

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

POWER THE FUTURE
611 Pennsylvania Avenue, SE
Suite No. 183
Washington, DC 20003

Plaintiff,

v.

Case No. 24-cv-2821

ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue N.W.
Mail Code 2310A
Washington, DC 20460

and

UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue NW
Washington, DC 20530

and

UNITED STATES ATTORNEY’S OFFICE FOR
THE DISTRICT OF COLUMBIA
601 D Street NW
Washington, DC 20004

Defendants.

COMPLAINT UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff POWER THE FUTURE (“PTF”), for its Complaint against Defendants ENVIRONMENTAL PROTECTION AGENCY (“EPA”), UNITED STATES DEPARTMENT OF JUSTICE (“DOJ”), and UNITED STATE’S ATTORNEY’S OFFICE FOR THE DISTRICT OF COLUMBIA (“USAODC”), collectively referred to as “the Government,” alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* As the D.C. Circuit has explained,

When a member of the public makes a request for government records, FOIA requires the agency to ‘determine within 20 days’ what responsive records it has and can produce consistent with FOIA’s exemptions... to ‘immediately’ notify the requester of its determination, *id.*, and to follow up by making nonexempt records ‘promptly available...’

Judicial Watch, Inc. v. United States Dep't of Homeland Sec., 437 U.S. App. D.C. 128, 143, 895 F.3d 770, 785 (2018), citing 5 U.S.C. § 552(a)(6)(A)(i).

2. Although the D.C. Circuit has repeatedly made plain that records must be produced promptly, with then-D.C. Circuit Judge Brett Kavanaugh writing that records should ordinarily be produced “within days or a few weeks of a ‘determination,’ not months or years,” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 404 U.S. App. D.C. 275, 283, 711 F.3d 180, 188 (2013), beginning in 2024 the Government began what Plaintiff asserts on information and belief is a new, but regardless is a clear pattern and practice of using direct delays followed by motions practice to delay FOIA requests rather than to timely process or adjudicate them. Under this newly-instituted regime, Plaintiff’s requests and those of other FOIA requesters will linger for additional months or years on the docket.
3. More specifically and as more fully set forth below, the Defendants have jointly conspired to develop and implement a system, rising in practice to the level of a policy, to avoid or delay producing records. This has a pronounced and pernicious effect upon nonprofit requesters such as the Plaintiff, which relies upon records received under FOIA to further its mission, a significant part of which is public education on the operations of government.
4. Plaintiff is a nonprofit educational institution organized under section 501(c)(4) of the internal revenue code, and submits FOIA requests to various federal agencies, including but not limited to the EPA, in furtherance of its mission.
5. Rather than timely respond to FOIA requests submitted by the Plaintiff, Defendant the Environmental Protection Agency (EPA) routinely declares that requests for, e.g., a single

custodian's records of a sole, particular sort (e.g., email, text messages, calendar invitations, or "chat" logs) present "unusual circumstances"¹ to take a statutory extension but, regardless of whether it takes an extension of time to provide the required, most basic information (e.g., how many records the search returned), offers no evidence it in fact performs the search and does not process any request in the statutory period of time. This is the first step in the Government's system of delays.

6. A FOIA request is not ripe for suit until twenty working days have elapsed from the date the request was received by a component agency, or thirty days if an agency claims "unusual circumstances" prevent a response within twenty working days. 5 U.S.C.S. § 552(a)(6)(A)(i) and (a)(6)(B)(i). Due to weekends and holidays, twenty working days typically is equivalent to thirty calendar days.
7. EPA's failure to timely respond to the Plaintiff's FOIA requests forces Plaintiff to file litigation in this Court. When Plaintiff files such litigation, this Court issues a summons requiring a response by the Government in 30 days pursuant to 5 USC § 552 (a)(4)(C) (setting 30-day timeframe for responses in FOIA cases), rather than a summons calling for the Government to respond in 60 days, which is the default timeframe for most suits against the Government under Fed. R. Civ. P. 12 (a)(2).

