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13 IN THE UNITED STATES DISTRICT COURT  
14 FOR THE WESTERN DISTRICT OF WASHINGTON  
15 AT SEATTLE

16 NORTHWEST ENVIRONMENTAL ADVOCATES,  
an Oregon non-profit corporation,

17 Plaintiff,

18 v.

19 UNITED STATES ENVIRONMENTAL  
20 PROTECTION AGENCY, an agency of the United  
21 States of America,

22 Defendant.

Case No. 19-887

COMPLAINT

23 **INTRODUCTION**

24 1. This action alleges the U.S. Environmental Protection Agency (“EPA”) violated  
25 the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in responding to a FOIA request and  
26 administrative FOIA appeal submitted by plaintiff Northwest Environmental Advocates  
27 (“NWEA”). Specifically, NWEA challenges EPA’s inadequate search for, and unlawful  
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1 withholding of, records and portions of records responsive to a FOIA request NWEA submitted  
2 to EPA on September 13, 2017, as well as EPA's failure to respond to NWEA's October 24,  
3 2018 administrative FOIA appeal within the twenty-day timeline set by the FOIA. NWEA seeks  
4 declaratory relief, an injunction requiring EPA to comply with the FOIA, and an award of  
5 reasonable attorneys' fees and other litigation costs.

6 **JURISDICTION, VENUE AND BASIS FOR RELIEF**

7 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B)  
8 and 28 U.S.C. § 1331 because this action arises under the FOIA and the Declaratory Judgment  
9 Act, 28 U.S.C. §§ 2201-2202.

10 3. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) because a  
11 portion of the responsive records may be found in this district.

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

13 5. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. §  
14 552(a)(4)(B).

15 **PARTIES**

16 6. Plaintiff Northwest Environmental Advocates is a regional non-profit  
17 environmental organization founded in 1969 and incorporated under the laws of Oregon in 1981,  
18 with its principal place of business in Portland, Oregon. NWEA's mission is to work through  
19 advocacy and education to protect and restore water and air quality, wetlands, and wildlife  
20 habitat in the Northwest and across the nation. NWEA employs public education, community  
21 organizing, strategic partnerships, public records requests, information sharing, advocacy with  
22 administrative agencies, policy analysis, lobbying, expert analysis, and litigation to ensure better  
23 implementation and enforcement of the nation's laws that preserve the natural environment and  
24 protect water quality.

25 7. NWEA is a leader in protecting water quality and endangered aquatic species,  
26 and actively participates in many state and federal agency actions that affect water quality.  
27 NWEA provides advice and information to many environmental organizations across the  
28

1 country. Indeed, NWEA is an informational conduit to the public, the media, government  
2 agencies, and other environmental organizations such as water quality groups, salmon  
3 conservation and recovery groups, and organizations focused on protection of endangered  
4 species as well as regulatory agencies that implement the Clean Water Act and the Endangered  
5 Species Act.

6 8. NWEA is engaged in ongoing public outreach, education, and government  
7 “watch dog” efforts regarding state and federal compliance with environmental statutes. The  
8 records in this action are requested in support of NWEA’s ongoing efforts to improve water  
9 quality and the protection of aquatic species through proper implementation of the Clean Water  
10 Act. Because the information requested has not been publicly disclosed, its disclosure would  
11 significantly enhance public understanding concerning state and federal compliance with the  
12 Clean Water Act, in particular EPA’s obligation to ensure that water quality standards for toxic  
13 pollutants are up-to-date and adequate to protect threatened or endangered species such as  
14 salmonids and orca whales, both of which are suffering the ill effects of toxic pollution in  
15 Washington waters.

16 9. The above-described interests of NWEA and its members have been, are being,  
17 and, unless the relief requested herein is granted, will continue to be adversely affected by EPA’s  
18 disregard of its statutory duties under the FOIA and by the unlawful harm that results. EPA’s  
19 failure to fully implement the FOIA injures the interests of NWEA and its members and the relief  
20 requested in this lawsuit can redress these injuries.

21 10. Defendant U.S. Environmental Protection Agency is an agency of the executive  
22 branch of the United States government. EPA is in possession, custody, or control of records  
23 sought by NWEA and it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).

