

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

ENERGY POLICY ADVOCATES)	
170 S. Lincoln Street)	
Suite 150)	
Spokane, WA 99201)	
)	
Plaintiff,)	
v.)	Civil Action No. 19 - 3307
)	
UNITED STATES DEPARTMENT OF STATE)	
2201 C Street NW)	
Washington, DC 20520)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ENERGY POLICY ADVOCATES (“EPA”) for its complaint against Defendant UNITED STATES DEPARTMENT OF STATE (“STATE”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under one June 2019 FOIA request for certain described agency records, to which request defendant has not provided any of the statutorily required responses and therefore has denied.
- 2) These records are central to a matter of timely, current political and legal deliberation, of great public interest and policy and legal significance.
- 3) The records requested include and relate to the required “Circular 175” analysis of whether a particular agreement is a treaty. These records would inform the public of the Department’s “working law” leading it to declare that the 2015 “Paris climate agreement” (hereafter, “Paris”) was, for U.S. purposes, not a treaty but a mere “agreement”, despite Paris requiring ever-tightening constraints every five years in perpetuity or until the U.S.

withdraws, and despite Paris otherwise being a treaty according to its duration, its lineage, international practice and U.S. custom and practice.

4) As EPA noted in its request, “These records are of immense public interest. The Obama White House declared the December 2015 Paris agreement the “most ambitious climate change agreement in history”, therefore more ambitious than two predecessor climate agreements acknowledged by all parties to be treaties. Most parties have ratified Paris as a treaty under their own systems but, regardless, for U.S. purposes Paris has every appearance of being a treaty under Circular 175, and has been ratified as a treaty by legislatures around the world — if “deemed” into existence by then-heads of government of a small number of outlier countries, including the United States and North Korea.”

5) Plaintiff has come into possession of a document purporting to be the Paris Circular 175 memorandum of law, a non-privileged record¹ that is responsive to plaintiff’s request.

6) In asserting the authority to enter Paris as other than a treaty requiring Article II, Section 2 U.S. Senate “advice and consent”, this document materially misstates the history of the agreements supposedly enabling the claim.

7) As such, if authentic, this document represents a significant legal and political scandal. Records responsive to plaintiff’s request would allow the public to evaluate this information, and are the only means that would allow the public to do so..

8) State has failed to provide plaintiff with the requisite records or determination affirming the Department’s processing of plaintiff’s request at issue in this matter by, e.g., providing an initial determination of the number of responsive records it intends to release or withhold within the 20-day time limit established under 5 U.S.C.S. § 552(a)(6)(A)(i), as

¹This document plainly represents agency “working law”, which must be released under FOIA barring some applicable exemption; notably, deliberative process and attorney-client privileges do not apply to working law of an agency.

also articulated by this Court in *CREW v. Federal Election Commission*, 711 F.3d 180 (D.C. Cir. 2013). Under *CREW*, agencies must “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” within the statutory deadline of 20 working days.

9) Defendant State’s failure to respond in any meaningful way despite the passage of five months has constructively exhausted all of plaintiff’s administrative remedies, leaving plaintiff no choice but to file this lawsuit to compel State to comply with the law with regard to release of agency records.

10) On October 23, 2019, several media outlets reported that President Trump intends to send the United States’ notification of intent to withdrawal from Paris², ensuring a high-profile public policy debate about the propriety of entering and withdrawing from the Paris agreement.

11) In this context plaintiff asks this Court to compel State to release this plainly non-privileged record and other records responsive to its June 2019 FOIA request.

PARTIES

12) Plaintiff EPA is a non-profit organization incorporated in the state of Washington and dedicated to transparency and open government. EPA uses state and federal open records law to shed light on the operations of government including private influences on government policymaking and other actions. It thereby also educates the public on those matters.

13) Defendant State Department is a federal agency headquartered in Washington, DC.

²See, e.g., Lisa Friedman, “Trump Administration to Begin Official Withdrawal from Paris”, October 23, 2019, <https://www.nytimes.com/2019/10/23/climate/trump-paris-climate-agreement.html>; Rebecca Beitsch, “Trump prepares to formally withdraw US from Paris Climate Accord”, The Hill, October 23, 2019, <https://thehill.com/policy/energy-environment/467200-trump-prepares-to-formally-withdraw-us-from-paris-climate-agreement>.