¹ Plaintiff alleges that EPA claims "unusual circumstances" exist systematically, rather than upon consideration, given the proliferation of these claims despite, e.g., a facial implausibility of searches for a single individual's records entailing "the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request," 5 USC § 552(a)(6)(B)(iii)(I), and/or despite apparently not having first conducted the required search to know whether the single individual's records in fact are voluminous or require consultation with another agency or component (5 USC § 552(a)(6)(B)(iii)(II-III)).

8. The Government does not respond to Plaintiff's Complaints in 30 days. Instead, the EPA routinely requests extensions of time of at least 30 days to respond to Plaintiff's FOIA Complaints. As ostensible grounds for these extensions, the EPA routinely invokes on a claim of "good cause" that the U.S. Attorney's Office only recently assigned defense counsel to a case immediately prior to the Answer being due, notwithstanding that the cases have been served on the Government over three weeks and nearly four weeks prior to the routine act of assigning counsel.
9. Even if the Government timely responded to Plaintiff's suits after EPA failed to issue a determination, the Government would have effectively granted itself double the statutorily provided time to respond to a FOIA request.
10. But the Government does not timely respond. Because the Government habitually seeks extensions of at least 30 days before even filing responsive pleadings, the Government forces Plaintiff to wait at least *triple* the amount of time Congress intended before the agency will even respond to a FOIA request, in the form of an Answer, which Answer typically still avoids asserting how many records a search returned (or even that the search was performed at all).
11. As such, even after 90 days have elapsed the Government still does not provide a determination in response to Plaintiff's FOIA requests. When this Court issues "meet and confer" orders following receipt of an Answer in a FOIA case, the Government waits until mere days or even a single day before a Meet and Confer or Joint Status Report (JSR) is due to convey its position to Plaintiff's counsel. And invariably, the Government's position is that still further delay is necessary.

12. Plaintiff is a frequent FOIA requester as is inherent in its mission, with numerous pending cases on this Court's docket arising from the EPA's failure to timely produce records, and with other requests which have been ignored and are ripe for suit in the face of complete inaction by the EPA, and Plaintiff intends to continue to seek records from the EPA in the future.
13. Plaintiff states, on information and belief, that for it and at least certain other requesters, the only way to obtain processing of a FOIA request is to file suit, which initiates the above-described evasions.
14. Plaintiff has every reason to believe that absent the relief sought in this Complaint, the EPA and its attorneys at the United States Department of Justice and the United States Attorney's Office will continue to take every measure in their power to delay Plaintiff's FOIA requests and Plaintiff's FOIA litigation.
15. Specifically, Plaintiff has every reason to believe that the EPA will continue to delay conducting and communicating the results of the search as required by statute, will continue to fail to issue determinations with respect to its FOIA requests, and will continue to force Plaintiff to bring litigation to force processing of a FOIA request(s).
16. Plaintiff further has every reason to believe that once litigation is brought, the EPA and its lawyers in the Department of Justice and the U.S. Attorney's Office will routinely and as a matter of practice claim delay is required due to assignment of cases to defense counsel in a tardy manner, ensuring counsel then seek further delays before performing rudimentary and statutorily required duties such that compliance with statutory deadlines for responding to such litigation is impossible.

PARTIES

17. Plaintiff Power the Future is a non-profit organization incorporated in the State of Delaware dedicated to “disseminating research, sharing facts and truths, engaging at the local level and interacting with the media,” specifically relating to energy and environmental public policy. Power the Future uses FOIA requests to further its nonprofit educational mission. It currently has seven active suits against the EPA in this Court dating back to February of this year. All of those suits allege that the EPA failed to comply with FOIA and specifically with FOIA’s statutory timeframes. The case numbers for those suits are: 1:24-cv-1995, 1:24-cv-2040, 1:24-cv-2081,² 1:24-cv-2152, 1:24-cv-2218, 1:24-cv-2242 and 1:24-cv-2278. Plaintiff also has requests not in litigation, but which are ripe for litigation, because EPA continues to refuse to provide the most basic required “determination.” The tracking numbers assigned to these requests are 2024-EPA-04598, 2024-EPA-05647, 2024-EPA-05760, 2024-EPA-05671, 2024-EPA-05723, and 2024-EPA-05800.

