

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)

Plaintiff,)

v.)

Civil Action No. 15-1443

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Washington, D.C. 20460)

Defendant.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under two requests for correspondence between three high-ranking EPA officials and various lobbyists. (The first request also sought visitor logs for meetings with the lobbyists).
2. Because of the substantial public interest in these records, and because requester demonstrated its ability and intention to broadly disseminate this information, requester sought fee waivers.
3. Defendant EPA has indicated that each of these two requests would take less than two hours to satisfy, but nevertheless has failed to provide the required response to plaintiff’s

requests within the statutory deadline. That failure constitutes an improper denial of plaintiff's requests.

4. As a result of these denials, pursuant to 5 U.S.C. §552(a)(4)(A)(v)&(viii) CEI has exhausted its administrative remedies, and thus may seek judicial review, through this lawsuit to compel EPA to produce the responsive records.

PARTIES

5. Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
6. Defendant EPA is a federal agency headquartered in Washington, D.C.

JURISDICTION and VENUE

7. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this suit is brought in the District of Columbia, and because plaintiff is located in the District. Furthermore, jurisdiction is proper under 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because defendant is an agency of the United States.

FACTUAL BACKGROUND

9. This lawsuit seeks to compel EPA to respond fully and completely to two FOIA requests.

10. Plaintiff sent the first of these requests by electronic mail on June 26, 2015. Based on specific information and belief of particular Agency activities, this request seeks certain records (emphases in original):

- 1) *emails and text messages that include as parties* (i.e., sent to or from, including also as cc or bcc) *any of the following three EPA employees* i) Gina McCarthy, ii) Michael Goo (including all work-related emails sent to or from his private email accounts), and/or iii) Peter Tsirigotis, *and any of the following Michael J Bradley Associates employees* i) Michael Bradley, ii) Darlene Ryan, iii) Carrie Jenks and/or iv) any party at a “@mjbradley.com” address (that is, email or texts that include one of the three EPA employees and Mr. Bradley and/or anyone using a Bradley account);
 - 2) all mailing records, invoices, delivery notices or orders (e.g., FedEx, UPS, USPS) from the offices that Goo, McCarthy and/or Tsirigotis worked in during the period covered by this request which indicate the letter/parcel was sent to or from i) Michael Bradley, ii) Darlene Ryan, iii) and/or Carrie Jenks; and
 - 3) all visitor logs for EPA’s Sector Policies and Programs Division (D205-01), Research Triangle Park reflecting a visit by *Michael Bradley, Carrie Jenks and/or anyone listing an affiliation with or identifying Bradley Associates and/or the Clean Energy Group or “CEG” as the entity a visitor represents.*
- All records responsive to this request will have been dated during the five-month period May 1, 2014 through September 30, 2014, inclusive.

10. CEI asked that EPA waive processing and copying fees pursuant to 5 U.S.C.

§552(a)(4)(A)(iii), since the request was in the public interest, given that CEI has no commercial interest in the material, and there is substantial public interest in the requested information. CEI alternately asked for fee waiver as a media outlet.

11. EPA sent CEI a letter dated July 9, 2015, stating that “we have determined that the total fee that would be incurred in processing this request is de minimus [sic] and therefor not

billable.” The email also noted that the request has been assigned FOIA number EPA-HQ-2015-008383.

12. Under 40 CFR § 2.107 EPA does not bill for requests where the time spent searching for the requested records would be less than two hours. Thus, to determine this request was not billable EPA believed responsive records could be found within two hours.
13. EPA’s sole response to this request has been one office (Office of Air Quality Planning and Standards (OAQPS)) providing three records, consisting of two emails and one calendar item, discussing two separate meetings with Mr. Bradley, with no visitor logs or mailing records. In a July 24, 2015 letter, it asserted that this concludes OAQPS’s response and that the remaining responsive records will be provided by EPA’s Office of the Administrator. That latter office has not provided CEI any additional communication, nor has it indicated how many documents it will produce or withhold.
14. CEI sent the second of its FOIA requests by electronic mail on July 12, 2015. Based on specific information and belief regarding particular Agency activities, this request seeks certain records (emphases in original):

copies of all emails or other correspondence of any sort that include as parties (i.e., sent to or from, including also as cc or bcc) any of the following three EPA employees i) Gina McCarthy, ii) Michael Goo (including all work-related emails sent to or from his private email accounts), and/or iii) Peter Tsirigotis, and J.brad308@gmail.com (that is, email, instant messages or texts that include one of the three EPA employees and J.brad308@gmail.com)...dated during the five-month period May 1, 2014 through September 30, 2014, inclusive.
15. CEI asked that EPA waive processing and copying fees pursuant to 5 U.S.C. §552(a)(4)(A)(iii), since the request was in the public interest, CEI has no commercial

interest in the material, and there was substantial public interest in the requested information. CEI alternately asked for a fee waiver as a media outlet.

