

In the United States District Court

FOR THE DISTRICT OF COLUMBIA

CENTER FOR FOOD SAFETY,)
660 Pennsylvania Ave SE #402)
Washington, DC 20003)

Plaintiff,)

vs.)

UNITED STATES ARMY CORPS OF)
ENGINEERS,)
441 G Street N.W.)
Washington, DC 20314-1000)

Defendant.)

Case No. 1:22-cv-2183

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. NATURE OF ACTION

1. The Center for Food Safety (CFS)—a nonprofit public interest and environmental advocacy organization working to protect public health and the environment—brings this civil action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging the United States Army Corps of Engineers' (USACE) unlawful withholding of records that pertain to USACE's approval of nationwide permit (NWP) 56.

2. CFS filed a FOIA request with USACE to gain a better understanding of USACE's decision to approve NWP 56, which allows structures in marine and estuarine waters for finfish aquaculture. The goal of the request was to open the operations and activities of government to public scrutiny and contribute significantly to the public's understanding of the agency's action. CFS also requested a fee waiver in accordance with 5 U.S.C. § 552(a)(4)(A)(iii).

3. USACE is violating FOIA by failing to produce records in response to CFS's FOIA request, failing to conduct an adequate search for responsive records, and by failing to provide an initial determination as to the scope of the records to be produced or withheld, an estimated date by which the agency's search will be complete, and a determination on CFS's fee waiver request.

4. USACE's unlawful withholding of public records undermines FOIA's basic purpose of government transparency. Because prompt access to these records is necessary to effectuate FOIA's purpose, CFS seeks declaratory relief establishing that USACE is in violation of FOIA, and injunctive relief directing USACE to provide responsive records without any further delay.

II. JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which expressly provides a venue for FOIA cases in the District Court of the District of Columbia.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201.

8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

III. PARTIES

9. Plaintiff CFS is a national 501(c)(3) nonprofit public interest and environmental advocacy organization with a mission to protect public health and the environment by curbing the proliferation of harmful food production technologies, such as industrial aquaculture practices, and by promoting sustainable forms of food production. CFS represents over one million members who reside in every state across the country, who support safe, sustainable food production. CFS has long had a specific aquaculture program, dedicated to addressing the adverse environmental and public health impacts of industrial aquaculture, including numerous policy, scientific, and legal staff. In its program, CFS strives to ensure and improve aquaculture oversight, furthering policy and cultural dialogue with regulatory agencies, consumers, chefs, landowners, and legislators on the critical need to protect public health and the environment from industrial aquaculture and to promote and protect more sustainable alternatives. CFS and its members are harmed by USACE's violations of FOIA, as such violations preclude CFS from gaining a full

understanding of the decision-making process regarding the approval of NWP 56 and prevent CFS from disseminating information to the public concerning USACE's oversight of this novel industry.

10. Defendant USACE is an agency within the United States Government. USACE is in possession and control of the records that CFS seeks and is an agency within the meaning of 5 U.S.C. § 552(f)(1). USACE is therefore subject to FOIA.

IV. LEGAL BACKGROUND

11. The basic purpose of FOIA is to promote government transparency and public oversight of agency action. The statute effectuates this objective by establishing the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed exemptions. 5 U.S.C. § 552(b)(1)-(9).

12. FOIA imposes stringent deadlines on federal agencies with regard to making initial determinations in response to FOIA requests. Within twenty working days of receiving a FOIA request, an agency must determine whether it will release the requested records, and must notify the requester of its determination, the reasons for its decision, and the requester's right to appeal an adverse decision to the head of the agency. *Id.* § 552(a)(6)(A). An agency must also make a determination as to a fee waiver request within the twenty-day time period. *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 39 (D.D.C. 2011).

13. Congress has specified certain limited instances in which federal agencies may extend this twenty-working-day deadline. First, an agency may toll the deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii). Second, in "unusual circumstances" an

agency may extend the deadline no more than ten additional working days by providing written notice to the requester that sets forth the circumstances justifying the extension. *Id.* § 552(a)(6)(B)(i).

14. FOIA requires that a determination under 5 U.S.C. § 552(a)(6)(A) “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

15. For a determination to trigger the administrative exhaustion requirement, the agency must at least “(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* at 188.

16. If the agency fails to respond within the applicable time limit, the requester “shall be deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

17. Such constructive exhaustion¹ “allows immediate recourse to the courts to compel the agency’s response to a FOIA request.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 62, 64 (D.C. Cir. 1990).

18. The court “then has the authority to oversee and supervise the agency’s progress in responding to the request.” *Seavey v. DOJ*, Case No. 15-1303, 2017 WL 3112816, at *2 (D.D.C. July 20, 2017) (citing *Citizens for Responsibility and Ethics in Wash.*, 711 F.3d at 189); *see also Clemente*

¹ “Constructive exhaustion is determined by the actions (or lack thereof) an agency has taken by the time a suit is filed in the district court.” *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 113 (D.D.C. 2017) (citing *Oglesby*, 920 F.2d at 64).

v. FBI, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (a court “may use its equitable powers to require the agency to process documents according to a court-imposed timeline.”).