18. Defendant Environmental Protection Agency is a federal agency headquartered in Washington, DC, is covered by FOIA, and has possession and control over the records that Plaintiff seeks in the aforementioned cases and requests. Additionally, the EPA will likely be the recipient of future FOIA requests by the Plaintiff and others.

² Under LCvR 40.5, this case is a “related” case to Case No. 1:24-cv-2081 because it exemplifies the “pattern and practice” of delay that the Government engages in. As of this filing, the Government has received an extension of time in that case on the ostensible basis that the U.S. Attorney only recently assigned an Assistant United States Attorney to defend the matter. The Government has not indicated to Plaintiff any position at all with respect to the current status of Plaintiff’s FOIA request, the anticipated number of documents at issue, or when they might be released. Based on the same pattern and practice, Plaintiff anticipates the Government will provide this information only in the event of a forthcoming status report deadline (October 4), and then will claim that any pushback from Plaintiff on any of the Government’s positions requires another round of conferrals, such that Plaintiff will be deprived of the opportunity to meaningfully advance the case will be delayed for at least another 30 days, and perhaps longer.

19. The Department of Justice is a federal agency headquartered in Washington, DC. Through the Attorney General and employees reporting to the Attorney General, the DOJ supervises the United States Attorney in each judicial district. Plaintiff reasonably anticipates that the DOJ will continue to defend the EPA when it faces future FOIA litigation.
20. The United States Attorney's Office for the District of Columbia ("USAODC") is a component of the DOJ. As relevant to this suit, the USAODC defends the EPA when it is sued for violations of FOIA, and routinely takes actions to delay FOIA requests from being processed and to delay FOIA litigation from proceeding to an expeditious resolution. Plaintiff reasonably anticipates that the DOJ will continue to defend the EPA when it faces future FOIA litigation, whether from this Plaintiff or others, as a result of the Government's pattern and practice of behavior described herein.

JURISDICTION AND VENUE

21. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Additionally, this Court has jurisdiction for a pattern and practice claim pursuant to *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491, 267 U.S. App. D.C. 63 (D.C. Cir. 1988) and subsequent jurisprudence standing for the proposition that injunctive relief is available when a Plaintiff pleads a pattern and practice of FOIA violations at an agency give rise to the belief that the agency "will impair the party's lawful access to information in the future."
22. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e), for reasons including but not limited to that the Defendants are all headquartered in this District and the acts giving rise to this Complaint occurred in this District.

23. Plaintiff is not required to pursue administrative remedies before seeking relief in this Court because there are no administrative remedies available to adjudicate the Defendants' collective pattern and practice of delaying Plaintiff's FOIA requests as described herein.

PLAINTIFF'S FOIA REQUESTS

24. Because this Court has held, in *Khan v. United States Dep't of Homeland Sec.*, 2024 U.S. Dist. LEXIS 163952, *8-9 (D.D.C. 2024), that Plaintiff is required to identify "specific requests that any specific Defendants have failed to adjudicate," Plaintiff sets forth here the factual basis for each of its active FOIA suits against the Environmental Protection Agency, and how those individual cases illustrate a broader pattern and practice of delay on the part of the Government.

25. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2040, the Plaintiff filed suit on July 14, 2024 over the Government's failure to issue any determination with respect to a May 28, 2024 request for text messages of a single official over approximately nine weeks' time.

26. On August 14, 2024, the Assistant U.S. Attorney wrote to Plaintiff's counsel "I just received this case assignment," in a matter served on the USAO on July 17, 2024.

