

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

ENERGY POLICY ADVOCATES)
170 S. Lincoln Street)
Suite 150)
Spokane, WA 99201)

Plaintiff,)

v.)

Case No. 22-cv-1251

WHITE HOUSE OFFICE OF SCIENCE AND)
TECHNOLOGY POLICY)
Eisenhower Executive Office Building)
1650 Pennsylvania Avenue)
Washington, DC 20504)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ENERGY POLICY ADVOCATES for its complaint against Defendant WHITE HOUSE OFFICE OF SCIENCE AND TECHNOLOGY POLICY (“OSTP”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* for declaratory, injunctive, and other relief, seeking immediate processing and release of agency records responsive to three of Plaintiff’s requests, following the OSTP’s failure to comply with the express terms of FOIA, by withholding information under one request and failing to respond to the second and third, thereby failing to, e.g., fulfill its obligation to make a “determination” as that term is defined in *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 816 (D.C. Cir. 2013).

PARTIES

2. Plaintiff Energy Policy Advocates (“EPA”) is a non-profit organization incorporated in the State of Washington and dedicated to transparency and open government. Energy Policy

Advocates uses state and federal open records law to inform the public on the operations of government including private influences on government policymaking and other actions.

3. Defendant White House Office of Science and Technology Policy (“OSTP”) is a FOIA-covered, congressionally established office within the executive branch that “advise[s] the President and others within the Executive Office of the President on the effects of science and technology on domestic and international affairs”, located in Washington, DC.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
5. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).
6. EPA is not required to further pursue administrative remedies before seeking relief in this Court because it has exhausted the administrative appeal process as regards the one request Defendant responded to, and because the Defendant has failed to make a timely “determination” as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) in response to the other two.
7. EPA has no obligation to further exhaust administrative remedies with respect to its FOIA requests. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. U.S. Dept. of Justice*, 436 F. Supp. 3d 354, 359 (D.D.C. 2020) (citing various other cases and holding that the statutory text of FOIA relieves similarly-situated plaintiffs of any exhaustion requirement).

ENERGY POLICY ADVOCATES’ FOIA REQUESTS

8. Plaintiff submitted the first FOIA request at issue here to Defendant by electronic mail on February 25, 2022. The request sought certain described correspondence of two named

officials, Eric Lander and Jane Lubchenco, over an eight-week period of time, on any email account used at any time for work-related correspondence, that was sent to one or more of six or five named outside parties, respectively. This request pertained to an OSTP “event on countering climate change denial and delay” in which the Office brought in political activists to discuss, e.g., social science which might explain political opposition to their demands. See, e.g., Maxine Joselow, “White House schedules first event on countering climate change denial and delay,” Washington Post, February 24, 2022, <https://www.washingtonpost.com/climate-environment/2022/02/24/white-house-science-office-hold-first-ever-event-countering-climate-change-denial-delay/>.

9. Plaintiff noted in this request that one of the two officials, Ms. Lubchenco, had been shown during a prior stint as a political appointee in a different agency during a previous administration to have continued to use her previous employer’s “.edu” email account for official federal work-related correspondence, and also detailed Defendant’s own history, during that same administration, of employees having been found to engage in the practice of using non-official email accounts for work-related correspondence.
10. Defendant assigned these requests the numbers Request OSTP-FOIA-22-044 and OSTP-FOIA-22-048, consolidating them together as OSTP FOIA number 22-048. On March 23, 2022, Defendant partially denied Energy Policy Advocates’ FOIA Request, producing in part 15 pages while stating in relevant part that records were being redacted pursuant to Exemption 5 and Exemption 6 of the Freedom of Information Act.
11. On April 1, 2022, Plaintiff filed an administrative appeal on the bases that the agency withheld numerous records by redacting them in substantive full as “deliberative” but which redactions, which are of the entirety of the text, indicate by their size that the

withheld messages are likely four or fewer words and highly unlikely to satisfy the legal requirement as representing exempt “deliberative process” information; that the agency failed to demonstrate that its redactions/withholdings are narrowly tailored to cover only truly exempt information, as opposed to all information on a page or portion of a page, without regard to whether such information is properly exempt; and that the agency failed to adequately demonstrate that any applicable FOIA exemption applies to the withheld records, at all.

12. On May 4, 2022, Defendant asserted that it granted this appeal in part and denied in part on May 4, 2022, rejecting Plaintiff’s first and third bases for challenging the substantial withholdings and asserting upon review that it acted properly in applying the exemptions, upholding all of its withholdings. Defendant made no efforts to explain how its search of captured all records, including records that may have been housed on non-governmental servers or email accounts.
13. On March 28, 2022, Plaintiff submitted another FOIA request to Defendant seeking copies of all FOIA productions released in 2022 to i) Alex Thompson, ii) any party claiming to represent Politico, and/or iii) any party claiming to represent the Government Accountability Project. This request followed up on the March 28, 2022 Politico story by Alex Thompson, “How a Google billionaire helped pay for Biden's science office,” <https://www.politico.com/news/2022/03/28/google-billionaire-joe-biden-science-office-00020712>, which discusses records obtained under the Freedom of Information Act.
14. These records would have been already assembled and reviewed for any potential redactions, as an OSTP FOIA production had led to the Thompson story in Politico about records released to a Government Accountability Project.

