

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:18CV00018

SOUTHERN ENVIRONMENTAL LAW
CENTER

and

ENVIRONMENTAL DEFENSE FUND,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This Freedom of Information Act (“FOIA”) suit challenges Defendant Environmental Protection Agency’s (“EPA” or the “agency”) unlawful and unreasonable delay in responding to requests for information about the agency’s communications with the Heartland Institute.

2. Plaintiff Southern Environmental Law Center (“SELC”), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, requested information relating to EPA’s communications with the Heartland Institute on October 19, 2017.

3. Plaintiff Environmental Defense Fund (“EDF”), a nonprofit corporation that uses science, economics, and the law to protect human health and the environment, requested information relating to EPA’s communications with the Heartland Institute on August 1, 2017.

4. While EPA acknowledged both requests and asked for some initial clarification, it has subsequently stopped communicating with SELC. EPA has provided vague responses to EDF's outreach that do not indicate any expectation of near-term progress on EDF's FOIA request. For both SELC and EDF, EPA has failed to make a determination on the FOIA requests or provide any responsive documents to date.

5. EPA has violated FOIA by failing to "promptly" provide requested information and make a determination within 20 working days of receiving a request. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). SELC and EDF seek a declaration that EPA has violated FOIA and an order requiring EPA to provide all nonexempt, responsive documents without further delay.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

7. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiffs are "deemed to have exhausted [their] administrative remedies" because EPA has "fail[ed] to comply with the applicable time limit provisions."

8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

PARTIES

Plaintiffs

9. Plaintiff Southern Environmental Law Center, Inc. ("SELC") is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states.

10. SELC is a "person" for purposes of FOIA, 5 U.S.C. § 551(2).

11. SELC uses public advocacy and the law to protect the people and the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information. SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

12. Plaintiff EDF is a 501(c)(3) nonprofit corporation whose mission is to preserve the natural systems on which all life depends.

13. EDF is a “person” for purposes of FOIA, 5 U.S.C. § 551(2).

14. Established in 1967, EDF is one of the world’s largest environmental organizations, with more than two million members and supporters and a staff of more than 700 scientists, economists, policy experts, and other professionals around the world. EDF seeks to solve some of the most critical public health and environmental threats facing humanity, including climate change, pollution, and toxic chemical exposure, and to educate the public about these problems. EDF disseminates information to the general public through press releases, reports, analyses, social media, and other forums. EDF maintains a website, <https://www.edf.org/climate/promoting-government-transparency>, to make publicly available records obtained through FOIA requests. As a result of these efforts, records that EDF has obtained under FOIA have received coverage in several major media outlets.

Defendant

15. The U.S. Environmental Protection Agency is an “agency” for purposes of FOIA. 5 U.S.C. § 551(1). EPA has possession or control of the requested information.

FACTS

Background

16. The Heartland Institute is a non-profit think tank, with the self-described aim of promoting “free-market solutions to social and economic problems.”¹

17. In November 2016, the Heartland Institute released an “Action Plan for President Trump,” which contained several items that would halt or reverse initiatives to address climate change.²

18. In July 2017, Heartland Institute spokesperson Jim Lakely confirmed that EPA had “reached out to the Heartland Institute to help identify scientists” for a red team/blue team review of climate science, and that the Heartland Institute was “happy to oblige.”³

19. EPA’s potential red team/blue team exercise has garnered significant media coverage and elicited concerns from a wide range of stakeholders and observers.⁴

¹ The Heartland Institute website, About Us, <https://www.heartland.org/about-us/index.html> (last visited Mar. 1, 2018).

² The Heartland Institute website, Action Plan for President Trump, <https://www.heartland.org/topics/government-politics/trump-action-plan/index.html> (last visited Mar. 4, 2018).

³ John Siciliano, *Trump Administration Lining Up Climate Change ‘Red Team’*, Wash. Examiner (July 24, 2017), <http://www.washingtonexaminer.com/trump-administration-lining-up-climate-change-red-team/article/2629124>.