27. Defendant owed Plaintiff a simple determination on this request no later than July 11, 2024, after taking its extension of time. On October 4, 2024, despite declaring the request "complex" implying an initial inquiry into the matter (see n. 1, *supra*), Defendant claimed that the official did not in fact send or receive text messages.

28. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2081, Plaintiff filed suit on July 17, 2024, over the Government's failure to issue any determination with

respect to a FOIA request for the Zoom, Teams, etc., meeting “chat” logs” of a single official over approximately five months’ time.

29. With reference to that case, on August 16, 2024, the Assistant U.S. Attorney wrote to Plaintiff’s counsel, stating “I have been assigned the defense of the above matter. A response to the complaint is due on August 19, 2024. I will be moving for an extension of 30-days within which to respond.” This matter was served on the USAODC on July 18, 2024, such that the Assistant U.S. Attorney’s correspondence indicates no action was taken until the eve of the deadline for responsive pleadings.
30. Defendant owed Plaintiff a determination on the aforementioned FOIA request no later than July 15, 2024, after taking an extension of time to respond. It continues to refuse to do so.
31. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2152, the Plaintiff filed suit on July 23, 2024 because the Government had failed to issue any determination with respect to a request for certain calendar invitations of one senior official.
32. With reference to that case, on August 19, 2024, the Assistant U.S. Attorney wrote to Plaintiff’s counsel, “I was just assigned this case over the weekend. The Answer is due this Friday.” This matter was served on the USAODC on July 24, 2024, such that it appears the Government took no action (not even the simple action of assigning a defense attorney) for over three weeks after the suit was served.
33. Defendant owed Plaintiff a simple “determination” on the above request no later than July 22, 2024, after taking its extension of time. It continues to refuse to provide such a determination. Plaintiff notes in anticipation of continued delays by Defendant that that the agency claimed in a June 17, 2024, that it expected to provide a final response by October 11, 2024.

34. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2218, the Plaintiff filed suit on July 23, 2024 because the Government had failed to issue any determination with respect to a FOIA request for certain calendar invitations of one senior official.
35. On August 27, 2024, counsel for Defendant requested an additional 30 days to respond to the Complaint and stated, in an August 28, 2024 Motion for Extension of Time to Answer, *inter alia*, “undersigned counsel was only recently assigned this matter.” Case No. 1:24-cv-2218, ECF No. 4.
36. Defendant owed Plaintiff a simple “determination” on the above request no later than July 12, 2024, after taking its extension of time. It continues to refuse to provide such a determination.
37. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2242, the Plaintiff filed suit on July 31, 2024 because the Government had failed to issue any determination with respect to a May 31, 2024 request for certain described emails of one senior official, but had only requested Plaintiff narrow its request from some unstated number of potentially responsive records,
38. On August 29, 2024, the Assistant U.S. Attorney wrote to Plaintiff’s counsel, “Me again, with the same question; this time for Case No. 24-2242, which is due next Tuesday. Let me know.” This matter was served on the USAODC on August 1, 2024, and the Assistant U.S. Attorney’s comment refers to an email in 24-2152 stating “I was just assigned this case over the weekend. The Answer is due this Friday.”

39. On September 30, 2024, counsel for Defendant filed a Motion seeking an extension of time to file a Motion for Consolidation in 24-2242.³
40. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-2278, the Plaintiff filed suit on August 2, 2024 because the Government had failed to provide a determination with respect to a May 23, 2024 request of certain described email correspondence of one official. This was despite Defendant taking an extension of time and after specific requests from Plaintiff in follow-up correspondence that Defendant provide the number of potentially responsive records. Defendant indicated it had conducted its search and requested Plaintiff narrow its request, but never provided the information Plaintiff requested, such that Plaintiff was effectively being asked to narrow its request from an unknown number of potentially responsive records and with no information pertinent to the necessity of or an informed approach to reducing this number of responsive records which the Government would not disclose.
41. In *Power the Future v. Environmental Protection Agency*, Case No. 1:24-cv-1995, the Plaintiff filed suit on July 10, 2024 because the agency had failed to issue any determination with respect to a FOIA request for the Zoom, Teams, etc., meeting “chat” logs” of a single official over approximately five months’ time.
42. In that matter, without directly referencing late assignment, the Assistant U.S. Attorney sought the same extension of time by email dated August 9, 2024. This matter was served on the USAODC on July 11, 2024, such that the Government appears to have taken no substantive action until the eve of the deadline for responsive pleadings.

