

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants the U.S. Department of Energy and the Federal Energy Regulatory Commission have failed to comply with the applicable time-limit provisions of FOIA, the Union of Concerned Scientists is deemed to have constructively exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining Defendants from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff Union of Concerned Scientists (UCS) is a nonprofit organization with the mission of conducting scientific analysis and research in the public interest. UCS combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future. The organization is headquartered in Massachusetts and incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Energy (DOE) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DOE has possession, custody, and control of the records that UCS seeks.

7. Defendant Federal Energy Regulatory Commission (FERC) is a component of DOE—an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1)—and is headquartered in Washington, DC. FERC has possession, custody, and control of the records that UCS seeks.

STATEMENT OF FACTS

8. UCS submitted six FOIA requests to DOE and one request to FERC, primarily seeking to shed light on the influence of outside private interests on decisionmaking by government regulators with regard to energy policy.

Murray Energy Communications Request

9. On August 7, 2018, UCS submitted a FOIA request to DOE seeking communications between DOE officials and representatives of Murray Energy.

10. UCS's FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between 1) political appointees¹ at the Department of Energy and 2) any representative of Murray Energy or with email addresses ending in "coalsource.com."

The request sought responsive records "from January 1, 2018 to the present."

11. DOE acknowledged receiving UCS's FOIA request on August 8, 2018, and assigned the request FOIA tracking number HQ-2018-01432-F.

12. On August 8, 2018, UCS agreed to incorporate another of its requests into this one, amending the request to the following:

All emails, email attachments, or calendar invitations/entries sent or received between political appointees at the Department of Energy and:

- a) Any representative of Murray Energy or with the email addresses ending in "coalsource.com" or
- b) Any representative of FirstEnergy or with the email addresses ending in "firstenergygroup.com"

¹ In each of its requests involving political appointees, UCS defined "political appointees" as "Presidential Appointees with Senate confirmation, Presidential Appointees, Schedule C Presidential Appointees, non-career SES, or any person who is hired under a non-career SES appointment."

13. UCS also agreed to limit the search to the following program offices: the Office of the Secretary; the Office of Fossil Energy; the Office of Congressional and Intergovernmental Affairs; the Office of the General Counsel; the Office of Public Affairs; the Office of Electricity Delivery and Energy Reliability; the Office of Cybersecurity, Energy Security, and Emergency Response; the Office of Energy Efficiency and Renewable Energy; and the Office of Nuclear Energy.

One-Week Request

14. On August 7, 2018, UCS submitted a FOIA request to DOE seeking communications to or from a specific set of custodians over a one-week period.

15. UCS's FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received by the following people:

- a. Brian McCormack
- b. Mark Menezes
- c. Steve Winberg
- d. Mark Maddox
- e. Sean Plasynski
- f. Bruce Walker
- g. Edward McGinnis
- h. Theodore Garrish
- i. Martin Dannenfelser
- j. Jennifer Loraine
- k. Daniel Simmons
- l. Sean Cunningham
- m. Shaylyn Hynes

The request sought responsive records "from May 30, 2018, to June 5, 2018."

16. DOE acknowledged receiving UCS's FOIA request on August 8, 2018, and assigned the request FOIA tracking number HQ-2018-01436-F.

Fisher/McNamee Communications Request

17. On August 15, 2018, UCS submitted a FOIA request to DOE seeking communications to or from Travis Fisher and Bernard McNamee containing any of a set of key terms.

18. The first component of this FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received by Travis Fisher that contain any of the following terms:

- a. "PPD-21"
- b. "Critical electric infrastructure"
- c. "Electric reliability organization"
- d. "RTO"
- e. "Sector specific agency"
- f. "Fuel secure"
- g. "Critical infrastructure"
- h. "Defense electric infrastructure"
- i. "202(c)"
- j. "Federal Power Act"
- k. "FPA"
- l. "Resilience"
- m. "Defense Production Act"
- n. "DPA"
- o. "Strategic electric generation reserve"
- p. "eop.gov"
- q. "S1"

The request sought responsive records "from March 1, 2017, to April 15, 2018."

