

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

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)

AMERICAN TRADITION INSTITUTE)
2020 Pennsylvania Avenue, N.W., #186)
Washington, D.C. 20006)

Plaintiffs,)

v.)

C.A. No. 13-406

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Ariel Rios Building)
Washington, D.C. 20460)

Defendant.)

**COMPLAINT FOR DECLARATORY RELIEF AND
RELIEF IN THE FORM OF MANDAMUS**

Plaintiffs COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) and AMERICAN TRADITION INSTITUTE (“ATI”) for their complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), allege as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production of EPA Instant Message transcripts under two separate but substantively similar FOIA requests by two distinct groups.

- 2) In January 2013, Plaintiffs submitted their respective requests, both of which seek certain records created on Instant Messaging (“IM”) accounts and sent or received by three senior officials of the United States Environmental Protection Agency.
- 3) Plaintiff CEI discovered the existence of these IM accounts in an Agency email obtained under a previous FOIA request. That email indicated that EPA’s creation of a false identity email account for its then-Administrator Lisa Jackson was first discussed in an “IM” discussion.
- 4) These IM accounts are used for particular official functions by senior agency employees, and will also reveal the extent to which Defendant EPA has complied with disclosure and other obligations.
- 5) Specifically, these “IM”s are “agency records” under federal record-keeping and disclosure laws and are of significant public interest for reasons including that their existence is not widely known, if at all, even among regular requesters of EPA records.
- 6) To Plaintiffs’ knowledge Defendant EPA has never produced an Instant Message in response either to a request under FOIA, or in response to a congressional oversight request, despite numerous requests from both for “records” or “electronic records”.
- 7) EPA denied both Plaintiffs’ requests to have their fees waived or reduced for the requests for Instant Messages at issue in the present matter, despite having, until recently, routinely provided Plaintiffs fee waivers for requests of far less public interest.

- 8) Defendant EPA never responded to either Plaintiff's appeal of these fee waiver denials. Defendant thereby continues its refusal to waive fees for both requests, to respond to either appeal, or to provide estimated fees necessary to proceed or to appeal.
- 9) As such, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications, EPA has denied both requests and both appeals, leaving Plaintiffs no recourse but this lawsuit asking this Court to compel EPA to comply with the law.

PARTIES

- 10) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 11) Plaintiff ATI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. ATI's programs include a specific transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 12) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

- 13) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.
- 14) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiffs reside in the District of Columbia, and defendant is federal agency.

FACTUAL BACKGROUND

- 15) This lawsuit seeks to compel EPA to respond fully and completely to two separate FOIA requests dated January 24, 2013 (CEI) and January 29, 2013 (ATI), for records of the same class (discussions using IBM “Sametime”, Oracle Messenger or other instant messaging service). To Plaintiffs’ knowledge EPA has never released any records of this class in response to requests seeking “records” or “electronic records.”
- 16) EPA has chosen to treat both Plaintiffs’ requests similarly.
- 17) Plaintiff CEI sought certain described IM records sent to or from former Administrator Lisa Jackson. Plaintiff ATI sought certain IM records sent to or from Jackson and two other senior EPA officials who worked closely with Jackson.
- 18) After acknowledging both requests with auto-responses generated by its FOIAOnline.gov system, by letters dated February 1, 2013 (ATI) and February 5, 2013 (CEI) Defendant denied both Plaintiffs’ requests for fee waiver, which waivers are provided for under FOIA for media outlets and not-for-profit groups that broadly disseminate government information.

- 19) Plaintiffs challenged their respective fee waiver denials by appeals labeled, identified and sent pursuant to EPA regulations and guidelines by electronic mail to hq.foia@epa.gov on February 5, 2013 (ATI) and February 8, 2013 (CEI).
- 20) EPA failed to grant, deny, or ask for more time or information prior to deciding on either appeal.
- 21) By these initial determination fee-waiver denial letters, Defendant acknowledged that the requests are not being processed, stating instead in both cases that an EPA office would contact the respective Plaintiff to estimate fees, which each Plaintiff would then have to agree to as a condition of Defendant initiating its searches.
- 22) EPA has never provided Plaintiffs a cost estimate of the fees it refused to waive.
- 23) Transparency in government is the subject of high-profile promises from the president and attorney general, both arguing forcefully that “that FOIA ‘should be administered with a clear presumption: In the face of doubt, openness prevails’” (*See, e.g.*, Attorney General Eric Holder, OIP Guidance, “President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a ‘New Era of Open Government,’” <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. This and a related guidance elaborate on President Obama’s memorandum for the heads of executive departments and agencies, January 20, 2009, http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.)

