

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

AMERICAN TRADITION INSTITUTE)
2020 Pennsylvania Avenue, N.W.)
#186)
Washington, D.C. 20006)

Plaintiff,)

v.)

Case No. CV: 13-112

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Ariel Rios Building)
Washington, D.C. 20460)

Defendant.)

**COMPLAINT FOR DECLARATORY RELIEF AND
RELIEF IN THE FORM OF MANDAMUS**

Plaintiff AMERICAN TRADITION INSTITUTE (“ATI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under two distinct requests for certain EPA records reflecting discussions with and about two environmental activist groups dedicated in substantial part to influencing EPA policy, and which work closely with EPA toward that end.
- 2) In two separate FOIA requests initiated in April 2012, ATI sought certain described records from five identified offices within EPA, to, from or discussing the American Lung Association (or ALA) in one request and Sierra Club (“Sierra”) in the other.

- 3) These two groups are the subject of heightened public interest for their close relationships with Defendant. ALA presents a “prototypical transition...to an organization actively engaged in lobbying and seeking funding from both government agencies and private firms in return for promoting their agenda”,¹ lobbies and litigates² for greater authority for EPA, runs billboard campaigns against politicians who challenge EPA,³ and has received \$20,405,655 from EPA in the last 10 years for its programs.⁴ Sierra Club employs a similar model and has close working relationships with senior Agency officials.⁵
- 4) For nearly ten months and despite several entreaties by Plaintiff Defendant EPA has produced no responsive records, and no substantive response to Plaintiff’s requests,

¹ Bennett, James T., *Pandering for Profit: The Transformation of Health Charities to Lobbyists* (December 14, 2011). GMU Working Paper in Economics No. 11-54. Available at SSRN: <http://ssrn.com/abstract=1972369> or <http://dx.doi.org/10.2139/ssrn.1972369>, published in the *Virginia Economic Journal*, Volume 17, 2012, pp. 33-64. Bennett is a George Mason University “Eminent Scholar” holding, *inter alia*, the William P. Snavely Chair of Political Economy and Public Policy.

² See, e.g., American Lung Association, “American Lung Association Joins Suit Against EPA over Pollution Standards”, Press Release, February 14, 2012, <http://www.longislandpress.com/2012/02/14/american-lung-association-joins-suit-against-epa-over-pollution-standards/>.

³ See, e.g., Amanda Carey, “American Lung Association plasters Rep. Upton’s district with provocative ad,” *Daily Caller*, March 23, 2011, <http://dailycaller.com/2011/03/23/american-lung-association-plasters-rep-uptions-district-with-provocative-ad/>.

⁴ Dennis Ambler, “Samples of US Government Grants to the Global Warming Industry,” Science and Public Policy Institute, Washington, DC, August 22, 2012 http://scienceandpublicpolicy.org/images/stories/papers/originals/sample_grants.pdf citing to EPA data at http://yosemite.epa.gov/oarm/igms_egf.nsf/Reports/Non-Profit+Grants?OpenView.

⁵ For example, in 2012 Sierra promptly hired Defendant’s Region 6 Administrator Al Armendariz expressly to continue his work against a particular domestic industry (coal), after he left EPA when videotaped acknowledging he informing his EPA staff of his “philosophy of enforcement”, “It was kind of like how the Romans used to, you know, conquer villages in the Mediterranean. They’d go in to a little Turkish town somewhere, they’d find the first five guys they saw, and they’d crucify them. And then, you know, that town was really easy to manage for the next few years.” See, e.g., Broder, John M., “E.P.A. Official in Texas Quits Over ‘Crucify’ Video”, *New York Times*, May 1, 2012, http://www.nytimes.com/2012/05/01/us/politics/epa-official-in-texas-resigns-over-crucify-comments.html?_r=0, which also links to the videotaped remarks, viewed January 18, 2013.

but only non-responsive and circular replies to Plaintiff's numerous attempts to obtain cooperation, thereby obstructing the FOIA process.