19. The second component of this FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received by Bernard McNamee that contain any of the following terms:

- a. "PPD-21"
- b. "Critical electric infrastructure"
- c. "Electric reliability organization"
- d. "RTO"

- e. "Sector specific agency"
- f. "Fuel secure"
- g. "Critical infrastructure"
- h. "Defense electric infrastructure"
- i. "202(c)"
- j. "Federal Power Act"
- k. "FPA"
- l. "Resilience"
- m. "Defense Production Act"
- n. "DPA"
- o. "Strategic electric generation reserve"
- p. "eop.gov"
- q. "S1"

The request sought responsive records "from January 1, 2018 to the present."

20. DOE acknowledged receiving UCS's FOIA request on August 8, 2018, and assigned the request FOIA tracking number HQ-2018-01472-F.

National Coal Council Communications Request

21. On August 21, 2018, UCS submitted a FOIA request to DOE seeking records reflecting communications between DOE officials and representatives of the National Coal Council.

22. The first component of UCS's FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between 1) political appointees in the Office of the Secretary, Office of Fossil Energy, or Office of Electricity at the U.S. Department of Energy and 2) any representative from the National Coal Council or email addresses ending in "NCC1.org"

The request sought responsive records "from June 1, 2018 to the present."

23. The second component of UCS's FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received by Bernard McNamee and any representative from the National Coal Council or email addresses ending in “NCC1.org”

The request sought responsive records “from June 1, 2018 to the present.”

24. The third component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received by Mark Menezes and any representative from the National Coal Council or email addresses ending in “NCC1.org”

The request sought responsive records “from June 1, 2018 to the present.”

25. DOE acknowledged receiving UCS’s FOIA request on August 8, 2018, and assigned the request FOIA tracking number HQ-2018-01507-F.

Alliance Resource Partners/Peabody Energy Communications Request

26. On August 29, 2018, UCS submitted a FOIA request to DOE seeking records reflecting communications between DOE officials and representatives of Alliance Resource Partners or Peabody Energy.

27. The first component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between 1) political appointees in the Office of the Secretary, Office of Fossil Energy, or Office of Electricity at the U.S. Department of Energy and 2) any representative from Alliance Resource Partners, LP or email addresses ending in “alrp.com”

The request sought responsive records “from January 1, 2018 to the present.”

28. The second component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between 1) political appointees in the Office of the Secretary,

Office of Fossil Energy, or Office of Electricity at the U.S. Department of Energy and 2) any representative from Peabody Energy, Inc. or email addresses ending in “peabodyenergy.com”

The request sought responsive records “from January 1, 2018 to the present.”

29. The third component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between Bernard McNamee and any representative from Alliance Resource Partners, LP or email addresses ending in “alrp.com”

The request sought responsive records “from January 1, 2018 to the present.”

30. The fourth component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between Bernard McNamee and any representative from any representative from Peabody Energy, Inc. or email addresses ending in “peabodyenergy.com”

The request sought responsive records “from January 1, 2018 to the present.”

31. The fifth component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between Mark Menezes and any representative from Alliance Resource Partners, LP or email addresses ending in “alrp.com”

The request sought responsive records “from January 1, 2018 to the present.”

32. The sixth component of UCS’s FOIA request to DOE specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received between Mark Menezes and any representative from Peabody Energy, Inc. or email addresses ending in “peabodyenergy.com”

The request sought responsive records “from January 1, 2018 to the present.”

33. DOE acknowledged receiving UCS’s FOIA request on August 8, 2018, and assigned the request FOIA tracking number HQ-2018-01548-F.

FERC Request

34. On August 21, 2018, UCS submitted a FOIA request to FERC seeking records reflecting communications sent or received by Travis Fisher or Anthony Pugliese containing any of a set of key terms.