15. Defendant has failed to respond in any way to this request except to request, on March 29, 2022, that Plaintiff resubmit the request in the body of an email rather than as an attachment, which Plaintiff then did on that same day.
16. On April 4, 2022, Plaintiff submitted a third request seeking correspondence to or from Ms. Lubchenco that was also to or from one of the “denial/delay event” participants, but over a three-month period. Defendant sent an acknowledgement letter on May 4, 2022, assigning the request OSTP-FOIA # 22-059, but without providing the required *CREW* response or acknowledging Plaintiff’s request for fee waiver.
17. The requested records will inform the public of high-profile ethics revelations at OSTP and media coverage thereof, and also the genesis of a tendentious event and campaign out of OSTP. The described meeting seeking to counter political opposition, one of many Biden administration initiatives seeking to do so by styling opposition as “disinformation” (“deliberate disinformation campaigns that are as insidious as they are invidious”, <https://www.whitehouse.gov/ostp/news-updates/2022/02/25/readout-of-white-house-climate-science-roundtable-on-counteracting-delayism-and-communicating-the-urgency-of-climate-action/>), was the subject of substantial national and international media coverage.
18. The public deserves to know, without further delay, the genesis of the aforementioned tendentious effort.
19. As Plaintiff informed Defendant in all three requests at issue here, other federal agencies have acknowledged Plaintiff’s status as a media outlet (*e.g.*, Securities & Exchange Commission Request No. 21-00769-FOIA; Department of the Interior Request No. DOI-OS-2021-003335).

20. The 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).
21. 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, 5 U.S.C. § 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. 5 U.S.C. § 52(a)(6)(A)(ii)(II). In either case, the Department’s receipt of the requester’s response to the Department’s request for information or clarification ends the tolling period.
22. Defendant has provided no further response after declining to make a determination on Plaintiff’s two unanswered fee waiver requests (March 28, 2022, April 4, 2022 requests), and its correspondence conveying that at some point in the future it would respond to Plaintiff’s request (April 4, 2022 request).
23. Defendant has improperly withheld records in response to all three requests in violation of FOIA including, in response to the February 28, 2022, request, its withholding of

certain records as exempt by virtue of being deliberative or b6 personnel/privacy information, after Plaintiff's administrative appeal.

24. As such, Defendant OSTP continues to improperly deny Plaintiff access to agency records in violation of FOIA regarding all three of Plaintiff's requests, and further declines to make the statutorily required "determination" regarding when the Plaintiff might expect to be granted access to the documents it has requested regarding two of them.

FIRST CLAIM FOR RELIEF
Duty to Produce Records – Declaratory Judgment

25. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth 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 in each of its FOIA requests, and Defendant has unlawfully withheld the information.

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 each of its FOIA requests described above, and any attachments thereto, but Defendant has failed to provide the records;
- b. OSTP's processing of each of Plaintiff's three FOIA requests described above is not in accordance with the law, and does not satisfy OSTP's obligations under FOIA;

- c. OSTP must now produce all records responsive to Plaintiff's requests, and must do so without cost to the Plaintiff.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

30. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
31. Plaintiff is entitled to injunctive relief compelling Defendant to produce the records responsive to the three FOIA requests described herein.
32. Plaintiff is entitled to injunctive relief compelling Defendant to grant the Plaintiff's request for a fee waiver.
33. Plaintiff asks the Court to enter an injunction ordering Defendant to produce to Plaintiff, within 20 business days of the date of the order, the requested records sought in Plaintiff's FOIA requests described above, and any attachments thereto, at no cost to the Plaintiff.
34. 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 OSTP's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

35. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

36. 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.

37. This Court should enter an injunction or other appropriate order requiring the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Energy Policy Advocates respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with FOIA and every order of this Court;
2. Declare Defendant has violated FOIA by failing to provide Plaintiff with the requested records, by failing to grant Plaintiff's request for a fee waiver, and/or by failing to notify Plaintiff of a final determination within the statutory time limit;
3. Declare that the documents sought by the request, as described in the foregoing paragraphs, are public records under 5 U.S.C. § 552 *et seq.* and must be disclosed;
4. Order Defendant to expeditiously provide the requested records to Plaintiff within 20 business days of the Court's order;
5. Award Plaintiff's attorneys their fees and other litigation costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as this Court deems just and proper.

Respectfully submitted this the 5th day of May, 2022,

ENERGY POLICY ADVOCATES

By Counsel:

/s/Matthew D. Hardin

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