

**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. 14-1356 (RMC)

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

Defendant.)

AMENDED 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 two separate FOIA requests, each made jointly by both plaintiffs.
2. The first of these requests (“Dimock”) sought certain Agency records over a seven-month period. These records comprise copies of all correspondence which was part of

the “HQ-Dimock” email group by or to then-EPA official Robert Sussman. Upon information and belief, particularly screen shots provided to plaintiffs showing the group’s participants, Mr. Sussman participated in this correspondence in his capacity as Senior Policy Counsel to the Administrator. EPA ignored plaintiffs’ reminder about this request and has done nothing to respond to it for a year.

3. Plaintiffs requested a fee waiver as provided by FOIA. Defendant asserted that the request would incur no fees because it would require only *de minimis* search and processing.
4. The second FOIA request at issue in this suit (“Grifo”) seeks certain Agency records over a four-month period. These records comprise copies of correspondence sent or received by certain officials which involve a policy activist subsequently hired by EPA in the position of Scientific Integrity Official. Plaintiffs again requested fee waiver. Defendant EPA initially denied plaintiffs’ request for fee waiver, which it reversed and granted after Plaintiffs made an administrative appeal.
5. Defendant has provided no records or otherwise substantive response to either request, respectively, for one year (Dimock), and for five months (Grifo).
6. Accordingly, plaintiffs file this lawsuit to compel EPA to comply with the law with regard to improper withholding of public records.

PARTIES

7. 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 and energy 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.

8. 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.
9. Defendant EPA is a federal agency headquartered in Washington, DC.

JURISDICTION AND VENUE

10. 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.
11. 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 plaintiffs and defendant EPA have offices in the District of Columbia.

FACTUAL BACKGROUND

Plaintiffs' "Dimock" FOIA Request EPA-HQ-2013-009621

12. In a July 25, 2013, request sent by electronic mail to EPA's Headquarters, plaintiffs requested:

“copies of all emails, text messages, or instant messages sent to or from (including also as cc: or bcc:) any EPA-assigned email, text and/or IM account(s) of Robert Sussman, former Senior Policy Counsel to the Administrator (or while holding any position over the covered period), which communications were part of the ‘HQ-Dimock’ group reflected in screen shots, infra.”).

Plaintiffs also requested a waiver of fees.

Defendant’s Reply and Subsequent Proceedings

13. EPA did not acknowledge this request until September 4, 2013. EPA assigned this request identification number EPA-HQ-2013-0091996 which it later amended to EPA-HQ-2013-009621.
14. By letter dated September 10, 2013, defendant EPA through its employee, Larry Gottesman, deemed plaintiffs’ request non-billable and stated that it would incur only *de minimis* expense. Such a classification means that the agency determined it would take two hours or less to comply with the request.
15. However, defendant failed to specifically address the fee waiver request and in so doing failing to either grant or deny the fee waiver, asserting instead that, “Based upon...the information available to us at this time, we have determined that the total fees that would be incurred in processing this request is deminimus [sic] and therefore not billable. The EPA Office of the Administrator will respond to your request for information for the Agency.” September 10, 2013 response from EPA to plaintiffs’ counsel.
16. Defendant owed plaintiffs a response to this request on or by August 22, 2013. As such, by its failure to respond substantively, defendant waived any ability to seek fees.

17. Nearly one year later defendant has still yet to provide the required substantive response to the Dimock request or any responsive records despite plaintiffs reminding defendant of the outstanding request, to which defendant did not respond. This is true even though defendant asserted that the request would require only *de minimis* search and processing.
18. As such, by failing to respond to plaintiffs' request in the required time in violation of statutory deadlines, defendant has missed its statutory deadline to substantively respond, failed to act as promised, and by this inaction, also waived any ability to now seek fees.
19. Plaintiffs have therefore constructively and actually exhausted the administrative process as regards this request.

Plaintiffs' "Grifo" FOIA Request EPA-HQ-2014-003658

20. In a February 12, 2014 request sent by electronic mail to EPA's Headquarters, plaintiffs requested, respectively:

"Any and all electronic or other correspondence dated from July 28, 2013, to November 25, 2013, inclusive, sent or received by now-Administrator Gina McCarthy or her executive assistants, Associate Administrator of the Office of Policy Joel Beauvais, Assistant Administrator of the Office of Administration and Resources Management Craig E. Hooks, or the Office of Human Resources Director Susan Kantrowitz which:

- (a) was sent or received by Francesca Grifo;
- (b) references 'scientific integrity official';
- (c) references 'scientific integrity'; or,
- (d) references 'Union of Concerned Scientists' or 'UCS'."

