



U.S. Department of Justice

United States Attorney
Southern District of New York

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March 11, 2019

Via ECF

Honorable Robert W. Sweet
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Natural Resources Defense Council et al. v. U.S. Environmental Protection Agency*,
No. 18 Civ. 11227 (RWS)

Dear Judge Sweet:

This Office represents Defendant the U.S. Environmental Protection Agency (“EPA”) in the above-referenced action brought by Plaintiffs Natural Resources Defense Council and Environmental Defense Fund (“Plaintiffs”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I write respectfully in response to Plaintiffs’ letter dated March 7, 2019. *See* Dkt. No. 31 (“Pl. Ltr.”).

Plaintiffs assert that their motion for partial summary judgment and to expedite should now be “held in abeyance” pending resolution of another set of putative motions that Plaintiffs plan to file “early [this] week”—this time concerning the applicability of FOIA’s exemption 5 as to the current version of the OMEGA model. Pl. Ltr. at 2. The Court should reject Plaintiffs’ proposal.

Initially, for the reasons set out in EPA’s prior submissions, the Court should deny Plaintiffs’ current motion outright, not hold it in abeyance. Plaintiffs’ request for partial summary judgment and for declaratory relief is legally unsupported, as set out in EPA’s brief, Dkt. No. 24 (“EPA Br.”) at 6-8. And EPA’s response on March 4 mooted Plaintiffs’ request that EPA be directed to issue a determination concerning a set of records prioritized by Plaintiffs. *See* Dkt. No. 30 (EPA Ltr. dated Mar. 5, 2019).

Plaintiffs now complain that “EPA has provided a limited determination on only a subset of the request,” Pl. Ltr. at 1, and seek to retroactively expand the scope of their prior motion to encompass the expedition of their entire request. But as noted above, it was Plaintiffs’ own motion that sought relief with respect to a limited set of priority records—which they defined in their papers. *See* Dkt. No. 23 (Plaintiffs’ amended notice of motion, seeking “an order requiring [EPA] to produce . . . *certain records* by March 6, 2019” (emphasis added)); Dkt. No. 13 at 2 (Plaintiffs’ brief, seeking an order regarding EPA’s “most recent [OMEGA] model and data” by a date certain), *see also id.* at 7, 9, 11.

Plaintiffs would unnecessarily multiply the proceedings by challenging exemptions piecemeal, through multiple sets of briefs likely to address overlapping issues. Instead, EPA respectfully requests that the Court stay EPA's deadline to respond to any motion that Plaintiffs file challenging the exemption 5 withholding until EPA has responded to the non-priority portion of Plaintiffs' request. EPA expects to be able to do so within the next three weeks, by April 1, 2019. Judicial efficiencies would be better served by consolidated motion practice concerning Plaintiffs' full FOIA request and EPA's complete response.

Finally, EPA disagrees with Plaintiffs' assertion that "EPA has not disputed that 'good cause' exists for the Court to expedite consideration of this case under the Civil Priorities Act, 28 U.S.C. § 1657(a)." Pl. Ltr. 2. While EPA did not specifically address § 1657(a) in its opposition brief, it is plain that EPA disputes this point: the Civil Priorities Act permits a court to expedite consideration of an action "if good cause therefor is shown." 28 U.S.C. § 1657(a). For the reasons set out in EPA's prior submissions, there is no good cause to expedite this case. EPA has responded to the priority portion of Plaintiffs' FOIA request and intends to complete its response to the remaining portion in the coming weeks. Moreover, Plaintiffs are not entitled to expedited processing under FOIA, *see* EPA Br. at 8-12—which distinguishes this case from the principal case Plaintiffs cite on this point. *See Brennan Ctr. for Justice v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 547-48 (S.D.N.Y. 2018).¹ Accordingly, the Court should deny any relief under § 1657(a).

Thank you for your consideration of this matter.

Respectfully submitted,

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¹ The other case Plaintiffs cite, *Ferguson v. FBI*, 722 F. Supp. 1137 (S.D.N.Y. 1989), was decided before Congress amended FOIA to add an expedited processing provision. Thus, at the time, courts could not look to FOIA itself to determine which requests should be expedited.