Plaintiff CEI's FOIA Request HQ-2013-003088 Seeking Certain Specified Instant Messages of Three Former Senior Officials

- 24) On January 24, 2013, Plaintiff CEI submitted one FOIA Request by FOIAOnline.gov to EPA’s headquarters FOIA office, seeking:

copies of all written Sametime, or enterprise instant messaging, “chat” or message threads sent from or to (including as “cc:” or “bcc:”) any such account(s) established by EPA for the use of Administrator Lisa Jackson (a) including accounts established in some version of her name, as well as the account(s) established for her in the name of “Richard Windsor”, and any other Sametime or instant messaging account(s) established in any name for her use, whether EPA describes the account(s) as non-public, public, secondary, alias, or otherwise, (b) which messages/threads are dated during the period January 20, 2009 to the date EPA processes this request, inclusive, and (c) which include the words “climate”, “endanger” (which includes in e.g., “endangerment”), “coal”, or “MACT”, in the body or Subject” field. Sametime or enterprise instant messaging records are Agency records, as affirmed by, inter alia, EPA’s April 11, 2008 memo (John B. Ellis) to the National Archives and Records Administration (Paul Wester), reporting certain discovery of certain record-keeping problems, at p. 4, and EPA’s policy statement prohibiting use of non-EPA email accounts and instant messaging applications.

- 25) EPA assigned this request identification number EPA-HQ-2013-003088 by electronic confirmation that same day.

Plaintiff ATI's FOIA Request HQ-2013-003213 Seeking Certain Specified Instant Messages Addressing Coal, Greenhouse Gas Regulation

- 26) On January 29, 2013, Plaintiff ATI submitted one FOIA Request by FOIAOnline.gov to EPA’s headquarters FOIA office, seeking:

copies of all Sametime (or “Sametime Connect”), Oracle Messenger, or otherwise enterprise instant messaging “chat” or message thread meeting the following description: (a) sent from or to (including as “cc:” or “bcc:”) ANY such account(s) established in ANY name by or with EPA for the use of (i) Administrator Lisa Jackson, (ii) Lisa Heinzerling in any of her EPA positions, or (iii) Assistant Administrator for Air Gina McCarthy, (b) which messages/threads are dated during the period January 20, 2009 to the date EPA processes this request, inclusive, and (c) which include “Sierra”, or the acronyms “ALA” (which stands for American Lung Association) or “CPR” (which stands for Center for Progressive Reform).

- 27) EPA assigned this request identification number EPA-HQ-2013-003213 by electronic confirmation that same day.

Defendant's Response to Plaintiffs' FOIA Requests

- 28) EPA acknowledged both requests with auto-electronic responses generated by its FOIAOnline.gov system.
- 29) By letter addressed to CEI, but citing ATI's request number and delivered to ATI by electronic mail on February 1, 2013, EPA National FOIA Officer Mr. Larry Gottesman denied ATI's fee waiver stating in pertinent part, "You have failed to demonstrate that the release of the information requested significantly increases the public understanding of government operations or activities."
- 30) In denying ATI's request EPA wrote, *inter alia*, "The EPA Office of the Administrator (AO) will be responding to your information request for the Agency. If the estimated costs exceed \$150.00, EPA will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your assurance of payment."
- 31) By letter delivered by electronic mail on February 5, 2013, EPA National FOIA Officer Mr. Larry Gottesman denied CEI's fee waiver stating in pertinent part, "You have not expressed a specific intent to disseminate the information to the general public."
- 32) In denying CEI's request EPA wrote, *inter alia*, "If the estimated costs exceed \$25.00, EPA will contact you regarding the cost of processing your request and seek an

assurance of payment. They will be unable to process your request until they receive your assurance of payment.”

