

**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.)
)
U.S. DEPARTMENT OF HOMELAND)
SECURITY)
245 Murray Lane, S.W.)
Washington, D.C. 20528,)
)
Defendant.)
_____)

Civil Case No. 1:22-cv-01489

COMPLAINT

1. Plaintiff Protect the Public’s Trust brings this action against the U.S. Department of Homeland Security 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 U.S. Department of Homeland Security (“DHS” 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 or about 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 help the public understand which high-level DHS officials have potential conflicts of interest, how the Department is addressing those conflicts, and whether officials are following the rules. These questions are particularly important at a department like DHS, which has a large budget and a massive policy portfolio.
9. On June 2, 2021, the Department acknowledged receipt of Plaintiff’s request and assigned it request number 2021-HQFO-00991.
10. On June 9, 2021, the Department sent an acknowledgement letter concerning the request 2021-HQFO-00991, which “conditionally grant[ed]” Plaintiff’s request for a fee waiver and indicated that the Department would “invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c).”
11. On June 28, 2021, the Department stated “[w]e are currently conducting a search for records regarding your FOIA request. We have tasked OGC for this, but wanted to provide you with a link that may be of interest to you regarding this request.” The referenced link lead to an Office of Government Ethics webpage containing pledge waivers for two DHS officials, among others.
12. On July 19, 2021, Plaintiff requested an update regarding the status of request 2021-HQFO-00991.

13. On August 26, 2021, the Department indicated that the status of request 2021-HQFO-00991 had been updated to “In Process.”
14. On October 29, 2021, Plaintiff again sought an update regarding the status of request 2021-HQFO-00991.
15. On November 1, 2021, the Department’s Privacy Office indicated “[t]he Office of the General Counsel (OGC) has provided us with potentially responsive records for 2021-HQFO-00991, and your request has been added to our processing queue.” The Department further stated “[o]ur general expectation is that we will be able to send you a final response within 3 to 4 months. Please know that this estimate may change dramatically based on the volume of work associated with our expedited COVID-19 requests and on the types of records that OGC has provided us for your request.”
16. Plaintiff reached out again to the Department regarding the status of request 2021-HQFO-00991 on February 18, 2022 and May 13, 2022.
17. On May 16, 2022, the Department responded in part “Your request was in the processing queue and it has been assigned to a FOIA specialist for review and processing. We expect to send you a Final response in the next 2 months. While we make every effort to be responsive to requesters and hope to be able to respond to you sooner, there may be additional delays”
18. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
19. At this time, Plaintiff’s request has been pending for nearly a year -- 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). Moreover, the Department has been “processing”

responsive records since at least November – over 200 days – and continues to warn of “additional delays.”

20. 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 conducted a search for responsive records and begun processing those records, it has not communicated to the Plaintiff the scope of the documents it intends to produce and withhold, along with the reasons for such withholding, or informed Plaintiff of its ability to appeal any adverse portion of its determination. Moreover, while the Department has provided a several estimates of when it may finally make a determination, the value of this estimate is undermined by the fact that the Department has already missed its initial estimated window to respond and represents that “there may be additional delays.”
21. 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.
22. Through the Department 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**

23. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
24. PPT properly requested records within the possession, custody, and control of the Department.

25. 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.
26. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
27. 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.
28. The Department's failure to provide all non-exempt responsive records violates FOIA.
29. 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 Department 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 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: May 26, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

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