

**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-00945

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 December 8, 2021, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records from several named offices and individuals:
 1. All records from January 20, 2021 through the date the search begins relating to the movie “Mayor Pete”; and
 2. All records from January 20, 2021 through the date the search begins that contain any of the following search terms:
 - “Mayor Pete”;
 - “Amazon”;
 - “Prime”;
 - “Movie”;
 - “Film”;
 - “Documentary”;
 - “Jesse Moss” or “Moss”;
 - “Jon Bardin” or “Bardin”;
 - “Dan Cogan” or “Cogan”;
 - “Laurie David”;
 - “Julie Gaither” or “Gaither”;
 - “Liz Garbus” or “Garbus”;
 - “Sam Jinishian” or “Jinishian”;
 - “Amanda McBaine” or “McBaine”;

- “Regina Scully” or “Scully”;
- “Buffalo Bonker” or “Bonker”;
- “Ana Font Hernandez”;
- “Cheyenne Kerekes” or “Kerekes”; and
- “Rebecca Stern” or “Stern”.

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 help the public understand whether any public resources were used to support a project that is outside of the Secretary’s official duties, and therefore fundamentally personal in nature. Specifically, this request concerns the operations and activities of the Department in relation to a movie about the current Secretary, “Mayor Pete,” which primarily concerns aspects of the Secretary’s life prior to becoming Transportation Secretary. Under Federal ethics laws and regulations, officials should generally use their time in office to perform official duties, and may not ask subordinates to perform tasks outside of their official duties. *See generally* 5 C.F.R. § 2635.705. The timing of the movie’s release raises questions about whether any officials in the Department improperly used official time and resources to facilitate or promote a personal project. The requested documents will go a long way to either substantiating or refuting these concerns, likely contributing

significantly to the public's understanding of how the Department related to the creation, promotion, and distribution of the movie.

9. Based in part on the strong public interest in resolving these questions and PPT's demonstrated history of disseminating information to the public, PPT also requested expedited processing of its request.
10. On December 9, 2021, the Department acknowledged receipt of the FOIA, referred to it as "File No. OST-2022-0097," and advised "all FOIA requests will be handled on a first-in/first-out basis."
11. Since that time, Plaintiff has reached out at least twice regarding the status of request OST-2022-0097, including on January 14, 2022 and March 22, 2022.
12. On February 8, 2022 -- already beyond the 20-day statutory period in which agencies are required to make a determination -- the Department provided an "interim response" denying Plaintiff's request for expedited processing.
13. Also on February 8, 2022, the Department represented "For request 2022-0097, we are still conducting the search, but expect to have the records within the next two weeks. I estimate we will respond by the end of the month."
14. Notwithstanding the Department's estimate that it would have records and respond by the end of February, Plaintiff has received no further updates 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 115 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 57 days since

the Department indicated it was conducting a search and estimated it would have records “within the next two weeks.”

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). While the Department has indicated that it has begun its search, the Department has not produced responsive documents to the Plaintiff, 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 beyond its denial of expedited processing, which was provided after the statutory time period for general requests had already run.
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: April 7, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

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