

**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 JUSTICE)
950 Pennsylvania Avenue, N.W.)
Washington, D.C. 20530)
)
Defendant.)
_____)

Civil Case No. 1:23-cv-02357

COMPLAINT

1. Plaintiff Protect the Public’s Trust brings this action against the U.S. Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) 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.
- 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 a nonprofit corporation 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. 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 Justice (“DOJ” 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 before June 6, 2023, PPT submitted a FOIA request to the Department’s Justice Management Division seeking the following records:

The public comments received by DOJ in response to “Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act” published in the Federal Register on December 22, 2022 relating to Operable Unit 2 and Operable Unit 4 of the Diamond Alkali Superfund Site in New Jersey.

7. As the head of the Department, 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 understanding of whether and how the Department decides to modify the Lower Passaic River consent decree and what organizations sought to influence the process. The Lower Passaic River is located in northern New Jersey. The areas at issue in the Consent Decree are part of the Diamond Alkali Superfund Site. The Consent Decree concerns cleanup costs for the Superfund site. The Environmental Protection Agency estimated that cleanup of the two site units at issue would cost \$1.82 billion. Department of Justice, *Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 87 Fed. Reg. 78710 (Dec. 22, 2022). The proposed Consent Decree requires 85 Settling Defendants to pay \$150 million in cleanup costs. The difference between the estimated cleanup costs and the proposed settlement costs is enormous—over \$1 billion. Moreover, the process that led to the proposed Consent Decree has itself been controversial. In April 2023, PPT filed an ethics complaint with the Environmental Protection Agency concerning the role of a former EPA employee who appears to have improperly participated in the particular matter to decide financial responsibility for several specific parties whom he directly affected while working at EPA years prior. *See* PPT, *Request for Investigation into Potential Violation by David Batson of the Lifetime Ethics Ban (18 U.S.C. § 207)*, (Apr. 3, 2023), <https://protectpublictrust.org/wp-content/uploads/2023/03/PPT-Request-for-Investigation-into-Potential-Violation-by-David-Batson-of-the-Lifetime-Ethics-Ban.pdf>. The requested documents will provide information about what entities sought to influence the Consent Decree and what concerns were raised regarding the decree prior to final approval.

9. On June 6, 2023, the Department acknowledged receipt of Plaintiff's request and indicated that it had been "forwarded" from the Justice Management Division to the Environment and Natural Resources Division for processing and response.
10. On June 22, 2023, the Environment and Natural Resources Division acknowledged receipt of the request and assigned it tracking number 2023-06165.
11. On July 10, 2023, Plaintiff reached out to the Department regarding the status of Plaintiff's request.
12. On July 11, 2023, the Department indicated that it was "aiming to provide your response within the next seven days."
13. More than seven days passed without the release of responsive records.
14. On August 1, 2023, Plaintiff again requested a status update.
15. On August 1, 2023, the Department responded, stating in part:

As part of our review of documents which might be responsive to your FOIA request, we came across a set of records marked confidential. As a result, we are required by law to communicate with the submitter to determine whether they still claim the FOIA Exemption 4 protection on those records. We will notify you if it turns out that we must engage the submitter notice process and afford the submitter time to review the records that we are proposing to release. At this point, we're still in the initial stages of that determination.

Because of the contingencies, it might be anywhere from two weeks to roughly 60 days or longer before we complete the processing of your FOIA request.
16. On August 2, 2023, Plaintiff responded, indicating its willingness to receive records on a rolling basis, including those that were not marked as confidential.
17. On August 3, 2023, the Department stated in part: "We'll work toward identifying the non-CBI records that can be released as an interim response."
18. That same day, Plaintiff followed up to ask when Plaintiff "can . . . expect the non-CBI records to be released?"

19. On August 4, 2023, the Department responded in part: “The best estimate I can provide right now is about 30 days.”
20. Thus, over the course of a month, the Department’s estimate for providing response records shifted from approximately seven days to provide all responsive records to an additional thirty days to provide a limited tranche of documents that have no exemptions.
21. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
22. At this time, it has been more than 65 days since Plaintiff submitted its FOIA request and since it was forwarded to the Environment and Natural Resources Division. This is beyond the statutory period for federal agencies to make a determination with respect to a FOIA request, even when the request is redirected within an agency. 5 U.S.C. § 552(a)(6)(A)-(B).
23. 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.
24. Public comments submitted to a federal agency are public documents with a discrete limited number of records that are easily obtainable for the requested agency to locate and produce. Public comments are routinely produced to the public quickly and often outside of the FOIA process. The request was a simple one that should have been completed with minimal effort by the Department and well within the 20 working days

provided for under the law. Continued delay and shifting rationales provided by the Department for why it cannot immediately produce all the responsive documents appears to require judicial intervention to rectify.

25. The Department's claim that it must take additional time to assess confidentiality concerns related to Exemption 4 is dubious. All of the records at issue were voluntarily submitted to the Department. The request for comment provides no assurances that comments would be kept confidential and a reasonable person would surmise that comments sent under these circumstances to a public-facing email address will not, in fact, be kept confidential.
26. Moreover, even crediting the Department's assertion that it is examining certain documents for confidentiality concerns, it has provided no explanation for why it has not provided other public comments that presumably do not raise the same concerns.
27. 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.
28. 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**

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

31. 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.
32. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
33. 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.
34. The Department's failure to provide all non-exempt responsive records violates FOIA.
35. 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 15, 2023

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST

By Counsel:

/s/Gary M. Lawkowski

Gary M. Lawkowski

D.D.C. Bar ID: VA125

Glynis R. Gilio

D.D.C. Bar ID: 1780627

DHILLON LAW GROUP, INC.

2121 Eisenhower Avenue, Suite 608

Alexandria, Virginia 22314

Telephone: 703-574-1654

GLawkowski@Dhillonlaw.com

Telephone: 703-636-9451

GGilio@Dhillonlaw.com

Counsel for the Plaintiff