19. FOIA requires each agency to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

20. With regard to production of responsive records, “FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Responsibility and Ethics in Wash.*, 711 F.3d at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)).

21. In certain limited instances, an agency may withhold records or portions of records pursuant to nine specific exemptions. 5 U.S.C. § 552(b). These exemptions must be “construed narrowly in keeping with FOIA’s presumption in favor of disclosure.” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

22. FOIA places the burden on the agency to prove that it may withhold responsive records or portions of records from a requester. 5 U.S.C. § 552(a)(4)(B).

23. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

24. In addition, FOIA provides a waiver for fees associated with the procurement of documents subject to FOIA requests. Such fee waivers are granted “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of

the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii).

25. Finally, FOIA requires that the agency provide “information about the status of a request . . . including . . . an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii).

V. FACTUAL BACKGROUND

26. CFS, through its aquaculture program, works to protect public health and the environment from the impacts of industrial aquaculture operations. CFS has a long history of promoting greater oversight concerning the environmental and public health impacts of animal factories, and specifically offshore industrial aquaculture facilities.

27. On May 5, 2022, CFS submitted a FOIA request to USACE, seeking “[a]ny and all documents from May 7, 2020 to January 13, 2021 regarding the U.S. Army Corps of Engineers’ decision to issue Nationwide Permit 56, previously referred to as Nationwide Permit B.” This is a narrow request, considering the date range (less than one year).

28. CFS explained that release of the requested records was in the public’s best interest because disclosure would significantly contribute to public understanding of the operations or activities of government, and because obtaining the information was of no commercial interest to CFS. CFS also requested a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

29. On May 9, 2022, USACE emailed CFS stating a formal acknowledgement and tracking number would be forthcoming. Exhibit A.

30. An initial determination on the May 5 FOIA Request was due by June 3, 2022, twenty working days after the date CFS submitted the request.

31. On May 31, 2022, CFS emailed USACE asking for an update, tracking number, and formal acknowledgement of the request. Exhibit A.

32. On June 3, 2022, USACE responded with a formal acknowledgement of the request and a tracking number (FP-22-018337). Exhibit A.

33. On June 3, 2022, CFS responded asking for an estimated date of completion for the request. Exhibit A.

34. On June 14, 2022, CFS again requested an estimated completion date for the request and offered to help narrow the request if necessary. Exhibit A.

35. On June 15, 2022, USACE responded that it was in touch with a records custodian and would be back in touch with CFS soon. CFS responded that same day, again requesting that USACE provide an estimated completion date as soon as possible. Exhibit A.

36. On June 21, 2022, CFS followed up with USACE asking for an update and an estimated completion date. Exhibit A.

37. On July 13, 2022, CFS again followed up asking for an estimated completion date. Exhibit A.

38. On July 18, 2022, USACE responded that it received documents for the FOIA request but cannot provide an estimated completion date. Exhibit A.

39. Over six weeks have passed since USACE logged in the May 5, 2022 FOIA Request, yet USACE has not provided an initial determination in response to the May 5, 2022 FOIA Request, made a determination of CFS's fee waiver request, supplied an estimated date of completion, or produced any responsive records.

40. As of the date of this complaint, CFS has received no further communications from USACE.

41. None of FOIA's nine exemptions to the statute's disclosure mandate apply to the records responsive to the May 5 FOIA Request.

42. CFS has been required to expend resources to prosecute this action.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Defendant Failed to Comply with FOIA's Mandatory Determination Deadline

43. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

44. USACE violated FOIA by failing to make a determination on CFS's May 5 FOIA Request, including CFS's fee waiver request. 5 U.S.C. § 552(a)(6).

45. CFS has a statutory right to receive a determination within the congressionally-mandated deadline of twenty working days. *Id.*

46. To date—over two months since CFS filed the May 5 FOIA Request—USACE has not provided a determination, notwithstanding the requirement of 5 U.S.C. § 552(a)(6)(A) of an agency response within twenty working days detailing the scope of the records the agency intends to produce and withhold, the reasons for making that determination, and an explanation of the process by which a requester can administratively appeal that determination.

47. USACE's failure to make an initial determination with regard to the May 5 FOIA Request, thus unlawfully delaying its response beyond the deadline that FOIA mandates, has prejudiced CFS's ability to timely obtain public records. *Id.* § 552(a)(6)(A)(i).

48. As such, CFS has exhausted the applicable administrative remedies with respect to the May 5 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

49. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to USACE in the foreseeable future.

50. CFS's organizational activities will be adversely affected if USACE continues to violate FOIA by failing to disclose responsive records as it has in this case.

51. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, USACE will continue to violate CFS's rights to receive public records under FOIA.