Plaintiffs also requested a waiver of fees.

Defendant's Reply and Subsequent Proceedings

21. EPA assigned this request identification number EPA-HQ-2014-003658.

22. Defendant initially denied plaintiffs' request for a fee waiver. Plaintiff administratively appealed this denial on March 18, 2014. This appeal was assigned identification number EPA-HQ-2014-004693. On April 15, 2014 defendant overturned the initial denial and granted plaintiffs' fee waiver with regard to the underlying request.
23. After granting the fee waiver defendant owed plaintiffs a responsive response with regard to the request no later than May 15, 2014. Tolling of the statutory deadline for a response ceased after defendant granted the fee waiver.
24. Defendant failed to provide the required response by May 15, 2014 and, to date, has failed to produce any responsive records, or otherwise a substantive response, and has not provided any justification for this non-production. As such, defendant has missed its statutory deadline to substantively respond by failing to provide a proper response or any timeframe for providing response records within the statutory deadline.
25. Defendant's failure to respond to plaintiffs in the statutorily required time, or to produce the requested documents pursuant to applicable law, constructively and actually exhausts the administrative process as regards this request.

LEGAL ARGUMENTS

26. 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 record-keeping and disclosure obligations.
27. 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).

28. U.S. Code 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.
29. 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*).
30. Defendant EPA owes plaintiffs records responsive to both requests at issue in this suit, which reasonably describe requested information and otherwise filed in compliance with

applicable law and regulation subject to legitimate withholdings, and has failed to provide them in violation of statutory deadlines.

31. Further, should EPA cross-complain or otherwise argue that its failure to perform is because it is due fees, plaintiffs note in advance that defendant EPA has waived its ability to assess fees under § 552(a)(4)(A)(viii) by failing to substantively respond to plaintiffs within the statutory deadline (EPA-HQ-2013- 009621). EPA, therefore, has waived all fees and must produce the requested documents as required by law.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

32. Plaintiffs re-allege paragraphs 1-31 as if fully set out herein.
33. Plaintiffs have sought and been denied production of responsive records reflecting the conduct of official business and defendant has otherwise failed to provide a substantive response to the FOIA requests EPA-HQ-2013-009621 and EPA-HQ-2014-003658.
34. Defendant also failed to respond substantively to plaintiffs' Dimock request, or to plaintiffs' fee waiver request, within the deadline(s) mandated under 5 U.S.C.S. § 552(a)(6)(A), therefore it is statutorily barred from assessing fees by § 552(a)(4)(A)(viii) for that request.
35. Plaintiffs ask this Court to enter a judgment declaring that:
 - a. EPA correspondence as specifically described in plaintiffs' FOIA requests EPA-HQ-2014-003658 and EPA-HQ-2013-009621, 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;
- c. EPA may not assess or seek costs and fees for request EPA-HQ-2013-009621 as plaintiffs are entitled to a waiver of their fees for correspondence and defendant has waived its ability to seek fees.

SECOND CLAIM FOR RELIEF
Seeking Injunctive Relief

- 36. Plaintiffs re-allege paragraphs 1-35 as if fully set out herein.
- 37. Plaintiffs are entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiffs' FOIA requests, subject to legitimate withholdings.
- 38. 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 requests EPA-HQ-2014-003658 and EPA-HQ-2013-009621, and any attachments thereto, subject to legitimate withholdings.
- 39. 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 withholds and any other remaining issues.
- 40. Plaintiffs ask the Court to enter an injunction ordering the defendant to either grant plaintiffs' fee waiver pursuant to EPA-HQ-2013-009621 within 10 business days of the date of the order, or to not seek fees for this request.

THIRD CLAIM FOR RELIEF
Seeking Costs And Fees

41. Plaintiffs re-allege paragraphs 1-40 as if fully set out herein.
42. 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.
43. 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.
44. 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 11th day of August, 2014,

_____/s/_____
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