

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE
COUNCIL and
ENVIRONMENTAL DEFENSE FUND,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant.

Case No. 18-cv-11227-RWS
ECF Case

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO EXPEDITE AND
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs bring this motion to expedite because Defendant United States Environmental Protection Agency (EPA) has refused for months to respond to a straightforward request under the Freedom of Information Act (FOIA). The request seeks a specific computer model and data files that EPA developed to predict the cost of vehicle emission-control technology. The model itself may be complex, but the FOIA request is simple: release the model and data files.

The cost of emission-control technology is a critical consideration for setting vehicle emission standards. Technology improves over time, and EPA periodically updates its model and data files to reflect these changes. EPA historically has made these updates available to the public. But, in 2017, EPA stopped making the updates available, and the last full release is more than two years out of date.

Release of the up-to-date model is now a matter of immediate public interest. EPA is preparing to finalize a far-reaching rule as soon as March 2019—a rule that would weaken greenhouse gas emission standards for all new cars and light trucks for more than half of the next decade. One of EPA’s central justifications for weakening standards is that emission-control technology costs too much. Yet EPA is refusing to disclose its own model and records about technology costs.

EPA’s refusal to respond to the FOIA request unlawfully thwarts public scrutiny of the agency’s activities. EPA’s behavior illustrates why Congress enacted FOIA in the first place: “to provide a means of accountability, to allow Americans to know what their government is doing.” *Brennan Ctr. for Justice v. Dep’t of State*,

300 F. Supp. 3d 540, 545 (S.D.N.Y. 2018). For the reasons below, and because time is of the essence, Plaintiffs respectfully move this Court to expedite consideration of this matter and to order EPA to release at least its most recent model and data no later than January 30, 2019.

BACKGROUND

In 2009, EPA determined that emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution that endangers the public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA then undertook to develop greenhouse gas emission standards for new light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). A “critical technical underpinning” of “the feasibility and cost of potential [greenhouse gas] standards” was EPA’s estimate of “the cost and effectiveness of the various control technologies.” *Id.* at 25,329.

EPA “developed a computerized model called the Optimization Model for reducing Emissions of Greenhouse gases from Automobiles (OMEGA)” specifically to support the development of greenhouse gas emission standards for new motor vehicles. *Id.* at 25,446. The OMEGA model produces “a reasonable estimate of how manufacturers will add technologies to vehicles” to meet a fleet-wide emissions level. *Id.* at 25,452. EPA used the model to project the “resultant cost” of technology “required for manufacturers to meet . . . standards.” *Id.* at 25,454.

During the rulemaking process, EPA publicly released the OMEGA model and its input data files. *See* <https://www.epa.gov/regulations-emissions-vehicles-and-engines/optimization-model-reducing-emissions-greenhouse-gases#omega-1.0.2>

(last accessed December 28, 2018). In May 2010, EPA finalized the first greenhouse gas emission standards for new light-duty vehicles. 75 Fed. Reg. 25,324.

EPA continued to update OMEGA and its input data to reflect ongoing technological developments. EPA utilized the then-current version of the model to support every major analysis of greenhouse gas emission standards until at least 2017.¹ In connection with each analysis, EPA released the then-current model and data for public review. *See* <https://www.epa.gov/regulations-emissions-vehicles-and-engines/optimization-model-reducing-emissions-greenhouse-gases> (last accessed December 28, 2018). In all, EPA released at least five different versions of OMEGA and associated data over the period 2009 to 2017. *Id.* EPA has continued to update its model and data since these releases,² but in 2017, without explanation, EPA stopped releasing updated versions.

EPA's current greenhouse gas emission standards for light-duty vehicles require average yearly improvements through the middle of the next decade.

77 Fed. Reg. 62,624, 62,627 (Oct. 15, 2012). In early 2018, it became apparent that

¹ *See, e.g.,* EPA & NHTSA, *Final Rule: 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62,624 (Oct. 15, 2012); EPA, *Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation* (Nov. 2016), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100Q3DO.pdf>.

² *See, e.g.,* Moskalik, A. et al., U.S. EPA, *Representing GHG Reduction Technologies in the Future Fleet with Full Vehicle Simulation* (April 3, 2018) (“This paper describes the approach that has been implemented by the EPA to expand and more directly apply full vehicle simulation in its overall modeling methodology.”), available at <https://www.epa.gov/sites/production/files/2018-10/documents/sae-paper-2018-01-1273.pdf>. EPA apparently applied an unreleased version of OMEGA to assess a forthcoming proposed rule and presented its findings to the Office of Information and Regulatory Affairs (OIRA) in April 2018, while the proposal was under OIRA review. *See* E.O. 12866 Review Materials, File: “Email 5- Email from William Charmley to Chandana Achanta,” Presentation: “EPA review of CAFE model with ‘GHG’ settings (08-Mar ver.)” (Apr. 16, 2018), at PDF 113, available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-0453>.