- 33) As such, by separate letters, Defendant denied both Plaintiffs’ requests for fee waiver, stating that an office within EPA would contact the respective plaintiff to estimate fees which each plaintiff would then have to agree to as a condition of Defendant initiating its searches.
- 34) To date EPA has still not provided a cost estimate for either request.

Plaintiffs’ Administrative Appeals

- 35) Plaintiff ATI submitted its administrative appeal on February 5, 2013 by electronic mail to the address EPA provides publicly, hq.foia@epa.gov, challenging EPA’s denial of its request for fee waiver, responding to EPA’s basis for denial, and arguing why it merits a fee waiver.
- 36) Plaintiff CEI submitted its administrative appeal on February 8, 2013 by electronic mail to the address EPA provides publicly, hq.foia@epa.gov, challenging EPA’s denial of its request for fee waiver, responding to EPA’s basis for denial, and arguing why it merits a fee waiver.

Defendant’s Response to Plaintiffs’ Administrative Appeals

A. Defendant’s Response to Plaintiff CEI

- 37) By letter dated February 12, 2013, EPA acknowledged CEI’s electronically filed, February 8, 2013 appeal, stating it was received by Defendant’s Office of General Counsel on February 11, 2013.

B. Defendant's Response to Plaintiff ATI

- 38) By letter dated February 12, 2013, EPA acknowledged ATI's electronically filed, February 5, 2013 appeal, stating it was received by Defendant's Office of General Counsel on February 11, 2013.
- 39) This letter, citing to ATI's request identification number HQ-2013-003213, was addressed and mailed to undersigned counsel Horner (who submitted both requests at issue in this matter) at the Competitive Enterprise Institute. EPA assigned ATI's request the appeal number HQ-APP-2013-003415.
- 40) EPA then sent a letter dated March 13, 2013, again addressed and mailed to undersigned counsel Horner at the Competitive Enterprise Institute and using identical language, again citing to ATI's request number HQ-2013-003213 and acknowledging ATI's appeal. This letter claimed receipt of ATI's appeal on March 13, 2013 and assigned a different appeal identification number than it first assigned to this request, HQ-APP-2013-004426.
- 41) Having heard nothing further after Defendant's deadline for responding to ATI's appeal passed, ATI then wrote to the FOIA Specialist who had signed and sent both of these letters, Ms. Barbara Bruce, by electronic mail (at hq.foia@epa.gov and FOIA_HQ@epamail.epa.gov), requesting clarification and a status update.
- 42) ATI wrote the following on March 14, 2013, providing email and cell phone contact information:

To EPA OGC/Ms. Bruce,
Attached please see two letters in one PDF file, dated February 7, 2013 and March 13, 2013 and both purporting to be sent in response to the above-captioned

request (attached) by the American Tradition Institute (ATI). ATI appealed the denial of the fee waiver on February 5, 2013.

Both are addressed to the Competitive Enterprise Institute. I acknowledge receipt of these letters on behalf of ATI. However, please correct the mailing address and requesting party in your records.

I specifically write to inquire as to the document that the March 13, 2013 letter responds, to and the status of the appeal acknowledged in the February 7, 2013 letter.

Please do not hesitate to contact me with any questions.

I look forward to your response.

- 43) Defendant ATI heard nothing back from EPA.
- 44) EPA has not contacted CEI or ATI concerning either their appeals or the completion of their requests.
- 45) As such, by not replying to Plaintiffs' appeals seeking fee waiver Defendant continues to deny them and to otherwise improperly deny Plaintiffs' requests.