- 5) A FOIA specialist with Defendant EPA informed Plaintiff that a superior official with Defendant removed both requests from the two FOIA officers originally assigned to handle them, instructing these officers to perform no work on the requests.
- 6) Defendant EPA denied Plaintiff's requests for fee waivers despite FOIA's fee waiver provisions being designed to ensure public interest groups whose work is largely derived from obtaining records from government are not barred from accessing public records, and despite routinely providing waivers for requests of far less public interest.
- 7) Defendant further frustrated Plaintiff's requests by insisting that Plaintiff agree to fee estimates before Defendant would conduct its search, while also refusing to provide estimated fees for Plaintiff to agree to or appeal.
- 8) By this EPA has created a *cul de sac* for Plaintiff, whereby Defendant refuses to take steps toward complying with the Act or provide a substantive response.
- 9) Defendant EPA agreed with Plaintiff's administrative appeal of Defendant's failure to produce responsive records, yet after four more months continues to provide no substantive response to Plaintiff's requests.
- 10) As such, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities and their relationships, EPA has constructively denied ATI's requests and its appeal, leaving ATI no recourse but this lawsuit asking this Court to compel EPA to produce responsive records.

PARTIES

- 11) Plaintiff ATI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. ATI's programs include a specific transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 12) Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

- 13) 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 under 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.
- 14) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant is an agency of the United States.

FACTUAL BACKGROUND

- 15) This lawsuit seeks to compel EPA to respond fully and completely to two separate FOIA requests dated April 2, 2012. The requests sought records relating to dealings of five particular EPA offices with the groups Sierra Club and American Lung Association, with which EPA works collaboratively including on legal and policy matters, and financially supports.

- 16) EPA acknowledged Plaintiff's requests separately with adapted form letters, each assigning tracking numbers and promising that the same two specified offices had been assigned each request. Neither letter provided any initial determination on ATI's requests to have its fees waived or substantially reduced.
- 17) EPA has since chosen to treat these distinct requests together.
- 18) After three months of no further response, no ruling on ATI's requests to have its fees waived or reduced, or any substantive response indicating that EPA was in fact processing ATI's requests, Plaintiff counsel who was also the requester contacted Defendant EPA by telephone on July 5, 2012 to obtain a status update.
- 19) At that time EPA's FOIA specialist who was assigned one of Plaintiff's requests, HQ-FOI-01058-12 ["ALA"], informed Plaintiff that both FOIA specialists originally assigned the requests had had them taken away by their supervisor with an instruction to take no action on the requests.
- 20) After one more week of no response from Defendant, on July 11, 2012 Plaintiff filed an administrative appeal arguing that by these actions and by its inaction the Agency had constructively denied Plaintiff's requests.
- 21) After four weeks, by letter dated August 8, 2012 Defendant responded to Plaintiff's appeal, agreeing that the Agency had in fact not responded to Plaintiff's request or requests for fee waiver. Defendant asserted that EPA would respond within five days to Plaintiff's requests for fee waivers.
- 22) By letter dated August 7, 2012, Defendant denied both of Plaintiff's requests for fee waiver for information about the Agency's relationship with these two groups.

- 23) Plaintiff appealed the denial of its requests for fee waiver on August 29, 2012.
- 24) As regards Plaintiff's request for responsive records, instead of Defendant EPA stating it would produce records subject to legitimate exemptions, nearly six months ago Defendant replied to Plaintiff's appeal stating that Plaintiff would receive an update on the status of EPA processing its requests. It has provided no updates, no substantive response indicating it is processing and plans to comply with Plaintiff's requests, and has ignored Plaintiff's correspondence seeking to prompt action.
- 25) Transparency in government is the subject of high-profile promises from the president and attorney general of the United States, both arguing forcefully that "that FOIA 'should be administered with a clear presumption: In the face of doubt, openness prevails'" (See, e.g., Attorney General Eric Holder, 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 for the heads of executive departments and agencies, January 20, 2009, http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.)

**Plaintiff's FOIA Request HQ-FOI-0152-12 Seeking Certain
Specified Emails to, from or discussing Sierra Club**

- 26) On April 2, 2012, Plaintiff requested "copies of any email sent from or to (including as cc:)" five identified EPA offices "and containing the word 'Sierra' in either the body, subject line or any domain name in the email."
- 27) EPA acknowledged this request by letter dated April 2, 2012, and assigned it tracking number HQ-FOI-0152-12.