³ Counsel for Defendant did not first consult with Plaintiff’s counsel per LCvR 7(m).

43. Also in that matter, on September 12, 2024, 60 days after Plaintiff filed suit over the Agency's failure to make a determination on its request, Defendant filed its Answer, in which it again declined to provide the overdue number of potentially responsive records for which it was required to search and report by July 9, 2024. Then, on September 28, 2024, Defendant filed a Motion to Consolidate this request and lawsuit with FOIA lawsuits filed over six other, disparate requests to turn them into one large, complex request. With this Motion Defendant filed an affidavit stating the burden it views Plaintiff's requests to present, implying but declining to state over the course of thirty-six (36) paragraphs that it had completed searches for any requests, while acknowledging it had yet to provide the required determination in any of the matters it sought to combine and further delay and, as has become its pattern and practice, again declining to state what number of potentially responsive records it found and are at issue. Case No. 1:24-cv-1995, ECF 9-1 at ¶¶ 32-34.
44. By seeking to consolidate each of these requests to which it still will not respond with multiple other requests to which it still will not respond, Defendant seeks to postpone indefinitely producing even the most basic information such as the number of records responsive to the requests.
45. The facts in each request are distinct and often starkly so due to the requests involving at minimum three distinct tech platforms (possibly more, depending on what types of messaging apps were used for "chats"), devices and classes of records over sometimes vastly different periods of time, from five weeks to twenty-three months and periods in between. Indeed, it seems inconceivable but regardless is extraordinarily unlikely that any of the distinct classes of records responsive to any one request, for a custodian's text messages (Case No. 1:24-cv-2040), two different officials' Teams/Zoom etc. chats (Case Nos. 1:24-cv-

1995, 1:24-cv-2081 (Utech)) and calendar invitations (Case Nos. 1:24-cv-2152, 1:24-cv-2218), or certain emails (expressly excluding calendar invitations) (Case Nos. 1:24-cv-2242, 1:24-cv-2278), would be responsive to any other request for his or her other records.

46. These differences in types and timeframes of records are the obvious rational basis for Plaintiff's separate requests. As such, Plaintiff suggests the Government's objective in tying these small and simple requests together into one omnibus request is delay.

47. Defendant has also now sought additional time to file its Motion to Consolidate these FOIA suits over seven distinct requests involving two separate custodians, differing periods of time, and four different classes of records found on at least three distinct communication platforms, all of which the Defendant has responded to with these delaying tactics.

48. Whether for political (i.e., election-related), strategic, or for other reasons, the USAODC contemporaneously adopted this same posture in other matters on behalf of other agencies, both in response to Plaintiff's requests and other requesters which undersigned counsel represents.

49. Other PTF FOIA requests to EPA (FOIA Request Nos. 2024-EPA-04598, 2024-EPA-05647, 2024-EPA-05760, 2024-EPA-05671, 2024-EPA-05723, and 2024-EPA-05800), also have received no determination despite statutory deadlines passing. Absent filing suit, the requester is simply being ignored, leaving requester no choice in order to try and obtain the requested records within some (relatively) reasonable period of time by entering the litigation labyrinth the Government has constructed. Plaintiff anticipates that it will be forced to file suit with respect to each of these requests, at great expense, but Plaintiff knows that relief the Court grants in each of these matters will be delayed by the Defendants at every turn and will

not resolve the extreme likelihood that Defendants will continue to delay Plaintiff's FOIA requests and related litigation in the future, as is their pattern and practice.

