUMENTS**

- 21) 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 an initial determination with 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).

22) 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.

23) In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011) the 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.” In addition the Fourth Circuit noted that the Open Government Act of 2007 causes agencies to waive their right to fees if the agency fails to comply with an applicable time limit under FOIA. See *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, FN 2 (4th Cir. 2013). In other words, the amendments were created to prevent agencies from delaying processing requests only to then impose fees when compelled to produce responsive records.

24) State must therefore produce the requested documents as required by law.

**FIRST CLAIM FOR RELIEF**  
**Duty to Produce Records under the Freedom of Information Act**  
**Declaratory Judgment**

25) Plaintiffs re-allege paragraphs 1-24 as if fully set out herein.

26) Plaintiffs are entitled to responsive records subject to legitimate withholdings.

27) Plaintiffs have no requirement to further pursue its administrative remedies.

28) Plaintiffs ask this Court to enter a judgment declaring that:

- a. The records requested in both the January 28, 2015 request and the February 2, 2015 request are agency records subject to FOIA;
- b. State's refusal to provide responsive records is unlawful; and
- c. Defendant must reduce responsive records subject to legitimate withholdings.

**SECOND CLAIM FOR RELIEF**  
**Duty to Produce Records Under the Freedom of Information Act**  
**Injunctive Relief**

29) Plaintiffs re-allege paragraphs 1-28 as if fully set out herein.

30) Plaintiffs are entitled to declaratory relief that defendant has failed to provide responsive documents and/or injunctive relief compelling defendant to provide plaintiff documents response to both requests.

31) Plaintiffs ask the Court to enter an injunction ordering the defendant to provide plaintiffs documents responsive to the request within 10 business days of the date of the order.

32) 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, if any, and any other remaining issues.

**THIRD CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

- 33) Plaintiffs re-allege paragraphs 1-32 as if fully set out herein.
- 34) 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.
- 35) 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.
- 36) 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 30th day of March, 2015.

ENERGY & ENVIRONMENT LEGAL INSTITUTE  
FREE MARKET ENVIRONMENTAL LAW CLINIC

By Counsel:

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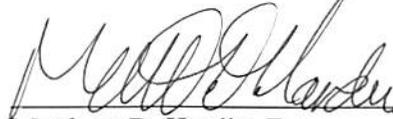
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