Plaintiff's FOIA Request HQ-FOI-0158-12 Seeking Certain Specified Records to, from or discussing American Lung Association

28) On April 2, 2012, by a separate document Plaintiff requested “copies of any email sent from or to (including as cc:)” five identified EPA offices “and anyone with ‘Lung’ in their e-mail domain (this includes but is not limited to “Lung.org” or ‘LungUSA.org’”).

29) EPA acknowledged this request by letter dated April 3, 2012, and assigned it tracking number HQ-FOI-0158-12.

30) As part of both Requests, ATI wrote, in pertinent part:

“please provide copies of all records meeting the description which follows and which were sent or received by or are in the possession of staff working now or during the period covered by this Request in or for the following five Offices at EPA HQ:

**Office of Associate Administrator for Policy,
Office of Associate Administrator for External Affairs and Environmental
Education,
Office of Associate Administrator for Air and Radiation
Office of the Deputy Administrator, and/or
Office of the Assistant Administrator for Air and Radiation**

... Documents responsive to this Request will have been dated, sent or received by the identified EPA HQ offices between January 21, 2009 and the date EPA performs the relevant, respective search(es) in response to this Request, inclusive.”

Defendant's Response to Both FOIA Requests

31) EPA acknowledged both requests by separate form letters, each excerpting the respective request, framing its scope, and stating that another office within the Agency was assigned the responsibility of processing Plaintiff's requests. (“Your request has been forwarded to the Office of the Administrator (AO) and the Office of

Air and Radiation (OAR) for processing” [HQ-FOI-0152-12], and “Your request has been forwarded to AO OAR for processing” [HQ-FOI-0158-12] [*gap in text and acronyms in lieu of office names are in the original*]). These letters were signed by Larry Gottesman, National FOIA Officer.

32) EPA did not thereafter provide ATI the initial determinations on its requests for fee waiver until after ATI appealed this functional refusal to process ATI’s requests.

Other Proceedings Below: Telephone Contact

33) On July 5, 2012 ATI counsel and requester called the telephone number listed in the form acknowledging HQ-FOI-01058-12 [“ALA”], answered by the EPA FOIA specialist assigned that request (“Vivian”). While on the telephone “Vivian” looked into this inaction at ATI’s request, explained the history as reflected in her file and in her memory, and informed ATI counsel of affirmative steps taken by the Agency to remove the requests from the normal handling procedure.

34) Specifically, Defendant’s FOIA specialist informed Plaintiff’s counsel that the supervisor of both assigned specialists, Larry F. Gottesman,⁶ instructed them to take no action on the requests. Gottesman is the National FOIA Officer who first assigned the requests to “AO” and OAR” and to these two FOIA specialists.

35) During the same conversation this FOIA officer expressed surprise that the promised followup had not occurred, stating that the lack of promised action troubled her

⁶ Mr. Gottesman is “the U.S. Environmental Protection Agency’s (EPA’s) Freedom of Information Officer,” a senior position entailing, e.g., testimony to Congress on Agency fulfillment of its statutory duties under FOIA, See, e.g., http://epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0318_lfg.pdf.

“because this is my file” in that technically she was still assigned to carry out EPA’s obligations as to the request.

- 36) Plaintiff’s counsel attested to this discussion in an affidavit filed with ATI’s administrative appeals of EPA’s refusal to process these requests (affidavit is an appendix to ATI’s administrative appeal, Ex. 1, attached).
- 37) Mr. Gottesman in fact took no action on the requests and EPA provided no further substantive response indicating an intention to process the requests. EPA did not seek an extension to respond to Plaintiff’s requests. EPA did not otherwise notify ATI of reasons it must delay responding to ATI’s requests for records and for fee waivers. EPA provided no responsive records.