35. The first component of UCS’s FOIA request to FERC specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received from Travis Fisher that contain any of the following terms:

- a. “Coal”
- b. “Nuclear”
- c. “Resiliency”
- d. “Resilience”
- e. “Critical infrastructure”
- f. “Reliability”
- g. “White House”
- h. “Federal Power Act”
- i. “FPA”
- j. “Defense Production Act”
- k. “DPA”
- l. “doe.hq.gov”
- m. “eop.gov”
- n. “Perry”
- o. “202(c)”
- p. “McNamee”

The request sought responsive records “from March 1, 2018 to the present.”

36. The second component of UCS’s FOIA request to FERC specifically sought the following records:

All emails, email attachments, or calendar invitations/entries sent or received from Anthony Pugliese that contain any of the following terms:

- a. “Coal”
- b. “Nuclear”
- c. “Resiliency”
- d. “Resilience”
- e. “Critical infrastructure”
- f. “Reliability”
- g. “White House”
- h. “Federal Power Act”
- i. “FPA”
- j. “Defense Production Act”
- k. “DPA”
- l. “doe.hq.gov”
- m. “eop.gov”
- n. “Perry”
- o. “202(c)”
- p. “McNamee”

The request sought responsive records “from January 1, 2018 to the present.”

37. FERC acknowledged receiving UCS’s FOIA request on August 8, 2018, and assigned the request FOIA tracking number FOIA-2018-113.

38. On September 26, 2018, UCS and FERC agreed to exclude from the search publicly available news links, subscription services, and news briefings that have not been commented on or forwarded by recipients.

39. On October 11, 2018, FERC released 30 documents to UCS pursuant to its request. FERC indicated that it would make another determination within 20 business days of that production.

Exhaustion of Administrative Remedies

40. As of the date of this Complaint, Defendants have failed to (a) notify UCS of a final determination regarding UCS’s FOIA requests, including the scope of responsive records Defendants intend to produce or withhold and the reasons for any withholdings; or (b) produce

the requested records or demonstrate that the requested records are lawfully exempt from production.

41. Through Defendants' failure to respond to UCS's FOIA requests within the time period required by law, UCS has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

42. UCS repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

43. UCS properly requested records within the possession, custody, and control of Defendants.

44. Defendants are respectively an agency and a component thereof subject to FOIA and must therefore make reasonable efforts to search for requested records.

45. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to UCS's FOIA requests.

46. Defendants' failure to conduct adequate searches for responsive records violates FOIA.

47. Plaintiff UCS is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly make reasonable efforts to search for records responsive to UCS's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Records

48. UCS repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

49. UCS properly requested records within the possession, custody, and control of Defendants.

50. Defendants are respectively an agency and a component thereof subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

51. Defendants are wrongfully withholding non-exempt agency records requested by UCS by failing to timely produce records responsive to its FOIA requests.

52. Defendants are wrongfully withholding non-exempt agency records requested by UCS by failing to segregate exempt information in otherwise non-exempt records responsive to UCS's FOIA requests.

53. Defendants' failure to provide all non-exempt responsive records violates FOIA.

54. Plaintiff UCS is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, UCS respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to UCS's FOIA requests;

- (2) Order Defendants to produce, by such date as the Court deems appropriate, any and all non-exempt records responsive to UCS's FOIA requests and an index justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to UCS's FOIA requests;
- (4) Award UCS attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant UCS such other relief as the Court deems just and proper.

Dated: November 13, 2018

Respectfully submitted,

/s/ Hart W. Wood

Hart W. Wood

D.C. Bar No. 1034361

John E. Bies

D.C. Bar No. 483730

American Oversight

1030 15th Street NW, B255

Washington, DC 20005

(202) 873-1743

hart.wood@americanoversight.org

john.bies@americanoversight.org

Counsel for Plaintiff