50. Based on Plaintiff's own FOIA cases and other requests described above, Plaintiff asserts that the Government's pattern, practice, and/or policy is to delay the release of records to Plaintiff through all available means and far in excess of statutory deadlines, as follows:

a) First, the Government fails to follow the statutory timeframe for issuing a determination.

To the best of undersigned counsel's recollection, at minimum for the above-cited requests in 2024, the EPA has never issued a "determination" in response to any of Plaintiff's requests within twenty days (or even thirty days).

b) Second, the Government will respond to litigation by seeking endless delay, usually beginning with a failure to file responsive pleadings in a timely manner.

c) Then, if Defendants' actions in other matters continues to guide its actions in these, even after losing its efforts before this Court to force consolidation, Defendants will continue to refuse to process PTF's requests unless PTF agrees to pretend the agency in fact won.

51. Plaintiff alleges that because this pattern, practice, and policy by the Government has arisen in these seven open cases filed by Plaintiff (as well as other cases involving other Government agencies represented by the same counsel at the U.S. Attorney's Office), Plaintiff expects that the Government will continue to take all measures within its power to unlawfully delay responding to Plaintiff's FOIA requests, to force Plaintiff to file suit in order to receive any response at all to its FOIA requests, and to stall litigation relating to Plaintiff's FOIA requests through baseless pleadings having no outcome other than delay while wasting Government, Plaintiff and judicial resources in this pattern of delay.

52. This behavior will continue given the apparent confidence that consequences will never ensue or, if they do, are worth avoiding release of the information sought.

53. Absent injunctive relief, Plaintiff will continue to suffer from the patterns, practices, and policies described herein.

DOJ's participation in the Pattern and Practice of Delay

54. DOJ's pattern and practice is to aid and abet agencies in their pursuit of avoiding their FOIA obligations and specifically to extend their efforts to delay the release of records.

55. A quick search of this Court's dockets indicates that in the vast majority of FOIA cases, the Department of Justice seeks extensions of time to file responsive pleadings, as a near-ritual, thereby systematically abrogating Congress's intent that responsive pleadings are due on an expedited basis pursuant to 5 USC § 552 (a)(4)(C).

56. A sample of the cases involving Plaintiff specifically indicates at least the following cases where DOJ has claimed it habitually assigns attorneys to defend FOIA matters in a tardy fashion by which it ensures its client agencies cannot or do not comply with FOIA's statutory deadlines. These are in addition to the six *PTF v. EPA* matters in which Defendants acted similarly and cited in n. 3, *supra*:

- a. In *Power the Future v. Dep't. of Energy*, Case No. 24-1833, the Assistant U.S. Attorney indicated by phone on July 24, 2024 that DOJ sought extension of 30 days to file responsive pleadings in a matter served on USAODC on July 2, 2024.
- b. In *Power the Future v. Council on Environmental Quality*, 24-1840, the Assistant U.S. Attorney sought "additional time to review the complaint and figure out our next steps" by email dated July 31, 2024, notwithstanding that the matter was served on USAODC on July 2, 2024.

- c. In *Power the Future v. Dep't. of Energy*, 24-1860, the Assistant U.S. Attorney communicated with undersigned counsel by phone on July 24, 2024 and sought an extension of 30 days, notwithstanding that this matter was served on USAODC on July 2, 2024.
- d. In *Power the Future v. Council on Environmental Quality*, Case No. 24-1889, the Assistant United States Attorney wrote that “this one was only recently assigned to me,” in a July 25, 2024 email relating to a matter served on USAODC on July 2, 2024.
- e. In *Power the Future v. Dep't. of Energy*, Case No. 24-1923, the Assistant U.S. Attorney sought an extension of 30 days by phone on July 24, 2024, notwithstanding that this matter was served on USAODC on July 2, 2024.
- f. In *Power the Future v. Dep't. of Energy*, Case No. 24-1935, the Assistant U.S. Attorney indicated by phone on July 24, 2024 that DOJ sought extension of 30 day notwithstanding that this matter was served on July 3, 2024.
- g. In *Power the Future v. Council on Environmental Quality*, Case No. 24-1942, the Assistant U.S. Attorney sought enlargement by email dated July 29, 2024 in a matter served on USAODC on July 3, 2024.
- h. In *Power the Future v. Dep't. of Interior*, Case No. 24-1979, the Assistant U.S. Attorney wrote in an email dated July 29, 2024 that “I have just been assigned the above-captioned case for the government.” This matter was served on USAODC on July 9, 2024.
- i. In *Power the Future v. Dep't. of State*, see 24-2078, “I will be representing the United States in the above case. Our answer is due 8/19 and I will be seeking a