Plaintiff’s Administrative Appeal

- 38) One week after this telephone conversation with EPA, by electronic mail on July 11, 2012, Plaintiff ATI filed its administrative appeal of EPA’s constructive denial of these requests and requests for fee waivers, specifically challenging EPA’s failure or refusal to provide substantive responses.
- 39) As part of this appeal Plaintiff’s undersigned counsel Horner attested, by affidavit, to the above-described conversation with EPA’s FOIA specialist.
- 40) In this appeal ATI plainly stated it was appealing EPA’s refusal to provide the requested information. (*See, e.g.*, ATI statement it was appealing EPA’s “‘adverse determination’ in its election to not respond to two Requests”, as presented in the telephone call with “Vivian” (administrative appeal, p. 1); *see also*, “Alternately, we appeal EPA’s failure to timely respond and to thereby constructively deny those

Requests” (Id.); *and see* ATI citing to EPA’s failure to seek an extension of time to produce responsive records (Id., p. 4), and that EPA “sat on the requests” by not producing responsive information as required (appeal, p. 5). *See also*, “EPA has denied ATI’s requests” (Id., p. 6), and , “EPA’s Determination To Not Provide Requested Information Should Be Reversed” (Id., p. 8).

41) As such, ATI plainly appealed EPA’s refusal or otherwise failure to provide responsive records as required, either by affirmative or constructive denial.

Defendant’s Response to Plaintiff’s Administrative Appeal

42) EPA replied to this appeal by letter dated August 8, 2012, granting Plaintiff’s appeal of the Agency’s failure to respond to ATI’s requests for fee waiver, promising that determinations would come within five days.

43) EPA’s reply also granted Plaintiff’s appeal “insofar as EPA has not responded to your request”, not promising production of responsive records subject to legitimate withholdings but an update on the status of Plaintiff’s requests.

A. Defendant’s Response Denying Plaintiff’s Request for Fee Waiver

44) By letter dated August 7, 2012, Defendant denied both requests for fee waiver, stating Plaintiff had failed to demonstrate how information revealing the Agency’s relationship with these two groups, one of which it funds substantially and the other with which it works closely in other ways, would significantly increase the public’s understanding of government operations or activities.

45) Both fee waiver request denials also remain incomplete in that the Agency has to date continued its refusal to provide any estimate of fees to appeal, while nonetheless

repeating the caution that Plaintiff that “[EPA] will be unable to process your request until they receive your written assurance of payment.”

46) Defendant thereby reiterated an impossible condition for processing Plaintiff’s requests of Plaintiff first accepting EPA’s cost estimates which Defendant still will not provide.

47) By letter dated October 4, 2012, Defendant denied Plaintiff’s requests to have its fees waived or substantially reduced as provided for in FOIA when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).

48) By letter dated and sent by electronic mail October 12, 2012, Plaintiff informed Defendant of precedent post-Congress’ 2007 amendments to FOIA establishing that, by failing to respond substantively to Plaintiff’s requests within the statutory period of time, Defendant waived its ability to seek fees.

49) Defendant did not respond to this letter.

B. Defendant’s Response to Plaintiff’s Appeal for Failure to Produce Records

50) By its letter dated August 8, 2012, EPA acknowledged that ATI’s appeal was of the Agency’s refusal to provide responsive records. *See*, “I am responding to your July 11, 2012 Freedom of Information Act (‘FOIA’) appeals. You appealed your constructive denial and delay in processing your FOIA Requests HQ-FOI-01052-12 and HQ-FOI-01058-12”.

51) Nonetheless, EPA stated only that “EPA’s FOIA office will also update you on the status of processing your request to date”, neither ruling on the appeal, ordering EPA to produce the withheld information, nor stating that EPA would produce the requested information.

Plaintiff’s Request for a Substantive Response, and Defendant’s Reply

52) By letter dated and sent by electronic mail December 19, 2012, Plaintiff wrote Plaintiff again seeking to prompt action, stating, inter alia, “although these requests are now more than eight months old, EPA has produced neither a single responsive record nor a substantive response. We request the Agency comply with its obligations under FOIA by one of two steps. We also inform EPA of our intention to protect and pursue our appellate rights if EPA does not elect one of the following two courses prescribed under FOIA within twenty additional working days from this letter.”