⁴ See, e.g., Amy Harder, *Attacks on EPA’s Climate Debate Go Beyond Usual Suspects*, Axios (July 27, 2017), <https://www.axios.com/attacks-on-epas-climate-debate-go-beyond-usual-suspects-1513304467-29842473-2228-45fe-8e93-7e97ae5d272a.html>; John P. Holdren, *The Perversity of the Climate Science Kangaroo Court*, Op-Ed, Boston Globe (July 25, 2017), <https://www.bostonglobe.com/opinion/2017/07/24/the-perversity-red-teaming-climate-science/VkT05883ajZaTPMbrP3wpJ/story.html>; David Schnare, *Schnare, Former Transition Official, On His Departure*, EPA Climate Science Review, Guest Perspective, Inside EPA (July 25, 2017), <https://insideepa.com/daily-news/schnare-former-transition-official-his-departure-epa-climate-science-review>; Brad Plumer & Coral Davenport, *E.P.A. to Give Dissenters a Voice on Climate, No Matter the Consensus*, N.Y. Times (June 30, 2017), <https://www.nytimes.com/2017/06/30/climate/scott-pruitt-climate-change-red-team.html>; Benjamin Santer, Kerry Emanuel, & Naomi Oreskes, *Attention Scott Pruitt: Red Teams and Blue Teams Are No Way to Conduct Climate Science*, Op-Ed, Wash. Post (June 21, 2017), https://www.washingtonpost.com/news/capital-weather-gang/wp/2017/06/21/attention-scott-pruitt-red-teams-and-blue-teams-are-no-way-to-conduct-climate-science/?utm_term=.a38bb966adbf.

20. Stakeholders have expressed concerns that the red team/blue team exercise could circumvent established processes that ensure rigorous scientific assessments and peer review.⁵ A former Science Advisor to the President explained that “‘red team’ efforts [on climate science] have consistently been characterized by brazen cherry-picking [and] misrepresentation of the findings of others,”⁶ and other scientists objected that calls for a red team/blue team exercise wrongly bear “[t]he implicit message . . . that scientists belong to tribes.”⁷

21. A red team/blue team exercise would be unnecessary in light of the thorough, transparent approach that EPA and other governmental agencies have repeatedly used for prior reviews of climate science, including EPA’s Endangerment Finding for Greenhouse Gases, which was upheld by the U.S. Court of Appeals for the D.C. Circuit.⁸

22. EPA has issued no details about how the red team/blue team exercise on climate change would be conducted.

23. On September 28, 2017, the Heartland Institute reportedly “hosted a meeting of about 40 climate scientists, economists, lawyers, and other experts to discuss the possible creation by the Trump administration of a Red Team - Blue Team exercise on climate change.”⁹

⁵ See, e.g., Plumer & Davenport, *supra* note 4; Santer, Emanuel, & Oreskes, *supra* note 4.

⁶ Holdren, *supra* note 4.

⁷ Santer, Emanuel, & Oreskes, *supra* note 4.

⁸ See EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 120-122 (D.C. Cir. 2012), *rev’d on other grounds*, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (2014); see also U.S. Glob. Change Research Prog., *Climate Science Special Report, Fourth National Climate Assessment* (2017), https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf; EPA, Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 80 Fed. Reg. 64,510, 64,518 (Oct. 23, 2015) (concluding that since the 2009 Endangerment Finding, “[t]he findings of . . . recent scientific assessments confirm and strengthen the conclusion that [greenhouse gases] endanger public health” and “public welfare”).

⁹ E-mail from Joseph Bast, Heartland Institute, to Jim Lakely, Heartland Institute (Oct. 12, 2017), *available at* https://www.eenews.net/assets/2017/10/16/document_cw_05.pdf.

24. Although the President's Chief of Staff has reportedly concluded that a red team/blue team exercise would be ill-conceived, Pruitt recently suggested that the idea remains under consideration.¹⁰

25. While reports of correspondence between EPA and the Heartland Institute on the red team/blue team exercise have surfaced through unofficial channels, the public remains in the dark about the extent of those communications and any other topics that may have been discussed.

