

U.S. Department of Justice



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

March 19, 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 13, 2019. *See* Dkt. No. 33 (“Pl. Ltr.”).

Plaintiffs assert that they plan to seek summary judgment, but have once again altered the relevant universe of records that they challenge. Accordingly, the case will remain unripe for disposition until Plaintiffs clarify the scope of their newly narrowed request and, if necessary, until EPA responds to any remaining portion of that request.

In their most recent letter, Plaintiffs state that they have “voluntarily narrow[ed] their claim in this action to encompass only . . . the current full version of EPA’s OMEGA model and the files necessary to fully utilize it.” Pl. Ltr. at 1. Moreover, they withdrew their motion to expedite and for partial summary judgment. Pl. Ltr. at 2.

While Plaintiffs now affirm that the litigation is ripe for briefing on EPA’s withholdings under FOIA exemption 5, they still have not detailed the scope of their unilaterally narrowed request. Plaintiffs initially assert that they are now seeking only the “files necessary to fully utilize” the latest version of OMEGA. Pl. Ltr. at 1. But they later state that EPA is not only “withholding critical components, including the model itself,” but also contend that “*other* components,” “such as ‘pre-processors,’” are “missing.” *Id.* at 2 (emphasis added).

But such “other components” were not produced because Plaintiffs did not seek them among the “priority records” they previously identified in their now-withdrawn motion. *See* Dkt. No. 13 at 7 (Plaintiffs’ brief, seeking an order regarding the “most recent [OMEGA] model and input data files”). Moreover, Plaintiffs appear to have excluded the “pre-processors” from the litigation through their voluntary narrowing of the request; I am informed by EPA that pre-processors are not “necessary to fully utilize” the OMEGA model. *See* Pl. Ltr. at 1.

Moreover, Plaintiffs' continued modifications to their "priority request" and now to the scope of the narrowed request are a waste of the parties' time and resources. EPA had been working to process the remaining records responsive to Plaintiffs' original FOIA request; until their March 13 letter, Plaintiffs had given EPA no indication that they were uninterested in the remainder of the records responsive to their original request.¹

While Plaintiffs complain about an "asymmetry of information" between requesters and the government, *see* Pl. Ltr. at 2 (quoting *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 747 (S.D.N.Y. 2011)), EPA notes that Plaintiffs also never sought to confer with EPA about voluntarily narrowing the request or the scope of the narrowed request, nor did they otherwise informally seek information about the "pre-processors" or other relevant files before submitting their most recent letter to the Court.

Accordingly, EPA respectfully requests that Plaintiffs be directed to meet and confer with EPA concerning both the scope of Plaintiffs' narrowed request and a briefing schedule for any motion, and that the Court set a deadline for the parties to submit a joint scheduling proposal.

If Plaintiffs nonetheless move for summary judgment in the absence of a jointly proposed schedule and agreement regarding the scope of the narrowed FOIA request, EPA renews its request that the Court stay EPA's deadline to respond to any motion challenging the withholdings under exemption 5 until the scope of the narrowed request is clarified and—if necessary—until EPA has had sufficient opportunity to respond to any additional portion of Plaintiffs' request. As EPA argued in its previous letter, judicial efficiencies would be better served by consolidated motion practice concerning the full scope of Plaintiffs' narrowed FOIA request and EPA's complete response.

Thank you for your consideration of this matter.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: /s/ Samuel Dolinger
SAMUEL DOLINGER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677
E-mail: samuel.dolinger@usdoj.gov

cc: Counsel of record (via ECF)

¹ On March 4, 2019, I spoke with Peter Huffman, counsel for Natural Resources Defense Council, and inquired about Plaintiffs' position on proposing a production schedule for the remaining records responsive to Plaintiffs' request. I received no response to this inquiry before Plaintiffs filed their letters to the Court on March 7 and March 13, Dkt. Nos. 31, 33.