

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

PROTECT THE PUBLIC’S TRUST)
712 H Street, N.E.)
Suite 1682)
Washington, D.C. 20002,)

Plaintiff,)

v.)

Civil Case No. 1:22-cv-00757

U.S. DEPARTMENT OF TRANSPORTATION)
1200 New Jersey Avenue, S.E.)
Washington, D.C. 20590,)

Defendant.)

COMPLAINT

1. Plaintiff Protect the Public’s Trust brings this action against the United States Department of Transportation under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgement Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.
3. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. Plaintiff Protect the Public’s Trust (“PPT”) is an unincorporated association of retired and former public servants and concerned citizens that is dedicated to restoring public trust in government by promoting the fair and equal application of the rules and standards of

ethical conduct to all public servants. *See* D.C. Code § 29–1102(5). Consistent with Justice Brandeis’s aphorism that “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman,” PPT seeks to promote transparency and broadly disseminate information so that the American people can evaluate the integrity and ethical conduct of those who act in their name. Louis Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.

5. Defendant United States Department of Transportation (“DOT” or “the Department”) is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

STATEMENT OF FACTS

6. On June 2, 2021, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records from the Office of the General Counsel:

From November 23, 2020 through the date this request is processed, all waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration exempting them from any part of their obligations as defined in relevant laws, regulations, rules, and/or the Biden Administration’s Ethics Pledge. This request also includes any records and communications between employees of the Office of the General Counsel, as well as any records and communications between the Office of the General Counsel and any political appointees regarding waivers or impartiality determinations.

7. As Attorney General Garland has made clear, FOIA is “a vital tool for ensuring transparency, accessibility, and accountability in government” whose “‘basic purpose . . . is to ensure an informed citizenry,’ which is ‘vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed.’” Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines* 1 (Mar. 15, 2022),

<https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Memo”).

8. The release of these documents is in the public interest because they will contribute to the public’s understanding of how political appointees at the Department are complying with their ethical obligations. Particularly given the large sums of money the Department is tasked with managing and/or disbursing under the Infrastructure Investment and Jobs Act, Public Law 117-58 (Nov. 15, 2021), it is imperative that the public be able to understand the ethical standards that apply to senior Department officials, as well as any exceptions and the justifications for making any such exceptions.
9. On June 3, 2021, the Department acknowledged receipt of the FOIA, but requested that Plaintiff provide a complete mailing address.
10. On June 3, 2021, Plaintiff responded by providing a complete mailing address to the Department.
11. Also on June 3, 2021, the Department sent an acknowledgement letter to Plaintiff which identified Plaintiff’s FOIA request as file number “2021-281.” This letter also stated “Please be advised that all FOIA requests will be handled on a first-in/first-out basis. Your request will be addressed in the order it was received. We regret any inconvenience caused by the delay.”
12. Since that time, Plaintiff has reached out at least three times regarding the status of request 2021-281, including on September 10, 2021, October 29, 2021, and January 26, 2021.
13. On January 27, 2021, the Department responded in part “I am sorry for the delay in responding to your request. I have followed up on the search and am awaiting an update

from the Ethics Office. Once our office has the records, we should be able to provide the records fairly quickly to you. I will provide a better update once I receive one myself.

Thank you for your patience.”

14. There has been no further response from the Department.
15. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
16. As of today, Plaintiff’s request has been pending for more than 280 days – well beyond the statutory period for federal agencies to make a determination with respect to a FOIA request. 5 U.S.C. § 552(a)(6)(A)-(B). Furthermore, it has been more than 45 days since the Department acknowledge it had records and indicated it would provide them “fairly quickly.”
17. At this time, the Department has not made a determination of whether it will comply with Plaintiff’s request. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). The Department has not produced responsive documents to the Plaintiff or even provided an estimated date of completion, has not communicated to the Plaintiff the scope of the documents it intends to produce and withhold, along with the reasons for such withholding, and has not informed Plaintiff of its ability to appeal any adverse portion of its determination.
18. Given these facts, it appears that absent litigation the Department has not and does not intend to meet its statutory obligations to provide the requested records.
19. Through the Department’s failure to make a determination within the time period required by law, PPT has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

20. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
21. PPT properly requested records within the possession, custody, and control of the Department.
22. The Department is an agency subject to FOIA, and therefore has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.
23. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
24. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to segregate exempt information in otherwise non-exempt records responsive to the PPT FOIA request.
25. The Department's failure to provide all non-exempt responsive records violates FOIA.
26. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

Protect the Public's Trust respectfully requests this Court:

- (1) Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with the requirements of FOIA and any and all orders of this Court.

- (2) Order Defendant to produce, within ten days of the Court's order, or by other such date as the Court deems appropriate, any and all non-exempt records responsive to PPT's FOIA request and indexes justifying the withholding of all or part of any responsive records withheld under claim of exemption.
- (3) Enjoin the Defendant from continuing to withhold any and all non-exempt responsive records.
- (4) Award PPT the costs of this proceeding, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).
- (5) Grant PPT other such relief as the Court deems just and proper.

Dated: March 18, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

/s/Gary Lawkowski
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