JURISDICTION AND VENUE

14) 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.

15) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the records are located in Washington, D.C., and defendant State is a federal agency.

FACTUAL AND STATUTORY BACKGROUND

16) On June 7, 2019, plaintiff submitted one FOIA request to State, via its FOIA facsimile portal ((202) 261-8579)). Plaintiff requested expedited treatment on the basis of its status as a media outlet.

17) EPA's request was specific and clearly defined, requiring no subjective analysis and allowing for ready assessment of the population of potentially responsive records.

18) Specifically, using State's own record titles, definitions (e.g., of the term "Circular 175 request"), and terms of art, plaintiff requested (citations omitted):

- 1) all Circular 175 requests,
- 2) Memorandum of Law re Circular 175, Subject: Request for authority to sign and accept the Paris Agreement
- 3) any cover memo(s) transmitting Memorandum of Law re Circular 175
- 4) Request for authority to sign and accept the Paris Agreement
- 5) a document titled C-175 Procedure.docx (likely author is Susan Biniarz)
- 6) a document titled Points on Joining Paris Agreement - One Pager (there is a document by that title that State circulated, possibly to "surrogates" and/or "validators" (we request only the final version; its likely author is Susan Biniarz)
- 7) any emails a) transmitting either of the above described documents titled i) the Circular 175 for Paris climate agreement, and/or ii) Points on Joining Paris Agreement - One Pager, that b) were sent to any party internal or external, dated April 14, 2016 through September 14, 2016, inclusive, by i) Todd Stern, ii) Michael

J, Mattler, iii) Susan Biniarz, iv) Clare Sierawski, v) Franz Hochstrasser, vi) Karen Johnson (Office of Oceans and International Environmental and Scientific Affairs), vii) Selene Ko, and/or viii) Brian J Egan. We also request all responses to any such transmittal, meaning, we request the entire thread of any email threads containing any such transmittal.

19) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, including a determination of whether the agency intends to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Within that deadline, the agency must also “determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents,” and “inform the requester that it can appeal whatever portion of” the agency’s “determination” is adverse to the requestor. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

20) 5 U.S.C. § 552(a)(6)(A) prescribes 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. Neither apply here as State did not seek additional information from plaintiff regarding the request at issue in this suit.

21) State owed EPA a “CREW” response to the request by July 8, 2019. State has provided no substantive response.

22) 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*).

23) State is now past its statutory period for issuing such determinations on the above-described request without providing any substantive response to plaintiff’s request.

24) Defendant State is thereby improperly denying plaintiff access to agency records in violation of FOIA.

FIRST CLAIM FOR RELIEF

Duty to Produce Records – Declaratory Judgment

25) Plaintiff re-alleges paragraphs 1-24 as if fully set out herein.

26) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

27) Plaintiff has a statutory right to the information it seeks and that defendant has unlawfully withheld.

28) Plaintiff is not required to further pursue administrative remedies.

29) Plaintiff asks this Court to enter a judgment declaring that:

- a. Plaintiff is entitled to records responsive to its FOIA request described above, and any attachments thereto, but State failed to provide them;
- b. State’s processing of plaintiff’s FOIA request described above is not in accordance with the law, and does not satisfy State’s obligations under FOIA;
- c. State must now produce records responsive to plaintiff’s request.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

- 30) Plaintiff re-alleges paragraphs 1-29 as if fully set out herein.
- 31) Plaintiff is entitled to injunctive relief compelling State to produce the records responsive to the FOIA request described in this pleading.
- 32) Plaintiff asks the Court to enter an injunction ordering State to produce to plaintiff, within 10 business days of the date of the order, the requested records sought in plaintiff's FOIA request described above, and any attachments thereto.
- 33) 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 plaintiff 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 plaintiff's challenges to defendant's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 34) Plaintiff re-allege paragraphs 1-33 as if fully set out herein.
- 35) 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.
- 36) This Court should enter an injunction ordering the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 3rd day of November, 2019,

By Counsel:

_____/s/_____
Christopher C. Horner
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