

**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-01246

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 around December 22, 2021, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records relating to Secretary of Homeland Security Alejandro Mayorkas:
 1. Meeting Requests: All records for meeting requests, meeting memos, briefing documents schedules, communications, and any other records related to the submission, consideration, approval, and scheduling of meeting requests for meetings with Secretary Mayorkas. This should include but not be limited to records and communications relating to meeting approvals from the Department Ethics Office/Office of the General Counsel.
 2. External Communications: Any and all communications, documents, and other records to, from, or between a party outside the federal government and any employee of the Office of the Secretary relating to secretarial meeting requests. This includes those communications where such an employee is copied on an email with an outside entity or sends or receives an email where an outside (non-governmental) party is corresponding with an official at the Department of Homeland Security (“DHS”).

3. Travel Records: All records relating to all official travel undertaken by Secretary Mayorkas and Immediate Office of the Secretary political appointees accompanying his on official travel. These records should include, but not be limited to, travel requests or invitations, travel briefings or memos, meetings, calendars, or schedules relating to such travel; travel authorizations; itineraries; vouchers; Department Ethics Office/Office of the General Counsel approval; and disposition of any gifts received or purchases made while on official travel.
4. Building visitor logs for any and all visitors since 12:00pm on January 20, 2021 to the DHS headquarters building for meetings with Secretary Mayorkas or any officials in the Office of the Secretary.
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 with whom the Secretary of Homeland Security, one of the highest ranking officials in government, is meeting. Secretary of Homeland Security is a high profile and powerful position in any administration. Over the past year, Secretary Mayorkas in particular has been at the center of a number of highly controversial policy debates, including directing DHS’s approach to the southern border and combating so-called “disinformation.” See generally Olafimihan Oshin, *Mayorkas Not Concerned About McCarthy Impeachment Threat*, The Hill (May 1, 2022), <https://thehill.com/news/sunday-talk-shows/3473011-mayorkas-not-concerned-about->

[mccarthy-impeachment-threat/](#); Aaron Blake, *The Tempest Over DHS's Disinformation Governance Board*, Wash. Post (Apr. 29, 2022),

<https://www.washingtonpost.com/politics/2022/04/29/disinformation-governance-board-dhs/>. In light of these ongoing public controversies, it is all the more imperative that the public be able to see who is meeting with and in a position to potentially influence the Secretary and DHS policies. More generally, these records will also help the public understand what processes are in place to ensure compliance with ethics and other conflict of interest laws and regulations, and how the top official at DHS is complying with these processes.

9. On December 22, 2021, the Department acknowledged receipt of the request, assigned it request number “2022-HQFO-00365,” and “updated” the status of the request to “Received.”
10. On or around January 4, 2022, the Department sent a letter stating “[d]ue to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request,” asserting “[a]s your request seeks documents that will require a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c),” and “conditionally grant[ing]” Plaintiff’s fee waiver request.
11. On January 28, 2022, the Department updated the status of the request to “In Process.”
12. Since that time, Plaintiff has reached out at least twice regarding the status of request 2022-HQFO-00365, including on March 25, 2022 and April 22, 2022.

13. On April 25, 2022, the Department responded, stating “our general expectation is that, we will be able to send you a final response in the next three or four months.” The

Department further stated:

The Office of the Executive Secretary, the Office of the Chief Information Officer (OCIO) have provided us with potentially responsive records. We have also tasked the Office of the General Counsel (OGC) and they are currently conducting a search. Once we get records from OGC, we will add the case to the processing queue. It is very difficult to provide an accurate estimated date of completion until our FOIA analyst reviews these records for responsiveness and we have a better sense of the number of pages and the sensitivity of the material. The Privacy Office is also coordinating the Department’s response to requests related to COVID-19; many of these requesters asked and qualified for expedited processing, meaning that they are required to be placed at the front of the queue. Again, our general expectation is that we will be able to send you a final response within three to four 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 the program offices provide us for your request. Regardless of the specificity of your request, we cannot accurately estimate the amount of time it will take to process the record until we understand both the volume and sensitivity of the record.

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.

14. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.

15. As of today, Plaintiff’s request has been pending for more than 130 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).

16. 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 conducting a search for responsive records, it has not begun to process those records, produced responsive documents to the Plaintiff, 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 “general expectation” of when it may finally make a determination, the value of this estimate is undermined by representations that “this estimate may change dramatically” and “there may be additional delays.”

17. 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.
18. 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**

19. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
20. PPT properly requested records within the possession, custody, and control of the Department.
21. 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.
22. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.

23. 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.
24. The Department's failure to provide all non-exempt responsive records violates FOIA.
25. 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 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: May 5, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

/s/Gary M. Lawkowski

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