53) Plaintiff requested that Defendant “produce responsive, described records and detailed, Vaughn-style indexes describing any legitimately claimed FOIA exemptions applicable to withheld information sufficient to allow a reasonable determination of the validity of those withholdings. Alternately, EPA may elect to begin its required compliance with FOIA by providing a substantive response.”

54) Defendant did not respond to this letter.

LEGAL ARGUMENTS

Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Requests, and to its Appeal

55) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and

intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)) Alternately, the agency must cite “exceptional circumstances” and request, and make the case for, an extension that is necessary and proper to the specific request. See also *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

- 56) The courts have deemed a substantive agency response to mean the agency must begin to process the request. See, e.g., *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57. Examples include informing a requester that it assigned the request(s) to the simple, normal or complex processing tracks and giving notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule. See generally, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011). Alternately, a complying agency will obtain an appropriate extension in the event of unusual circumstances.
- 57) No office within Defendant EPA has provided any indication it is in fact processing Plaintiff’s requests, or sought and made its case for an extension of time to respond to ATI’s requests as required when “exceptional circumstances” exist.
- 58) EPA chose to merely assign tracking numbers and claim that certain offices would handle the requests.
- 59) After agreeing with Plaintiff on appeal regarding the Agency’s failure to respond to Plaintiff’s requests for records, Defendant did not substantively respond, or order

production of responsive records subject to legitimate withholdings, or indicate that the requests were in the queue for processing and that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule.

- 60) Defendant merely repeated its previous written assertions, and stated “EPA’s FOIA office will also update you on the status of processing your request to date”.
- 61) This is not a responsive reply to Plaintiff’s appeal. The Agency instead handled these requests in a way ensuring ATI had no other remedy but this lawsuit.
- 62) Nearly four months after agreeing with Plaintiff on appeal and despite further entreaties by Plaintiff seeking a substantive response, EPA continues to provide Plaintiff no responsive records or any substantive response at all.
- 63) Defendant’s sole written communication since that appeal, despite being styled as resolving Plaintiff’s appeal, simply stated that at some point in the future some office would provide some response.
- 64) By not substantively responding to ATI’s request Nos. HQ-FOI-0152-12, and HQ-FOI-0158-12, EPA has constructively denied the requests for records, and in its non-responsive ruling on Plaintiff’s appeal acknowledges Plaintiff has exhausted its administrative remedies.
- 65) To allow agencies to rule on appeal by merely providing indeterminate, non-substantive responses would make a mockery of FOIA. It would provide the taxpayer a right to see records without an actual remedy when those records are not produced as required. Plaintiff has no recourse but to file this lawsuit.

66) For the foregoing reasons, EPA is now legally required to provide Plaintiff records responsive to its requests.

Defendant EPA Owes Plaintiff a Waiver or Substantial Reduction of its Fees

67) FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs).

68) The language of the FOIA makes clear that Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government documents. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. (“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)).

69) Courts have noted this legislative history to find that 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 1282, 1284-1286 (9th. Cir. 1987).

- 70) The information requested in request Nos. HQ-FOI-01052-12 and HQ-FOI-01058-12 meets that description, for reasons both obvious and specified in Plaintiff's request and appeal.
- 71) This history suggests that all fees should be waived whenever a requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. The requested information also meets this description.
- 72) FOIA provides for fee waiver or reduction when "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).
- 73) EPA has not responded to Plaintiff's requests to have its fees waived or reduced for request Nos. HQ-FOI-01052-12 and HQ-FOI-01058-12.
- 74) Plaintiff has routinely received fee waivers under FOIA and for requests for information of far less demonstrable interest to the public than, as here, records reflecting the nature and extent of Defendant's relationship with two pressure groups with whom it works closely and to which it pays substantial amounts of taxpayer dollars.
- 75) Due to that nature of the requested records disclosure of the requested information would contribute significantly to public understanding of the operations or activities of the government. This is particularly true because neither Plaintiff, nor the public at large, has any other means of obtaining the information requested.

76) Further, ATI has proven its ability to disseminate the information to a broad audience, through means explained in its original FOIA request, and for the reasons for which ATI has received fee waivers in the past (see. e.g., U.S. Department of Energy FOIA request No., HQ-2012-01449-F, seeking a large volume of emails produced on a private email account via which the director of DoE's Loan Guarantee Program administered that program).