LEGAL ARGUMENTS

Instant Messages are "Agency Records" Under Federal Record-Keeping and Disclosure Laws and EPA Regulation

- 46) EPA provides employees access to IBM Sametime and Oracle Messenger accounts to facilitate instant messaging/enterprise messaging as an option for official internal or external communications.
- 47) IBM Sametime is an "EPA-wide service, open to any EPA employee" (*see*, http://www.epa.gov/superfund/distance_pdfs/internet_seminar_possibilities.pdf). EPA employees similarly use Oracle Messenger (*see*, e.g., http://www.umass.edu/tei/conferences/Triad_PDF/Balent.pdf, pp. 40, 42).
- 48) Sametime, Messenger or otherwise enterprise instant messaging correspondence are, and therefore must be maintained and produced as, Agency records. *See, inter alia*,

EPA's April 11, 2008 memo from John B. Ellis to the National Archives and Records Administration (Paul Wester), reporting certain discovery of certain record-keeping problems (at p. 4), and EPA's policy statement prohibiting use of non-EPA email accounts and instant messaging applications. *See also Records and ECMS Briefing, EPA Incoming Political Appointees 2009.*

- 49) As with email, Agency employees are not to use accounts for work-related correspondence other than those provided them by EPA, unless they copy their office account or provide their office with hard copies. *Id.*
- 50) EPA-provided IM services are not limited to internal EPA participation. As IBM notes, "Thanks to Sametime software's federation capabilities, you can also chat with people who use Google, AOL or other enterprise IM systems." (*See, e.g.,* <http://www-01.ibm.com/software/lotus/products/sametime/instant-messaging/screenshots.html>). As EPA notes, "Any EPA employee may use these tools with EPA and non-EPA participants." (http://www.umass.edu/tei/conferences/Triad_PDF/Balent.pdf, p. 19).
- 51) Features of these tools include allowing searches of chat histories.

Defendant EPA Owed and Has Failed to Provide Plaintiffs a Meaningful, Productive Response to their Requests, and to Their Appeals

- 52) EPA regulations provide in pertinent part that "(k) The decision on your appeal will be made in writing, normally within 20 working days of its receipt by the Headquarters Freedom of Information Staff." 40 C.F.R. § 2.104(k)
- 53) FOIA provides that a requesting party the substantive agency response within twenty working days to which requesters are entitled must affirm the agency is processing

the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...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)) Alternately, the agency must cite “exceptional circumstances” and request, and make the case for, an extension that is necessary and proper to the specific request. *See also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

- 54) Examples of the require substantive action on FOIA requests include informing a requester that it assigned the request(s) to the simple, normal or complex processing tracks and giving notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule. See generally, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011). Alternately, a complying agency will obtain an appropriate extension in the event of unusual circumstances.
- 55) After Plaintiffs appealed the Agency’s denials of their requests for fee waiver, Defendant did not substantively respond, or order production of responsive records subject to legitimate withholdings, or indicate that the requests were in the queue for processing and that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule, or that a decision on its appeal would require additional time.

- 56) No office within Defendant EPA has provided any indication it is in fact processing Plaintiffs' requests or appeals, or sought or made its case for an extension of time to respond to either request or appeal as required to show "exceptional circumstances."
- 57) To date, EPA has only assigned tracking numbers and claimed that certain offices would handle the respective requests, specifically that these offices would providing fee estimates, and acknowledged receipt of Plaintiffs' appeals.
- 58) Even after Plaintiff ATI's request for clarification and status, EPA continues to provide Plaintiffs no responsive records or any substantive response at all.
- 59) By not substantively responding to Plaintiffs' requests Nos. HQ-2013-003213 and HQ-2013-003088 EPA has constructively denied the requests for records, and by Defendant's refusal to rule on Plaintiffs' appeals, Plaintiffs have exhausted their administrative remedies.
- 60) For the foregoing reasons, EPA is now legally required to provide Plaintiffs records responsive to their requests.

Plaintiffs Are Entitled to Fee Waivers

- 61) FOIA is aimed in large part at promoting the active oversight roles of watchdog public advocacy groups. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs).
- 62) The language of the FOIA makes clear that Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government documents. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. ("A requester is

likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness)).

- 63) Courts have noted this legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-1286 (9th. Cir. 1987).
- 64) The information requested in requests Nos. HQ-2013-003088 and HQ-2013-003213 meets that description, for reasons both obvious and specified in Plaintiffs’ appeals.
- 65) This history suggests that all fees should be waived whenever a requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. The requested information also meets this description.
- 66) FOIA provides for fee waiver or reduction when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).
- 67) EPA has not responded to Plaintiffs’ appeals seeking to have their fees waived (or reduced) for requests Nos. HQ-2013-003088 and HQ-2013-003213.