30 day extension to answer. The good cause is that I was only recently assigned this case and need time to get up to speed and work with the Agency to determine relevant defenses.” Assistant U.S. Attorney by email on August 12, 2024. See also, “We will be making similar requests of the courts in all eight of the recently-filed related [sic] lawsuits—24-2078, 24-2120, 24-2145, 21-2151, 24-2070, 24-2149, 24-2168, and 24-2196. The cause will be, as noted by Dedra below, we were just recently assigned to this matter and need to investigate the claims for this case,” another Assistant United States Attorney by email on August 12, 2024 (matters served on USAODC, respectively, on July 18, 2024, July 22, 2024, July 24, 2024, July 24, 2024, July 31, 2024, July 24, 2024, July 24, 2024 and July 29, 2024 (from 14 to 25 prior calendar days prior)).

- j. In *Power the Future v. Dep’t. of Interior*, Case No. 24-2045, the Assistant U.S. Attorney sought additional time by email dated August 12, 2024 in a matter served on USAODC on July 18, 2024.
- k. In *Power the Future v. Dep’t. of Interior*, Case No. 24-2101, the Assistant U.S. Attorney sought additional time by email dated August 12, 2024 in a matter served on USAO on July 18, 2024.
- l. In *Government Accountability & Oversight v. Council on Environmental Quality*, Case No. 24-1340, the Assistant U.S. Attorney wrote to request an extension and indicated on June 4, 2024 that “This short extension is required because I was just assigned the case late yesterday.” This matter was served on the U.S. Attorney’s Office on May 13, 2024.

- m. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-1829, the Assistant U.S. Attorney emailed requesting an extension on July 26, 2024. This matter was served on July 6, 2024.
- n. In *Government Accountability & Oversight Dep't. of Energy*, Case No. 24-1887, in a July 29, 2024 filing, the Assistant U.S. Attorney informed the Court “This case was assigned to Assistant United States Attorney Brenda González Horowitz last week.” This matter was served on July 2, 2024.
- o. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-1957, on August 6, the Assistant U.S. Attorney wrote that “I have been assigned the defense of the above FOIA case. I will be moving for a 30-day extension of the time to answer the complaint, which is presently due tomorrow.” This matter was served on July 8, 2024.
- p. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-2027, on August 7, 2024 the Assistant United States Attorney wrote “I only recently assigned to this case.” This matter was served on July 15, 2024.
- q. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-2039, the U.S. Attorney sought additional time to file responsive pleadings by email dated August 8, 2024 in a matter served on USAO on July 15, 2024.
- r. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-2077, by email dated August 12, 2024, the Assistant U.S. Attorney stated “I was only assigned to this case yesterday evening.” This matter was served on USAODC on July 18, 2024.

- s. In *Government Accountability & Oversight v. Dep't. of Energy*, Case No. 24-2099, by email dated August 12, 2024, the Assistant U.S. Attorney stated “I was only just assigned to the case referenced above today.” This matter was served on USAODC on July 18, 2024.

57. As illustrated above, DOJ more often than not (and indeed almost without fail) seeks extensions from the Court rising to a practice and policy of effectively abrogating Congress’s expedited timeframe for FOIA complaints to be answered. As good cause, DOJ ordinarily cites its own pattern and practice of assigning cases to defense counsel on a late basis, or the mere fact that the DOJ is burdened by voluminous litigation, which is a significant part of DOJ’s reason for existence, and appears to be exaggerated by DOJ’s own serial failures to bring its client agencies into compliance with the law and DOJ’s insistence on delaying the litigation which its client agencies face, such that dockets continue to grow.