77) By not substantively responding to ATI's requests Nos. HQ-FOI-01052-12 and HQ-FOI-01058-12, EPA has wrongly, constructively denied both of Plaintiff's requests to have its fees waived or substantially reduced, as "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."

78) Defendant's denial is also incomplete because, instead of granting Plaintiff's requests as is proper, or even having attempted to follow through on its vow to assess fees by providing Plaintiff the necessary fee estimates and information about Plaintiff's appellate rights, as required, Defendant has merely stated that it will not proceed with its search until Plaintiff agrees to the fee estimates which the Agency continues to refuse to put forth.

79) Further, as Plaintiff noticed Defendant, under the OPEN Government Act of 2007 ("2007 Amendments"), agencies that do not respond to requests within the statutory time period are precluded from charging search fees (or copying fees for media requesters, who are not subject to search fees). *Bensman v. Nat'l Park Serv.*, No. 10-1910, 806 F. Supp. 2d 31 (D.D.C. Aug. 10, 2011) ("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. § 552(a)(4)(A)(viii)’). *See also Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury*, No. 07-2590, 2009, WL 2905963, 2009 U.S. Dist. LEXIS 86348 (N.D. Cal. Sept. 8, 2009)(Defendant waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request.); Reporters Committee for Freedom of the Press, Federal Open Government Guide, Response Times, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times>.

80) Defendant's position by which it is not processing Plaintiff's requests until Plaintiff first agrees to pay fees that Defendant failed to estimate is arbitrary and capricious, and also simply moot, on at least three grounds: after eight months EPA never estimated fees which it stated Plaintiff must agree to pay before Defendant processed Plaintiff's requests; disclosure of responsive records is plainly in the public interest for reasons stated to EPA and in this Complaint; and EPA waived its right to assess fees by not responding to ATI's request within the statutory time period.

81) Finally, since this request is for material which is clearly of benefit to the public, other persons will undoubtedly also request these records. It would be inequitable if the first requester were to bear the full material cost of the initial search.

Having Failed to Properly Respond to Plaintiff's Requests and Appeal, Defendant EPA Owes Plaintiff Responsive Records Subject to Legitimate Withholdings

- 82) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(A)(i). *See, e.g., Shermco Industries v. Secretary of the U.S. Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978).
- 83) EPA owed ATI a substantive response to its requests for information by April 30, 2012.
- 84) EPA failed to substantively respond to Plaintiff’s requests, which Plaintiff administratively appealed.
- 85) EPA provided no responsive records to ATI but stated it would update Plaintiff on the status of Plaintiff’s requests. EPA must now provide Plaintiff records responsive to its requests.
- 86) The courts have deemed a substantive agency response to mean the agency must begin to process the request. *See, e.g., Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990). Examples include informing a requester that it assigned the request(s) to the simple, normal or complex processing tracks and giving notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011).

87) Merely stating that an agency has many records to review, yet producing neither records nor notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule, after seven months and will get back to requester does not constitute a response. An agency must demonstrate an intention to process the request. *See, e.g., Oglesby v. Dep't of the Army*, 920 F.2d at 68.

88) Thus, EPA must now provide Plaintiff records responsive to its requests.

FIRST CLAIM FOR RELIEF

Duty to Release Specified EMails Sent To or From or Discussing Sierra Club HQ-FOI-01052-12 -- Declaratory Judgment

89) Plaintiff re-alleges paragraphs 1-88 as if fully set out herein.

90) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn “what their government is up to.” *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Ibid.* Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979).

91) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

92) Plaintiff has a statutory right to the information it seeks.

93) Defendant failed to search for or provide Plaintiff responsive records.

94) Defendant failed to respond to Plaintiff's administrative appeal.

95) Plaintiff has exhausted its administrative remedies.

96) Plaintiff asks this Court to enter a judgment declaring that

- i. EPA records sent to or from or discussing Sierra Club as described in Plaintiff's request HQ-FOI-01052-12, are public records subject to release under FOIA;
- ii. EPA must release those requested records;
- iii. EPA's denial of Plaintiff's FOIA requests seeking the described records is not reasonable, and does not satisfy EPA's obligations under FOIA; and
- iv. EPA's refusal to produce the requested records is unlawful.