16. EPA sent CEI an email dated July 16, 2015, stating in pertinent part that “Your request for fee waiver for the FOIA request EPA-HQ-2015-008943 has been determined to be not applicable as the request is not billable.”
17. EPA has not provided updates on when such documents will be provided, how many responsive documents exist, or how many it plans to produce or withhold.
18. Thus, it has not satisfied its obligations under FOIA and *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
19. EPA provided no further communications whatsoever regarding either of these requests, no further production of responsive records (indeed, no documents have been produced in response to the second request at all), and no request for further information or narrowing, within the 20 day time frame required by the statute. Nor did EPA make any claim made of “unusual circumstances” that would allow the agency more time to substantively respond to the requests.
20. EPA has not fulfilled its duties under FOIA. This amounts to constructive denial of the original requests, as EPA provided neither a general estimate of the number of responsive documents, nor provided any substantive reason why the documents could be lawfully withheld.

LEGAL ARGUMENTS

EPA Failed to Provide a Proper Response to CEI's FOIA Requests

21. Under the Freedom of Information Act, when an individual submits a request, an agency must respond within 20 working days by issuing a determination about whether it will comply with such request, notifying the requester of “such determination and the reasons

therefor.” 5 U.S.C. § 552(a)(6)(A)(i). Under *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013), that response 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.”

22. 5 U.S.C. § 552(a)(6)(A) states 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). Neither circumstance was invoked by EPA in the instant matter, and neither is applicable in this case.

23. As the first request was sent June 26, 2015, EPA was required to issue a determination in response to it by July 27, 2015, taking into account weekends and holidays.

24. As the second request was sent July 12, 2015, EPA was required to issue a determination in response to it by August 9, 2015, taking into account weekends and holidays.

25. EPA has not provided any documents or substantive response at all to the latter request, nor has it satisfied its obligations under FOIA and *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013) regarding either request.

26. This failure to issue proper responses within the statutory deadline constitutes a denial by EPA of CEI’s requests for records.

**Having Failed to Properly Respond to CEI’s Requests, EPA Owes
Responsive Records and Cannot Seek Fees**

27. In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011) the U.S. District Court for the District of Columbia noted, “An additional 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 by *Bensman* Court).

28. Having failed to comply with FOIA's deadlines, and thereby waived any right to claim fees, EPA must now process the requests without charging fees, and provide plaintiff with records, subject to any legitimate withholdings.

CLAIMS FOR RELIEF
FIRST CLAIM FOR RELIEF
Declaratory Judgment

29. Plaintiff re-alleges paragraphs 1-27 as if fully set out herein.
30. CEI has properly sought and been constructively denied responsive records reflecting the conduct of official business, as EPA has failed to provide either responsive records or a substantive response to the FOIA requests at issue in this case.
31. CEI has a statutory right to the information it seeks, without being assessed fees.
32. Plaintiff asks this Court to enter a judgment declaring that:
- i. EPA failed to provide a proper response to CEI's requests for records EPA-HQ-2015-008383 and EPA-HQ-2015-008943, and has thereby statutorily waived fees;
 - ii. EPA records as described in CEI's requests for records EPA-HQ-2015-008383 and EPA-HQ-2015-008943 are agency records subject to release under FOIA;
 - iii. EPA's refusal to produce the requested records is unlawful.

- iv. EPA has a duty to produce in a timely fashion all records in its possession responsive to plaintiff's FOIA requests, without charging any fees.

SECOND CLAIM FOR RELIEF
Injunctive Relief

- 33. Plaintiff re-alleges paragraphs 1-31 as if fully set out herein.
- 34. CEI is entitled to injunctive relief compelling EPA to produce all records in its possession responsive to CEI's FOIA requests, without fees, subject to legitimate withholdings.
- 35. Plaintiff asks this Court to order EPA to produce to CEI, within 10 business days of the date of the order, the requested records described in CEI's FOIA requests, and any attachments thereto, without charging any fees (as is consistent with EPA's determination that the requests are not billable).
- 36. 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 CEI receives the last of the produced documents, addressing any withholdings by EPA (including a Vaughn Index to be submitted by EPA if it withholds any documents) and a briefing schedule for resolving any remaining issues in the case about the production or withholding of documents.

THIRD CLAIM FOR RELIEF
Seeking Costs and Fees

- 37. Plaintiff re-alleges paragraphs 1-35 as if fully set out herein.
- 38. 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.
- 39. CEI is statutorily entitled to recover fees and costs incurred as a result of EPA's refusal to fulfill the FOIA requests at issue in this case.

40. Plaintiff asks the Court to order EPA to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

Respectfully submitted this 3rd day of September, 2015,

/s/ Hans Bader

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