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. ENVIRONMENTAL PROTECTION AGENCY 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460, Defendant.	)	Civil Case No. 1:22-cv-02352

COMPLAINT

1. Plaintiff Protect the Public's Trust brings this action against the Environmental Protection Agency 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 Environmental Protection Agency ("EPA" 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 February 25, 2022, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records from January 20, 2021 through the date the search commences relating to Principal Deputy Assistant Administrator, Office of Air and Radiation, Joseph Goffman and the ethics complaint filed against Mr. Goffman in August 2021:

    1. All records of communications, meeting requests, or meetings referencing or concerning the Complaint filed on or about August 17, 2021 by Protect the Public's Trust with the subject line "Request for Investigation into Ethics Violations by Acting Associate Administrator Joseph Goffman" and available here: https://www.protectpublicstrust.org/wpcontent/uploads/2021/08/Goffman-IG-complaint.pdf;

    2. All records of communications, meeting requests, or meetings referencing or concerning any alleged, potential, or otherwise known ethical misconduct by Mr. Goffman;

3. All records of any adverse personnel actions, including any written or verbal reprimand, taken against Mr. Goffman;

4. All records of communications between Mr. Goffman and the Ethics Office that have not been previously publicly disclosed; and

5. All records of communications sent or received by Mr. Goffman that reference "Harvard," Ms. Kathy Fallon Lambert, and/or any "Harvard.edu" email address.

For purposes of this request, we are seeking records held by:

- Any political appointee in the Office of the Administrator, including, but not limited to, the Administrator, the Deputy Administrator, the Chief of Staff, and the Office of Public Affairs;

- Any administrative staff (such as secretaries, executive assistants, or schedulers) in the immediate office of the Administrator (i.e., the administrative staff who work directly with the Administrator);

- The General Counsel, the Principal Deputy General Counsel, the Acting Associate Deputy General Counsel, and the Senior Counselor to the General Counsel;

- The Ethics Office, including, but not limited to, the Senior Counsel for Ethics;

- Mr. Joseph Goffman; and

- Mr. Peter Tsirigotis.

7. Plaintiff also requested a fee waiver for this request.

8. 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").

9. The release of these documents is in the public interest because it will inform the public about how the EPA responds to allegations of potential misconduct, as well as providing additional information about the scope and scale of potential misconduct.

10. On February 25, 2022, the Department sent an acknowledgement email labeling Plaintiff's request tracking number EPA-2022-002747, a separate email attaching a request assignment letter indicating that Plaintiff's request was assigned for processing, and a third email attaching a letter claiming an extension of time to respond to Plaintiff's request that indicated the "new due date is April 8, 2022."

11. On March 7, 2022, the Department reached out to Plaintiff, stating "[w]e have begun coordinating with the various offices and custodians listed in your request" and "have already begun the coordination of and search for responsive records among your named custodians." The Department further requested "clarification regarding the scope of #4," specifically asking "[a]re you asking for any ethics counseling/advice provided to Mr. Goffman by the Ethics Office about his ethics obligations (since our last release to you)? Or are you looking for any Ethics Office communications with Mr. Goffman specific to the August 2021 complaint?"

12. On March 16, 2022, the Department followed up to again ask for clarification on request number 4.

13. On March 17, 2022, Plaintiff replied, indicating "In #4, we're looking for both – counseling/advice since the previous FOIA response regarding Mr. Goffman as well as

communications from the Ethics Office specific to the complaint and the actions/events that prompted it."

14. On April 12, 2022, the Department provided an update, stating:

> As you'll recall, your list of custodians was from various offices throughout the Agency. I recently heard from the Office of Air and Radiation (OAR) that their eDiscovery search has produced a large number of records and it will require some time to review. They will also have to coordinate with other offices, and potentially other federal agencies. They are hoping to have their records ready by June. The Administrator's office is also searching but I don't know yet the volume of records they are reviewing. In OGC/Ethics, we have been searching and are now reviewing our Ethics records related to #4.

The Department further indicated "I'm hoping to get you an interim release for this one . . . . So as soon as I have some records ready, I'll get them released. And we will continue on a rolling basis."

15. On May 27, 2022, Plaintiff asked the Department for a status update.

16. On June 1, 2022, the Department stated "I will actually be out of the office for a few weeks starting in mid-June, and had already planned to do an interim release for EPA-2022-002747 before I leave."

17. On June 7, 2022, the Department responded to Plaintiff's request for a fee waiver, stating "[t]he total fee incurred in processing this request will not meet the cost threshold; therefore it is not billable."

18. Notwithstanding the Department's indications on April 12 and June 1 that the Department would be able to make at least an interim release in June, it is now August and Plaintiff has not received any records in response to its request. Indeed, in contrast to the Department's previous responsiveness in this matter, Plaintiff has not received any further communication from the Department.

19. Plaintiff has actively worked with the Department to clarify any purported ambiguity in its request. Moreover, notwithstanding the Department's initial claims that Plaintiff's request generated a large volume of records that would require time to review, the Department has represented that the total fee incurred in processing Plaintiff's request will not meet the EPA's billable cost threshold. The EPA's billable cost threshold for requesters without a fee waiver is photocopying in excess of 100 pages and time spent searching for records in excess of two hours. *See* 40 C.F.R. § 2.107(c)(iv).
20. As the Garland Memo makes clear, "Timely disclosure of records is also essential to the core purpose of FOIA." Garland Memo at 3.
21. At this time, it has been more than 160 days since Plaintiff submitted its FOIA request. This is 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).
22. 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, 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.
23. 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.
24. 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

25. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
26. PPT properly requested records within the possession, custody, and control of the Department.
27. 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.
28. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
29. 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.
30. The Department's failure to provide all non-exempt responsive records violates FOIA.
31. 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: August 9, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

/s/Gary M. Lawkowski
Gary M. Lawkowski
D.D.C. Bar ID: VA125
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue, Suite 402
Alexandria, Virginia 22314
Telephone: 703-965-0330
Facsimile: 415-520-6593
GLawkowski@Dhillonlaw.com

Counsel for the Plaintiff