SECOND CLAIM FOR RELIEF

**Release Specified E-mails Sent To or From or Discussing Sierra Club
-- Injunctive Relief**

97) Plaintiff re-alleges paragraphs 1-96 as if fully set out herein.

98) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's requests described, *supra*.

99) This Court should enter an injunction ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested records pertaining to Sierra Club, and a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

THIRD CLAIM FOR RELIEF

Duty to Release Specified EMailS Sent To or From or Discussing American Lung Association HQ-FOI-01058-12 -- Declaratory Judgment

- 100) Plaintiff re-alleges paragraphs 1-99 as if fully set out herein.
- 101) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 102) Plaintiff has a statutory right to the information it seeks.
- 103) Defendant failed to search for or provide Plaintiff responsive records.
- 104) Defendant failed to respond to Plaintiff's administrative appeal.
- 105) Plaintiff has exhausted its administrative remedies.
- 106) Plaintiff asks this Court to enter a judgment declaring that
- i. EPA records sent to or from or discussing American Lung Association as described in Plaintiff's request HQ-FOI-0158-12, are public records subject to release under FOIA;
 - ii. EPA must release those requested records;
 - iii. EPA's denial of Plaintiff's FOIA requests seeking the described records is not reasonable, and does not satisfy EPA's obligations under FOIA; and
 - iv. PA's refusal to produce the requested records is unlawful.

FOURTH CLAIM FOR RELIEF

Release Specified EMailS Sent To or From or Discussing American Lung Association -- Injunctive Relief

- 107) Plaintiff re-alleges paragraphs 1-106 as if fully set out herein.
- 108) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's requests described, *supra*.

109) This Court should enter an injunction ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested records pertaining to ALA, and a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

FIFTH CLAIM FOR RELIEF
**Request for Fee Waivers for HQ-FOI-01052-12 and HQ-FOI-01058-12 --
Declaratory Judgment**

110) Plaintiff re-alleges paragraphs 1-109 as if fully set out herein.

111) Plaintiff has sought and been constructively denied a waiver or reduction of its fees for two requests under the Freedom of Information Act, HQ-FOI-01052-12 and HQ-FOI-01058-12.

112) FOIA provides for fee waiver or reduction when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”

113) The information Plaintiff seeks in HQ-FOI-01052-12 and HQ-FOI-01058-12 meets this description.

114) Plaintiff has a statutory right to have its fees waived or substantially reduced.

115) Defendant has not responded to Plaintiff’s requests to have its fees waived.

116) Defendant did not substantively respond to Plaintiff’s requests within the statutory period of time, thereby waiving its ability to seek fees.

117) Plaintiff has exhausted its administrative remedies.

118) Plaintiff asks this Court to enter a judgment declaring that:

- i. Disclosure of Agency records as described in Plaintiff's requests HQ-FOI-01052-12 and HQ-FOI-01058-12 is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government;
- ii. EPA's refusal to respond to and constructive denial of Plaintiff's fee waiver requests is not reasonable, and does not satisfy EPA's obligations under FOIA;
- iii. EPA's refusal to grant Plaintiff's request for fee waiver is unlawful; and
- iv. EPA must grant Plaintiff's request to have its fees waived or substantially reduced associated with producing the requested records.

SIXTH CLAIM FOR RELIEF

**Request for Fee Waiver for HQ-FOI-01052-12 and HQ-FOI-01058-12
-- Injunctive Relief**

119) Plaintiff re-alleges paragraphs 1-118 as if fully set out herein.

120) Plaintiff is entitled to injunctive relief compelling Defendant to grant Plaintiff's requests to have its fees waived for HQ-FOI-01052-12 and HQ-FOI-01058-12.

121) We ask this Court to enter an injunction ordering the Defendant to grant Plaintiff's requests to have its fees waived within 10 business days of the date of the order.

SEVENTH CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

122) Plaintiff re-alleges paragraphs 1-121 as if fully set out herein.

123) 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.

124) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

125) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests 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 27th day of January, 2013,

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