- 68) Plaintiffs have routinely received fee waivers under FOIA and for requests for information of far less demonstrable interest to the public than, as here, records representing senior Agency officials corresponding by an obscure, little-known and apparently never-released medium of communication, about the Agency's most high-profile, controversial agenda item (HQ-2013-003088, CEI) and dealings with three highly influential pressure groups with which the Agency has close ties and even financially supports (HQ-2013-003213, ATI).
- 69) Due to that nature of the requested records, disclosure of the requested information would contribute significantly to public understanding of the operations or activities of the government. This is particularly true because neither Plaintiffs nor the public at large have any other means of obtaining the information requested.
- 70) Further, both CEI and ATI have proven their ability to disseminate the information to a broad audience, most particularly information obtained under FOIA requests through opinion pieces, research papers, media appearances, newsletters, Capitol Hill briefings and website postings, and for the reasons for which both CEI and ATI have received fee waivers in the past (see. e.g., EPA FOIA request No. HQ-FOI-2013-001343 (CEI request seeking emails to and from "Richard Windsor"), and Department of Energy FOIA request No. HQ-2012-01449-F (ATI's request seeking a large volume of emails produced on a private email account via which the director of DoE's Loan Guarantee Program administered that program; EPA request Nos. HQ-FOI-01052-12 and HQ-FOI-01058-12, seeking a large volume of emails to, from or referencing environmental pressure groups).

- 71) By not substantively responding to Plaintiffs' requests Nos. HQ-2013-003088 and HQ-2013-003213, EPA has constructively, wrongly denied both of Plaintiffs' requests to have their fees waived or substantially reduced, as "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."
- 72) Defendant's denials also are legally inadequate because, instead of granting Plaintiffs' requests as is proper, or even attempting to follow through on its vow to assess fees by providing Plaintiffs the necessary fee estimates and information about Plaintiffs' appellate rights, as required, Defendant has merely stated that it will not proceed with its search(es) until Plaintiffs agree to fee estimates which the Agency continues to refuse to put forth, while also refusing to rule on Plaintiffs' appeals.
- 73) Further, under the OPEN Government Act of 2007 ("2007 Amendments"), agencies that do not respond to requests within the statutory time period are precluded from charging search fees (or copying fees for media requesters, who are not subject to search fees). *Bensman v. Nat'l Park Serv.*, No. 10-1910, 806 F. Supp. 2d 31 (D.D.C. Aug. 10, 2011)("To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that '[a]n agency shall not assess search fees . . . if the agency fails to comply with any time limit' of FOIA. § 552(a)(4)(A) (viii)"). See also *Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury*, No. 07-2590, 2009, WL 2905963, 2009 U.S. Dist. LEXIS 86348 (N.D. Cal. Sept. 8, 2009)(Defendant waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request);

Reporters Committee for Freedom of the Press, Federal Open Government Guide, Response Times, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times>.

- 74) Finally, since this request is for material which is clearly of benefit to the public, other persons will undoubtedly also request these records. It would be inequitable if the first requester were to bear the full material cost of the initial search.

Having Failed to Properly Respond to Plaintiffs' Requests and Appeal, Defendant EPA Owes Plaintiffs Responsive Records Subject to Legitimate Withholdings

- 75) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating "that the agency is exercising due diligence in responding to the request...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)(A)(i). *See, e.g., Shermco Industries v. Secretary of the U.S. Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978).
- 76) EPA failed to substantively respond to Plaintiffs' requests, which Plaintiffs administratively appealed.
- 77) EPA owed Plaintiff ATI a substantive response to its appeal by March 8, 2013.
- 78) EPA owed Plaintiff CEI a substantive response to its appeal by March 11, 2013.
- 79) EPA provided no responsive records or substantive response to these appeals to either Plaintiff. EPA must now provide Plaintiffs records responsive to their requests.