EPA was considering action to weaken these standards. In March 2018, Plaintiffs and others sent a letter to EPA requesting that the agency release its updated OMEGA records. *See* Declaration of Peter Huffman (“Huffman Decl.”), Ex. A. EPA did not reply.

The next month, EPA announced that it intended to initiate a rulemaking concerning light-duty vehicle greenhouse gas emission standards for upcoming model years. *See* 83 Fed. Reg. 16,077 (Apr. 2, 2018). EPA’s official announcement generated significant public interest and was widely reported in the national press.³ Following the announcement, Plaintiffs again requested that EPA disclose any updated OMEGA records—this time via a formal FOIA request. *See* Complaint, Ex. A (Dkt. 1-1) (FOIA request dated July 25, 2018).

EPA received the FOIA request on or before August 10, 2018. Huffman Decl., Ex. B. On August 21, EPA sent a letter to Plaintiff NRDC regarding the request. *See* Complaint, Ex. B (Dkt. 1-2). In the letter, EPA granted Plaintiffs’ request for a public interest fee waiver. The letter also stated that Plaintiffs’ “request for expedited processing [was] denied,” but then represented that the request “[would] be processed as expeditiously as possible.” *Id.* The letter did not state whether EPA would release the records or otherwise substantively respond to the request.

³ *See, e.g.*, Tabuchi, H., *Calling Car Pollution Standards ‘Too High,’ E.P.A. Sets Up Fight With California*, NEW YORK TIMES (Apr. 2, 2018) (“A rollback of the rules, which are designed to cut back on emissions of greenhouse gases, would reverse one of the single biggest steps any government has taken to tackle climate change.”); Eilperin, J. & Dennis, B., *EPA to roll back car emissions standards, handing automakers a big win*, WASHINGTON POST (Apr. 2, 2018) (noting that EPA action “could change the composition of the nation’s auto fleet for years”).

Three days later, EPA published notice of a proposed rule that would substantially weaken greenhouse gas emission standards for light-duty vehicles by holding 2020 standards constant all the way through 2026. *See* 83 Fed. Reg. 42,986 (Aug. 24, 2018). Unlike every prior rulemaking for these standards, EPA disclaimed any reliance on its OMEGA model. *See id.* at 43,000. EPA informed the public that it had instead relied upon a version of a “CAFE” model developed by the Department of Transportation (DOT) to set fuel-economy standards under an entirely different statute. *See id.* Press reports indicated that senior EPA staff objected to DOT’s modeling. *See, e.g.,* Halper, E., *On fuel economy plan, Trump administration ignored its own EPA scientists*, LOS ANGELES TIMES (Aug. 14, 2018) (“The Trump administration’s plan to roll back aggressive Obama-era fuel economy standards for cars, pickups and SUVs is built on [DOT] computer modeling that senior officials at the Environmental Protection Agency had privately warned is flawed and unsupportable, according to newly released agency documents.”).

EPA set a two-month period for the public to comment on the proposed rule. 83 Fed. Reg. at 42,986. EPA’s statutory deadline to provide a substantive response to Plaintiffs’ FOIA request fell on September 10, 2018, early in the public comment period. *See* 5 U.S.C. § 552(a)(6)(A)(i)(I). EPA did not substantively respond.

On September 20, Plaintiffs and others again wrote to EPA. *See* Complaint, Exhibit C (Dkt. 1-3). The letter noted that EPA had not released updated OMEGA records and stated Plaintiffs’ concern “that the records will not be released through

FOIA in time to allow for meaningful review and analysis before the public comment deadline.” *See id.* EPA did not reply.

The public comment period ended on October 26. *See* 83 Fed. Reg. 48,578 (Sept. 26, 2018). In comments submitted that date, Plaintiffs and others again called on EPA to release its updated OMEGA model and data.⁴ EPA did not release the updated model.

On December 3, NRDC and EDF sued EPA for its ongoing violation of FOIA. *See* Complaint (Dkt. 1).

ARGUMENT

EPA is violating FOIA. “FOIA requires an agency to determine, within twenty working days, whether or not to comply with a FOIA request.” *Brennan Center*, 300 F. Supp. 3d at 546; 5 U.S.C. § 552(a)(6)(A)(i). The agency “shall immediately notify” the requestor of “such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i)(I); *see also* *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (Kavanaugh, J.). EPA received the FOIA request by August 10, 2018, and was required to notify Plaintiffs of its determination and reasons therefor no later than September 10, 2018. Because that deadline is nearly four months past, Plaintiffs are entitled to summary judgment on liability, *i.e.*, a declaration that EPA is violating FOIA. *See* Fed. R. Civ. P. 56(a).

⁴ Comment of EDF, NRDC, et al., on the Proposed Safer Affordable Fuel-Efficient (Safe) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Appendix A at 201 (Oct. 26, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5070>.

The only question left is the remedy. As explained below, EPA's unlawful delay has the practical effect of denying access to agency records of urgent public interest. Under these circumstances, good cause exists for expedited judicial intervention. This Court should order EPA to release at least its most recent model and input data files no later than January 30, 2019.

