



Environmental Law Center  
American Tradition Institute

**APPEAL UNDER THE FREEDOM OF INFORMATION ACT AND  
NOTICE REGARDING EPA DENIAL OF FOIA FEE WAIVER REQUEST**

December 19, 2012

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

RE: Request Numbers: HQ-FOI-01052-12, HQ-FOI-01058-12  
(Appeal Numbers HQ-APP-00175-12, HQ-APP-00176-12)

**By Electronic Mail to [hq.foia@epa.gov](mailto:hq.foia@epa.gov)**

We write regarding the above-referenced requests under the Freedom of Information Act (FOIA), both dated April 2, 2012. As the record shows, these are two discrete requests although EPA opted at a senior level to take them away from the assigned FOIA specialists and process, or more accurately also according to the record, not process, them together.

The most recent correspondence on these requests was our October 12, 2012 notice reminding the Agency of its waiver of any ability to seek fees. We write now to note that, 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.

Under FOIA, in response to our requests EPA may 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. It has done neither, and pursuant to FOIA we request one or the other within twenty working days from this letter, as described below.

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. This 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).

The courts have deemed a substantive agency response to mean the agency indicates an intention to process the request, and 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).

As you are aware, to date EPA has failed to offer any such indication of “due diligence”, or any justification of “exceptional circumstances” that it is “reasonably necessary” for it still to

have provided no substantive response. *See, e.g., Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)

Merely stating, after eight months, that an agency has many records to review and will get back to requester, producing neither records nor notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule, or even offering any indication of diligence toward satisfying the request, does not constitute a response under FOIA.

Given the time elapsed with no required, substantive response, any such response such as that for which we make our final administrative request today also rightly will include EPA agreeing to and initiating a rolling production by delivering those records which have been reviewed.

ATI neither waives nor agrees to limit any appellate rights by this request. Further, we do not agree that any response falling short of EPA's obligations by this time alters those rights.

Also, in the event that EPA takes the position that further exhaustion is required regarding its failure to produce as agreed with us on administrative appeal on August 8, 2012 that it had failed to produce, please also consider this an appeal of EPA's failure, nonetheless, to produce any records or a substantive response of any sort.<sup>1</sup>

Therefore, for all of the above stated reasons and all others in the record, please provide us responsive records subject to any legitimate and justified withholdings within twenty working days. Please provide all records and other responses to my attention at:

1489 Kinross Lane  
Keswick, VA 22947

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<sup>1</sup> In that same correspondence EPA also stated "EPA's FOIA office will also update you on the status of processing your request to date". EPA has failed to provide any substantive response.

Finally, we also remind EPA that each of the above-cited requests include the notation that “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”. If EPA claims it conducted the searches prior to now, we request the relevant official conducting the searches to attest to the date the respective searches were performed.

If you have any questions please do not hesitate to contact us. In the meantime, pursuant to the Agency’s previous agreement with us on administrative appeal and all other information and arguments on the record, within twenty additional working days from the date of this letter we look forward to EPA producing all responsive records subject to legitimate, justified withholdings, or informing us of the quantity of records it is reviewing and its intention to produce responsive records on what schedule, initiating a rolling production by releasing records reviewed to date.

We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Horner', is written over a faint, light-colored signature line.

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