FIRST CLAIM FOR RELIEF
Duty to Release Certain Described IMs -- Declaratory Judgment

- 80) Plaintiffs re-allege paragraphs 1-79 as if fully set out herein.
- 81) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn “what their government is up to.” *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*
- 82) Plaintiffs have sought and been denied production of responsive records reflecting the conduct of official business.
- 83) Plaintiffs have a statutory right to the information they seek.
- 84) Defendant failed to provide Plaintiffs responsive records.
- 85) Defendant refused to provide records despite agreeing with Plaintiffs’ administrative appeals of this failure.
- 86) Plaintiffs have exhausted their administrative remedies.
- 87) Plaintiffs ask this Court to enter a judgment declaring that
- i. EPA “IM” records using certain keywords and otherwise as specifically described in Plaintiffs’ requests Nos. HQ-2013-003088 and HQ-2013-003213, and all attachments thereto are public records subject to release under FOIA unless subject to one of that Act’s mandatory exclusions;
 - ii. EPA must release those requested records not subject to exclusion;
 - iii. EPA’s denial of Plaintiffs’ FOIA requests seeking the described records is not reasonable, and does not satisfy EPA’s obligations under FOIA; and
 - iv. EPA’s refusal to produce the requested records is unlawful.

SECOND CLAIM FOR RELIEF
Release of Certain Described IMs -- Injunctive Relief

- 88) Plaintiffs re-allege paragraphs 1-87 as if fully set out herein.
- 89) Plaintiffs are entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiffs' requests described, *supra*.
- 90) This Court should enter an injunction ordering the Defendant to produce to Plaintiffs within 10 business days of the date of the order, the requested "IM" records using certain keywords and otherwise as specifically described in Plaintiffs' requests Nos. HQ-2013-003088 and HQ-2013-003213, and all attachments thereto are public records subject to release under FOIA unless subject to one of that Act's mandatory exclusions, and a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

THIRD CLAIM FOR RELIEF
Requests for Fee Waiver for Requests Nos. HQ-2013-003088 and HQ-2013-003213
-- Declaratory Judgment

- 91) Plaintiffs re-allege paragraphs 1-90 as if fully set out herein.
- 92) Plaintiffs have sought and been denied waiver or reduction of their fees for two requests under the Freedom of Information Act, requests Nos. HQ-2013-003088 and HQ-2013-003213.
- 93) FOIA provides for fee waiver or reduction when "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."
- 94) The information Plaintiffs seek in requests Nos. HQ-2013-003088 and HQ-2013-003213 meets this description.

- 95) Plaintiffs have a statutory right to have their fees waived or, in the alternative, substantially reduced.
- 96) Defendant refuses to waive or substantially reduce Plaintiffs' fees.
- 97) Defendant has not provided an estimate of the fees it demands.
- 98) Plaintiffs have exhausted their administrative remedies.
- 99) Plaintiffs ask this Court to enter a judgment declaring that:
- i. Disclosure of Agency records as described in Plaintiffs' requests Nos. HQ-2013-003088 and HQ-2013-003213 is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government;
 - ii. EPA's denial of Plaintiffs' fee waiver requests is not reasonable, and does not satisfy EPA's obligations under FOIA;
 - iv. EPA's refusal to grant Plaintiffs' requests for fee waiver is unlawful; and
 - v. EPA must grant Plaintiffs' request to have their fees waived or, in the alternative, substantially reduced.

FOURTH CLAIM FOR RELIEF

**Requests for Fee Waiver for Requests Nos. HQ-2013-003088 and HQ-2013-003213
-- Injunctive Relief**

- 100) Plaintiffs re-allege paragraphs 1-99 as if fully set out herein.
- 101) Plaintiffs are entitled to injunctive relief compelling Defendant to grant Plaintiffs' request to have their fees waived or, in the alternative, substantially reduced for requests Nos. HQ-2013-003088 and HQ-2013-003213.
- 102) We ask this Court to enter an injunction ordering the Defendant to grant Plaintiffs' request to have their fees waived or, in the alternative, substantially reduced within 10 business days of the date of the order.

FIFTH CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

- 103) Plaintiffs re-allege paragraphs 1-102 as if fully set out herein.

104) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

105) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

106) Plaintiffs have a statutory right to the records that they seek, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiffs request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.


Respectfully submitted this 28th day of March, 2013,



DATED: March 28, 2013

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