A. Good cause exists for expedited consideration.

The Civil Priorities Act provides that a court “shall expedite the consideration of any action . . . if good cause therefor is shown.” 28 U.S.C. § 1657(a). Under the Act, “‘good cause’ is shown if a right under . . . a Federal Statute (including rights under [FOIA]) would be maintained in a factual context that indicates that a request for expedited consideration has merit.” *Id.* In passing the Act and singling out FOIA rights, Congress recognized “the special nature of Freedom of Information Act cases” and found that prompt judicial review “is critical to FOIA users and to the purposes of the Act”:

Without such prompt review, government officials can delay access to public records, and extended delays in court can encourage unjustified refusals to disclose information. Frequently the value of disclosed information is transitory. If this information is not released in a timely manner, it may be of no value at all.

H.R. Rep. 98-985, 1984 U.S.C.C.A.N. 5779, 5783. For these reasons, “Congress intended for the ‘good cause’ provision to be liberally construed by the courts in granting requests for expedited consideration under FOIA.” *Brennan Center*, 300 F. Supp. 3d at 547 (quotation omitted); *see also, e.g., Ferguson v. F.B.I.*, 722 F. Supp.

1137, 1144 (S.D.N.Y. 1989) (“Speed is an essential element in [the Court’s] process of de novo review under FOIA.”).

Good cause exists to expedite consideration here. Despite a clear statutory deadline, EPA refused to respond to the FOIA request through the entire comment period for its proposed rule—denying the public a full and meaningful opportunity to comment on the proposal. *Cf. Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 41 & n.9 (D.D.C. 2006) (“meaningful debate” about government activity “can only occur if [the government] processes its FOIA requests in a timely fashion and releases the information sought”; meaningful debate “cannot be based solely upon information that the Administration voluntarily chooses to disseminate”).

EPA is slated to finalize its proposed rule as soon as March 2019.⁵ Delay in releasing the requested records vitiates the very right FOIA was enacted to protect: accountability to the public for agency action. “Congress enacted FOIA to illuminate government activities. The law was intended to provide a means of accountability, to allow Americans to know what their government is doing.” *ACLU v. Dep’t of Defense*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). Congress also recognized “that delay in complying with FOIA requests may be tantamount to denial.” *Brennan Center*, 300 F. Supp. 3d at 546. Ending EPA’s unlawful delay would vindicate the public’s right to access and to use these vital federal records in a timely manner.

⁵ See Office of Management and Budget, *Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions*, Regulation Identifier Number 2060-AU09, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2060-AU09>.

Accordingly, for “good cause,” this Court should expedite consideration of this matter. *See* 28 U.S.C. § 1657(a).

B. EPA can—and should—produce priority records by January 30.

This Court has authority “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). EPA is improperly withholding records and a court order is necessary to compel prompt production. *See ACLU*, 339 F. Supp. 2d at 504 (excessive agency delay “shows an indifference to the commands of FOIA”). Plaintiffs respectfully request that this Court order EPA to produce at least the agency’s most recent model and input data files by January 30, 2019.

To the extent the agency seeks to claim an exemption from disclosure, Plaintiffs respectfully request the Court order EPA to produce an index of the claimed exemption for each withheld record (a “*Vaughn*” index) no later than January 30, 2019. *Cf. Brennan Center*, 300 F. Supp. 3d. at 547 (describing *Vaughn* index requirements).

Production by January 30 is reasonable under the circumstances:

First, FOIA mandates “prompt” production. *See* 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(C)(i). Depending on the circumstances, prompt production “typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188. Had EPA issued a timely determination, production would have been due “within days or a few weeks” of September 10, 2018. EPA has already been afforded months of additional time—production now should be truly prompt.

Second, production by January 30 furthers the purpose of FOIA. “FOIA was enacted in order to promote honest and open government and to assure the existence of an informed citizenry in order to hold the governors accountable to the governed.” *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (quotation omitted). EPA is poised to take far-reaching final action as soon as March. Near-term production is necessary to ensure sufficient time to analyze the model and disseminate the results of the agency’s own model to the public. *See also*, e.g., *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.”) (quoting *Long v. IRS*, 693 F.2d 907, 910 (9th Cir.1982)).

Third, and finally, production by January 30 is feasible. EPA does not need to conduct any complicated document search prior to production. The agency employees who maintain the model know where the model is stored and what input data files are needed to run it. EPA has produced multiple prior versions of the model over the years and need only replicate that process. Further, Plaintiffs are seeking a priority subset of records by January 30. The FOIA request covers all versions of EPA’s model and data updated since 2016; the most pressing public need, however, is for the most up-to-date version. That version should be easiest for EPA to quickly access, and the agency can reasonably produce at least that one model and data set on a priority basis.

CONCLUSION

For the reasons herein, the Court should declare that EPA has violated FOIA and order the agency to produce its most recent OMEGA model and input data files by January 30, 2019.

Dated: December 28, 2018

Respectfully submitted,

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