

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FOOD & WATER WATCH 1616 P St., N.W., Suite 300 Washington, D.C. 20036)	
)	
<i>Plaintiff,</i>)	Civil Action No. 20-2143
)	
v.)	COMPLAINT
)	
UNITED STATES DEPARTMENT OF ENERGY 1000 Independence Ave., SW Washington, DC 20585)	
)	
<i>Defendant.</i>)	

PRELIMINARY STATEMENT

1. Plaintiff Food & Water Watch (“FWW” or “Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the Office of Public Information (“OPI” or “Defendant”) of the Department of Energy (“DOE”), to disclose records wrongfully withheld in failing to meaningfully respond within the statutory deadline to Plaintiff’s FOIA request.
2. Plaintiff is a non-profit organization dedicated to research and public education concerning the activities and operations of federal, state, and local governments.
3. In mid-April, 2019 Plaintiff submitted a FOIA request via the DOE website. This request sought the release of information pertaining to an application submitted by Appalachian Development Group (“ADG”) to DOE regarding a loan guarantee for a natural gas liquids storage and trading hub (“Request”) pursuant to Title XVII of the Energy Policy Act of 2005, 42 U.S.C. § 16511, *et. seq.* The Request sought production of the application

for the loan guarantee itself and communications between DOE staff, members of Congress, and ADG discussing the loan guarantee.

4. In late December 2019, FWW filed Appeal No. HQ-2019-00759-f (“Appeal”) with the DOE Office of Hearings and Appeals (“OHA”) challenging the excessive redaction and inadequate search of OPI in response to the Request. OHA granted the Appeal in relevant part on January 13, 2020.
5. OHA’s order directed OPI to “(1) conduct further review of the documents... in accordance with our decision... and (2) conduct a further search for documents in response to [FWW’s] request in accordance with our decision above.”
6. In a series of email exchanges over the course of the five months following OHA’s grant of appeal, FWW communicated with DOE employees requesting, *inter alia*, a timeline of when the search of the documents would be completed and production of the documents themselves. To date OPI has failed to produce any such timeline, final determination, or documents as required by OHA’s decision on the Appeal.
7. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
8. FOIA further states that “Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(C)(i).

9. DOE FOIA regulations state that “[t]he Appeal Authority's action... will also contain a statement that it constitutes final agency action on the request and that judicial review will be available... Documents determined by the Appeal Authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.” 10 C.F.R. § 1004.8(e).
10. As OHA has determined that a search should be conducted for more documents and that more information should be disclosed, OPI is bound to promptly produce those documents. *See Id.*
11. To date, Defendant has failed to to produce requested records as required by the OHA Appeal in response to Plaintiff's December 2019 FOIA Appeal No. HQ-2019-00759-f.
12. Defendant's conduct amounts to a denial of Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to understand the details of the ADG loan guarantee application for a natural gas liquids storage and trading hub.
13. Plaintiff has exhausted all administrative remedies and now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
15. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
16. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the

government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, where the records are located, or in the District of Columbia).

17. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

PARTIES

18. Plaintiff, FWW, is a non-profit public interest organization incorporated and headquartered in Washington, D.C. with field offices in California, Colorado, Florida, Illinois, Maryland, New Jersey, New Mexico, New York, Oregon, and Pennsylvania.
19. Among other public interest projects, FWW engages in advocacy, research, education, and litigation to promote public understanding and debate concerning key current public policy issues. FWW is a national consumer advocacy organization focused on protecting the fundamental human rights of our communities to clean water, safe food, and a livable climate. FWW educates and informs the public through news releases to the media, through its website - www.foodandwaterwatch.org, and through community organizing.
20. Defendant, DOE, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).
21. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

22. In September 2017, ADG submitted to an application to DOE seeking a loan guarantee in the amount of \$1.9 billion for the construction of a natural gas and petrochemical storage and trading hub (“Storage Hub”) to transport natural gas liquids to be used in the production of plastics. The Storage Hub would operate by pumping natural gas liquids into an underground geologic formation known as a salt dome for storage and eventual transportation. Upon arrival at their destination the natural gas liquids would be used in the production of plastics; not for combustion as an energy source.
23. The Energy Policy Act of 2005 created the DOE loan guarantee program (“Program”) that ADG seeks to avail itself of in constructing the Storage Hub. *See* 42 U.S.C. § 16513.
24. The Program gives the Secretary approval authority for projects that seek to “(1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and 2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” 42 U.S.C. § 16513(a).
25. FWW sought information about ADG’s application for loan guarantees for the Storage Hub from DOE through a FOIA request in April 2019 and prevailed in relevant part in Appeal No. HQ-2019-00759-f to OHA due to the inadequacy of the search performed by OPI.
26. However, once the Appeal Decision was issued, FWW received no further communication from any DOE agency regarding the results of the Appeal.
27. After receiving no further updates from any DOE staff regarding the OHA ruling on the Appeal for six weeks, on February 27, 2020, FWW contacted an OHA official about the

status of the FOIA Request and Appeal. On February 28, 2020, an OHA attorney responded and indicated that the matter was no longer within OHA's jurisdiction and recommended contacting "the program office processing the request." In this case that was OPI.

28. On March 3, 2020, in response to this instruction FWW contacted an OPI official to discuss the status of the Request in light of the Appeal. The official provided a response on March 5, 2020 indicating that OPI assigned an analyst to manage the Request, that a search pursuant to the Appeal was ongoing, and that "once we have the results of the search completed we will better be able to provide you with an estimated date of production of a response to you."
29. Having heard nothing from the analyst or the OPI official regarding the Request FWW contacted the analyst again on April 22, 2020. The same day the analyst responded that a search was still ongoing and that "DOE has a layered review process which adds time to the processing of the request."
30. On May 26, 2020, FWW sent its final communication seeking an update on the progress of the search – which the analyst did not answer. At that point the OHA had granted the Appeal five months earlier and FWW had filed the original Request a year earlier. Still, OPI had produced no new responsive documents, had not produced a final determination, nor had it provided a timeline for when it might produce such documents in response to the Appeal.
31. To date OPI has produced no new responsive documents in response to the Appeal nor has it indicated that it has completed the search mandated by the Appeal.

32. Having fully exhausted its administrative remedies for its April 2019 request, FWW now turns to this Court to enforce the FOIA's guarantee of public access to agency records, along with the remedies available when an agency withholds that access.

CAUSE OF ACTION

33. Plaintiff incorporates the allegations in the preceding paragraphs.

34. Defendant's failure to issue a final determination and to produce documents that the agency has determined were responsive and non-privileged is a constructive denial and wrongful withholding of records in violation of 5 U.S.C. § 552, and the Department of Energy regulations promulgated thereunder, 10 C.F.R. § 1004 *et. seq.*

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on August 6, 2020,

 /s/Adam Carlesco
Adam Carlesco, DC Bar # 1601151
Food & Water Watch
1616 P St., NW, Suite 300
Washington, D.C. 20036
acarlesco@fwwatch.org

Counsel for Plaintiff