58. DOJ itself routinely fails to comply with FOIA’s deadlines with respect to requests it receives itself, which illustrates why DOJ is so comfortable in defending and encouraging its client agencies in the same behavior. DOJ’s FOIA report for calendar.

59. In but two examples involving undersigned counsel Matthew Hardin’s clients:

- a. Victoria Toensing has a suit pending in this Court under Case No. 1:24-cv-2444. This Complaint alleges that DOJ failed to respond to a FOIA administrative appeal within statutory timeframes. As with the list of cases set forth above, DOJ indicated it would seek an extension of thirty days to file responsive pleadings in Ms. Toensing’s case. In its Motion for an extension of time to file responsive pleadings in Ms. Toensing’s case, DOJ indicated that “due to an influx of cases in

the U.S. Attorney's Office, undersigned counsel was only recently assigned this matter.”

- b. Joshua Moon submitted a FOIA request to DOJ on June 6, 2024, to which DOJ has never responded.
60. In *Pub. Health & Med. Pros. v. FDA*, 672 F. Supp. 3d 253, 256 (N.D. Tex. 2023), the DOJ sought “a production schedule that would take at least 23.5 years.” Despite DOJ’s request, which DOJ asserted was based solely upon its client agency’s resources rather than any intentional effort to delay or avoid transparency, the court informed DOJ that “the number of resources an agency dedicates to such requests does not dictate the bounds of an individual's FOIA rights.” *Id.*
61. Notwithstanding the ruling against DOJ in the above case, DOJ continues to assert that individuals may be denied or delayed their statutory rights under FOIA because its client agency, or DOJ itself, are busy or unable to devote appropriate resources to processing a request.

COUNT I:
Pattern-and-Practice of FOIA Violations

62. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
63. Non-exempt records are to be made “promptly available” under FOIA. *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 437 U.S. App. D.C. 128, 138, 895 F.3d 770, 780 (2018), citing 5 U.S.C. § 552(a)(3)(A).
64. When an agency has established a “pattern and practice” of unlawful responses by an agency to FOIA requests, relief is available under *Payne Enters., Inc. v. United States*, 267 U.S. App. D.C. 63, 837 F.2d 486 (1988) and its progeny.

65. To prevail in a “pattern and practice” claim, “the plaintiff must allege a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements and that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt [***21] records from the agency in the future.” *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 437 U.S. App. D.C. 128, 138, 895 F.3d 770, 780 (2018).
66. Plaintiff alleges herein that the EPA has a clearly established pattern and practice of noncompliance with FOIA and delay in releasing non-exempt records and even FOIA “determinations.”
67. Plaintiff alleges herein that the USAODC and DOJ have a clearly established pattern and practice of encouraging and abetting agencies, including the EPA, in their noncompliance with FOIA and delay in releasing non-exempt records and even FOIA “determinations.”

PRAYER FOR RELIEF

Power the Future respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendants comply with FOIA and every order of this Court;
2. Declare Defendants have violated FOIA by engaging in a pattern and practice of unlawful delay and constructive denial of Plaintiff's FOIA requests;
3. Declare that the Plaintiff is entitled to prompt access to documents under FOIA;
4. Enjoin the Defendants from engaging in any behavior which would delay the “prompt” release of information in its existing litigation against the Environmental Protection Agency or in any pending or future FOIA requests to that agency.

5. Order the Government to timely provide a “determination” in response to all extant and future FOIA requests submitted by Plaintiff, and to promptly assign attorneys to any matters in litigation;
6. Award Plaintiff’s attorneys their fees and other litigation costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); and
7. Grant such other relief as this Court deems just and proper.

Respectfully submitted this the 3rd day of October, 2024,

POWER THE FUTURE

By Counsel:

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