SECOND CAUSE OF ACTION

Defendant Failed to Conduct an Adequate Search for Responsive Records

52. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

53. USACE violated FOIA by failing to conduct an adequate search for responsive records pursuant to 5 U.S.C. § 552(a)(3)(C)-(D).

54. CFS has a statutory right to have USACE process its May 5 FOIA Request in a manner that complies with FOIA. *Id.*

55. USACE violated CFS's right when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the May 5 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

56. CFS has exhausted the applicable administrative remedies with respect to the May 5 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

57. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to USACE in the foreseeable future.

58. CFS's organizational activities will be adversely affected if USACE continues to violate FOIA by failing to disclose responsive records as it has in this case.

59. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, USACE will continue to violate CFS's rights to receive public records under FOIA.

THIRD CAUSE OF ACTION
Defendant Unlawfully Withheld All Responsive Records

60. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

61. USACE violated FOIA by failing to promptly disclose records that are responsive to CFS's May 5 FOIA Request. 5 U.S.C. § 552(a)(4)(B).

62. CFS has a statutory right to the records it seeks, and there are no applicable exemptions under FOIA that provide a legal basis for USACE to withhold these records from CFS. *See id.* § 552(b)(1)-(9).

63. To date, USACE has not provided any records requested by CFS in the May 5 FOIA Request, notwithstanding the requirement of 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(C) to make agency records "promptly available."

64. As such, USACE is wrongfully withholding disclosure of information sought by CFS, information to which it is entitled and for which no valid disclosure exemption has been claimed. USACE's unlawful withholding prejudices CFS's ability to timely obtain public records.

65. CFS has exhausted the applicable administrative remedies with respect to the May 5 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

66. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to USACE in the foreseeable future.

67. CFS's organizational activities will be adversely affected if USACE continues to violate FOIA by failing to disclose responsive records as it has in this case.

68. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, USACE will continue to violate CFS's rights to receive public records under FOIA.

FOURTH CAUSE OF ACTION

Defendant Failed to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

69. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

70. USACE violated FOIA by failing to take reasonable steps to segregate and release nonexempt portions of lawfully exempt records in response to the May 5 FOIA Request. 5 U.S.C. § 552(a)(8)(A)(ii)(II).

71. CFS has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. *Id.*

72. To date, USACE has failed to disclose any records to CFS, including nonexempt information that could be reasonably segregated and released in response to the May 5 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

73. CFS has exhausted the applicable administrative remedies with respect to the May 5 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

74. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to USACE in the foreseeable future.

75. CFS's organizational activities will be adversely affected if USACE continues to violate FOIA by failing to disclose responsive records as it has in this case.

76. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, USACE will continue to violate CFS's rights to receive public records under FOIA.

FIFTH CAUSE OF ACTION

Defendant Failed to Provide an Estimated Date of Completion as Required by FOIA

77. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

78. USACE violated FOIA by failing to provide CFS with an estimated date of completion as required by 5 U.S.C. § 552(a)(7)(A)-(B).

79. CFS has a statutory right to have USACE process its May 5 FOIA Request in a manner which complies with FOIA. USACE has violated Plaintiff's rights in this regard by its failure to provide—by any means—an estimated completion date for its response to the May 5 FOIA Request as required by FOIA. 5 U.S.C. § 552(a)(7)(A)-(B).

80. USACE's failure to inform CFS of an estimated completion date for the May 5 FOIA Request has prejudiced CFS's ability to timely obtain public records.

81. CFS has exhausted the applicable administrative remedies with respect to the May 5 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

82. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to USACE in the foreseeable future.

83. CFS's organizational activities will be adversely affected if USACE continues to violate FOIA by failing to disclose responsive records as it has in this case.

84. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, USACE will continue to violate CFS's rights to receive public records under FOIA.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Defendant to provide a lawful initial determination on Plaintiff's FOIA request, including Plaintiffs' fee waiver request as required by FOIA by a date certain;
2. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's May 5 FOIA Request with the cut-off date for searches being the date the searches are conducted, and to provide to Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.
3. Declare that Defendant unlawfully failed to make and communicate an initial determination on Plaintiff's May 5 FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).
4. Declare that Defendant unlawfully failed to undertake a search and disclosure of all records responsive to Plaintiff's May 5 FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).
5. Declare that Defendant unlawfully failed to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption as required by 5 U.S.C. § 552(a)(7)(b).
6. Declare that Defendant unlawfully failed to provide Plaintiff with an estimated date of completion as to the search and production of Plaintiff's May 5 FOIA Request as required by 5 U.S.C. § 552(a)(7)(B)(ii).
7. Provide for expeditious proceedings in this action.

8. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

9. Grant such other relief as the Court may deem appropriate.

Dated this 25th day of July, 2022.

Respectfully submitted,

CENTER FOR FOOD SAFETY,

/s/ Meredith Stevenson

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