EDF's FOIA Request

26. On August 1, 2017, EDF submitted FOIA request EPA-HQ-2017-010058, seeking correspondence between a list of 47 specified EPA employees and the Heartland Institute, "including any of the Heartland Institute's staff, fellows, experts, board members, management, contractors, or anyone representing the Heartland Institute in any capacity." A copy of this FOIA request is attached as Exhibit 1.

27. EDF submitted this request to promote transparency for the red team/blue team exercise and other matters of significant public interest and to ascertain whether the Heartland Institute was exercising disproportionate or improper influence over EPA.

28. EDF requested expedited processing and a fee waiver for the request.

29. On August 10, 2017, Mr. Victor Farren, EPA, contacted EDF and asked for clarification about the request. Specifically, Mr. Farren asked for clarification as to which individuals at the Heartland Institute were covered by EDF's request.

¹⁰ See Lisa Friedman & Julie Hirschfeld Davis, *The E.P.A. Chief Wanted a Climate Science Debate. Trump's Chief of Staff Stopped Him*, N.Y. Times (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/climate/pruitt-red-team-climate-debate-kelly.html>; Jennifer A Dlouhy et al., *EPA Chief Signals Showdown with California on Fuel Emission Standards*, Bloomberg (Mar. 13, 2018), <https://www.bloomberg.com/news/articles/2018-03-13/epa-chief-signals-showdown-with-california-on-tailpipe-standards>.

30. On August 15, 2017, EDF responded with clarifying language and a list of specific individuals at the Heartland Institute that should be considered as covered in the request.

31. On September 7, 2017, EPA denied EDF's requests for expedited processing and a fee waiver.

32. On October 13, 2017, EDF appealed the denial of the fee waiver, noting that the request met the statutory requirements for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), and that EPA was prohibited from charging fees as a result of missing FOIA's statutory deadlines, *id.* § 552(a)(4)(A)(viii)(I).

33. On January 8, 2018, EPA issued its determination that the appeal was moot because "the amount of billable fees for [EDF's] request will fall below the minimum billable threshold Therefore, EPA will not charge processing fees for this request."

34. EDF has conducted extensive outreach to Mr. Farren seeking updates on EPA's processing of this FOIA request.

35. On September 22, 2017, Mr. Farren informed EDF by telephone that EPA had performed the search for records and estimated that the search yielded between 200 and 600 records, but indicated that he would not be able to process those records for another two months.

36. On December 11, 2017, Mr. Farren informed EDF by e-mail that he would not be able to process this FOIA request until 2018.

37. On February 9, 2018, Mr. Farren informed EDF by e-mail that he had not yet begun processing this FOIA request and provided no estimated timeframe for doing so.

38. To date EPA has not made any determination regarding EDF's request.

39. To date EPA has not provided any documents responsive to EDF's request.

40. More than 20 working days have passed since EDF submitted this request.

SELC's FOIA Requests

41. On October 19, 2017, SELC submitted five FOIA requests, subsequently assigned tracking numbers EPA-HQ-2018-000780, EPA-HQ-2018-000781, EPA-HQ-2018-000782, EPA-HQ-2018-000784, and EPA-HQ-2018-000785. The requests sought communications between five individuals at EPA and seven individuals at the Heartland Institute. A copy of these FOIA requests is attached as Exhibit 2.

42. SELC requested fee waivers for the requests.

43. On or about October 22, 2017, Victor Farren, EPA, contacted SELC and asked if he could consolidate the five requests into a single request. SELC agreed that he could.

44. Mr. Farren then asked SELC to review the EDF request, EPA-HQ-2017-010058. He stated that because the requests were substantially similar he could combine them. He would provide SELC with access to the documents requested by EDF when that request was processed.

45. SELC responded that Mr. Farren's proposal was acceptable, but that SELC would wish to see a more expansive date range, up to and including the date that SELC requested documents, i.e., October 19, 2017.

46. Mr. Farren responded that if SELC wanted documents from a timeframe that went beyond EDF's request they would need to file a supplemental request for those documents.

47. SELC responded that it wished to first receive documents from the overlapping request with EDF, but asked Mr. Farren to also consider the supplemental date range as a supplemental request.

