

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

**ENERGY & ENVIRONMENT LEGAL INSTITUTE)
722 12th St., NW, 4th Floor)
Washington, D.C. 20005)**

Plaintiff,

v.

Civil Action No. 17-1917

**UNITED STATES DEPARTMENT OF HEALTH)
AND HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, D.C. 20201)**

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ENERGY & ENVIRONMENT LEGAL INSTITUTE (“E&E Legal”) for its complaint against Defendant UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES (“the Department” or “HHS”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production of records in response to two FOIA requests to a components of HHS, the National Institute for Environmental Health Studies (“NIEHS”).
2. HHS has improperly denied the requests by failing to provide an initial determination in accordance with *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).

3. Plaintiff requested fee waivers for both, as provided by FOIA, due to the public interest in the information the records address and, expressly in the alternative, the media and educational status of each requester.
4. Plaintiff has received fee waivers by federal agencies because they are media outlets, and have received fee waivers by federal agencies on the very same substantive issue for reasons of the public interest at issue.
5. NIEHS send an acknowledgement letter with regard to of one of the requests but did not acknowledge the other request.
6. In its acknowledgment letter, NIEHS failed to discuss the fee waiver requested by plaintiff, instead simply stating it had classified the requester as ‘other.’
7. NIEHS did not estimate the volume of records responsive to the request, nor a date by which responsive records would be produced, nor any FOIA exemptions which might apply
8. HHS therefore has failed to properly respond to any of plaintiff’s request.
9. Accordingly, plaintiff files this lawsuit to compel the HHS to comply with the law and produce the properly described public records in these FOIA requests.

PARTIES

10. 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. E&E Legal is 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.

11. Defendant HHS is a federal agency headquartered in Washington, DC with constituent agencies including the National Institutes of Health (NIH) and National Cancer Institute (NCI).

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this brought in the District of Columbia, and because plaintiffs and the defendant all maintain offices in the District. Furthermore, jurisdiction is proper under 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
13. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because FOIA grants the District Court of the District of Columbia jurisdiction, and because defendant is a federal agency.

FACTUAL BACKGROUND

14. On July 14, 2017 plaintiff submitted a FOIA requests to NIEHS, seeking copies of all emails and attachments which used a number of specifically delineated keywords. (see Exhibits 1).
15. This request was submitted to NIEHS to the email address stockton@niehs.nih.gov.
16. On August 8, 2017 plaintiff submitted a request to NEISH via email at stockton@niehs.nih.gov seeking documents and emails with specified keywords.

Defendant's Reply and Subsequent Proceedings

17. NIEHS never acknowledged the receipt of the July 14, 2017 FOIA request, nor assigned it a FOIA number.
18. NIEHS did acknowledge receipt of the August 8, 2017 FOIA request, assigning it FOIA Case N0. 46712.
19. In that acknowledgement NIEHS did not state whether it was rejecting the fee waiver request, nor did it notify plaintiff of its right to appeal such a determination. NIEHS did state it would charge plaintiff such fees “as they apply to “other” requesters.”
20. NIEHS has not further contacted plaintiff, or nor provided a substantive response of any kind. It has failed to provide a schedule of production and what exemptions it might claim under FOIA, or otherwise comply with FOIA’s requirements within that 20-day timeframe. *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
21. Such a responsive by NIEHS was due August 11 with regard to the July 14 request and by September 6, with regard to the August 8 request.
22. By failing to respond to plaintiff’s request in the required time in violation of statutory deadlines, as well as declining to respond to plaintiff’s request for fee waiver defendant has also waived any ability to now seek fees.
23. Plaintiff has constructively and actually exhausted the administrative process as regards this request, because of NIEHS’s failure to abide by FOIA’s statutory deadlines, and because it has not properly advised plaintiff of the finality of its decisions regarding the

fee waiver request nor any relevant appellate rights.

ARGUMENTS

24. Transparency in government is the subject of high-profile executive branch promises arguing forcefully against agencies failing to live up to their legal record-keeping and disclosure obligations.
25. 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).
26. 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. HHS did not seek additional information from plaintiffs regarding the request at issue in this suit.

27. 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*).
28. Defendant HHS owes plaintiffs records responsive to the requests at issue in this suit, which request reasonably described the information sought and was otherwise filed in compliance with applicable law, subject to legitimate withholdings, and has failed to provide responsive records or any substantive response in violation of statutory deadlines.
29. Further, plaintiff notes that defendant has waived fees and/or waived its ability to assess fees under § 552(a)(4)(A)(viii) by failing to substantively respond to plaintiffs within the statutory deadline(s). The HHS, therefore, has waived all fees and must produce the requested documents as required by law.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

30. Plaintiff re-alleges paragraphs 1-29 as if fully set out herein.
31. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business, because defendant has failed to substantively respond pursuant to *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).

32. Plaintiff asks this Court to enter a judgment declaring that:
- a. The HHS's correspondence as specifically described in plaintiff's FOIA requests described, *supra*, and attached as an exhibit, is subject to release under FOIA;
 - b. The HHS must release those requested records or segregable portions thereof subject to legitimate exemptions;
 - c. The HHS may not assess or seek costs and fees for the request at issue in this case, as plaintiffs are entitled to a waiver of their fees.

SECOND CLAIM FOR RELIEF
Seeking Injunctive Relief

33. Plaintiff re-alleges paragraphs 1-32 as if fully set out herein.
34. Plaintiff is entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiff's FOIA requests, without fees, subject to legitimate withholdings.
35. Plaintiff asks 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 request, subject to legitimate withholdings.
36. Plaintiff asks 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 receives 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 and any other remaining issues.

THIRD CLAIM FOR RELIEF

Seeking Costs and Fees

37. Plaintiff re-alleges paragraphs 1-36 as if fully set out herein.
38. 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.
39. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of defendant's refusal to fulfill the FOIA request at issue in this case.
40. Plaintiff asks the Court to order the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff 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 20th day of September, 2017,

By Counsel:



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