48. SELC did not get a response from Mr. Farren.

49. SELC contacted Mr. Farren on December 18, 2017 and February 2, 2018 to check on the status of the request but did not get any response.

50. SELC has heard nothing since from EPA about the processing of these requests other than determinations on the fee waivers.

51. SELC was granted fee waivers for three of its requests: EPA-HQ-2018-000780 was granted on October 30, 2017; EPA-HQ-2018-000782 was granted on October 25, 2017; and EPA-HQ-2018-000785 was granted on October 25, 2017. SELC's fee waiver request for EPA-HQ-2018-000781 was determined to "not reach the minimum billable amount" and, thus, "no charges are associated in processing [SELC's] request." Similarly, for SELC's fee waiver request for EPA-HQ-2018-000784, EPA "determined that the total fee that would be incurred in processing this request does not reach a billable amount."

52. To date EPA has not provided any documents responsive to SELC's request.

53. More than 20 working days have passed since SELC submitted this request.

LEGAL BACKGROUND

54. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check against corruption and to hold the governors accountable to the governed.'" *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

55. "[T]he time provisions of the Act are central to its purpose." *Hayden v. U.S. Dep't of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to "promptly" make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must "determine . . . whether to comply" with a request within 20 working days of receiving the

request, and they must “immediately notify” the requester of that determination. *Id.*

§ 552(a)(6)(A).

56. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

57. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. *Id.* § 552(a)(6)(B).

58. Under EPA regulations and FOIA, if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 40 C.F.R. § 2.104(d); 5 U.S.C. § 552(a)(6)(B)(ii).

CLAIMS FOR RELIEF

Count 1

59. Plaintiffs incorporate by reference paragraphs 1 through 58 of this Complaint as if fully stated herein.

60. Defendant EPA has violated FOIA by failing to provide Plaintiff EDF with all non-exempt responsive records for its August 1, 2017 FOIA request.

61. By failing to provide EDF with all non-exempt responsive records to its FOIA request as described in paragraphs 26 and 30, Defendant EPA has denied EDF’s right to this information as provided by law under the Freedom of Information Act.

62. Unless enjoined by this Court, Defendant EPA will continue to violate EDF's legal right to be provided with copies of the records which it has requested in its FOIA request as described in paragraphs 26 and 30 above.

63. EDF is directly and adversely affected and aggrieved by Defendant EPA's failure to provide responsive records to its FOIA request as described above.

Count 2

64. Plaintiffs incorporate by reference paragraphs 1 through 63 of this Complaint as if fully stated herein.

65. Defendant EPA has violated FOIA by failing to provide Plaintiff SELC with all non-exempt responsive records for its October 19, 2017 FOIA requests.

66. By failing to provide SELC with all non-exempt responsive records to its FOIA requests as described in paragraph 41, Defendant EPA has denied SELC's right to this information as provided by law under the Freedom of Information Act.

67. Unless enjoined by this Court, Defendant EPA will continue to violate SELC's legal right to be provided with copies of the records which it requested in its FOIA requests as described in paragraph 41 above.

68. SELC is directly and adversely affected and aggrieved by Defendant EPA's failure to provide responsive records to its FOIA requests described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (i) Declare that EPA has violated and is continuing to violate FOIA by failing to timely respond to EDF's and SELC's requests;
- (ii) Declare that EPA has violated and is continuing to violate FOIA by improperly withholding documents that are responsive to EDF's and SELC's requests;
- (iii) Direct EPA to provide all nonexempt, responsive documents to EDF and SELC without further delay;
- (iv) Retain jurisdiction over this matter to rule on any assertions by EPA that certain responsive documents are exempt from disclosure;
- (v) Order EPA to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event that EPA determines that certain responsive records are exempt from disclosure;
- (vi) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
- (vii) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 15th day of March, 2018.

/s/ Greg Buppert
Greg Buppert – VA Bar No. 86676

/s/ Kimberley Hunter
Kimberley Hunter – NC Bar No. 41333 (*pro hac vice*
pending)

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