24 **STATUTORY BACKGROUND**

25 11. The purpose of the FOIA is “to establish a general philosophy of full agency  
26 disclosure unless information is exempted under clearly delineated statutory language.” S. Rep.  
27

1 No. 813, 89th Cong., 1st Sess., 3 (1965). “[D]isclosure, not secrecy, is the dominant objective of  
2 the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The FOIA therefore requires  
3 federal agencies to disclose records to any person upon request unless the information falls  
4 within one of nine narrow disclosure exemptions listed in the Act. *See* 5 U.S.C. § 552(a)(3)(A),  
5 (b); *see also Rose*, 425 U.S. at 361 (“These exemptions are explicitly made exclusive ... and  
6 must be narrowly construed.”) (internal citation and quotation marks excluded).

7  
8 12. The FOIA imposes strict and rigorous deadlines on federal agencies. The Act  
9 requires a federal agency that receives a FOIA request to determine whether the requested  
10 records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that  
11 determination to the requester within twenty business days. 5 U.S.C. § 552(a)(6)(A)(i). If the  
12 agency determines the records are not exempt from public disclosure, the agency is required to  
13 make the requested records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A). The  
14 FOIA requires each agency to make “reasonable efforts” to search for records. 5 U.S.C. §  
15 552(a)(3)(C).

16 13. The FOIA requires agencies to notify requesters of their right to appeal adverse  
17 FOIA determinations. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). Requesters must submit such appeals  
18 within ninety days of receiving the adverse determination. *Id.* If the requester appeals an  
19 agency’s determination, the agency must make a determination with respect to that appeal  
20 within twenty business days of receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

21 14. U.S. district courts have jurisdiction “to enjoin the agency from withholding  
22 agency records and to order the production of any agency records improperly withheld  
23 from the complainant.” 5 U.S.C. § 552(a)(4)(B).

## 24 **STATEMENT OF FACTS**

### 25 **The Petition for Rulemaking**

26 15. On October 28, 2013, NWEA petitioned EPA seeking rulemaking to update  
27 Washington State’s water quality criteria for toxic pollutants to protect human health and aquatic  
28

1 life in Washington.

2 16. On May 31, 2017, EPA denied NWEA's petition. EPA explained in a letter that it  
3 was denying the petition in large part because the Washington Department of Ecology  
4 ("Ecology") was planning on doing the work NWEA requested of EPA and because EPA wanted  
5 to defer to Ecology. EPA's letter denying NWEA's petition for rulemaking refers to EPA's work  
6 with Ecology over the past several years on matters related to the Petition, as well as  
7 conversations and workshops with Ecology.

8 **NWEA's FOIA Request No. EPA-HQ-2017-011463, and EPA's Response**

9 17. On September 13, 2017, NWEA submitted a FOIA request to EPA that requested  
10 "all documents prepared or utilized by, in the possession of, or routed through the EPA related to  
11 [t]he October 28, 2013 petition by NWEA to EPA seeking rulemaking to update Washington  
12 State's criteria for toxics." The request specified that NWEA sought only those records dated  
13 from October 28, 2013 to the date upon which EPA began its search for records responsive to the  
14 request. EPA assigned NWEA's September 13, 2017 FOIA request reference number EPA-HQ-  
15 2017-011463 (hereinafter "NWEA's FOIA Request").

16 18. On September 21, 2017, EPA notified NWEA that it planned to respond to  
17 NWEA's FOIA Request by December 13, 2017.

18 19. On October 13, 2017, EPA notified NWEA that it had posted an interim response  
19 to NWEA's FOIA Request on FOIA Online, an internet-based portal that some agencies  
20 including EPA use to communicate with FOIA requesters about the status of their requests.  
21 When NWEA checked FOIA Online, however, NWEA could not find or download an interim  
22 response to its FOIA request. On October 27, 2017, after NWEA notified EPA of the absence of  
23 records responsive to NWEA's FOIA Request on FOIA Online, EPA sent NWEA two  
24 responsive records by email.

25 20. On December 12, 2017, EPA notified NWEA that EPA needed to extend the  
26 December 13, 2017 response deadline due to the large number of responsive records.  
27  
28



1 EPA, asserting that EPA failed to conduct an adequate search reasonably calculated to locate  
2 information responsive to NWEA's FOIA Request and that EPA unjustifiably redacted portions  
3 of the released records. EPA assigned NWEA's administrative FOIA appeal number EPA-HQ-  
4 2019-000838 (hereinafter "NWEA's FOIA Appeal").

5 25. NWEA's FOIA Appeal was timely because EPA received the Appeal no later  
6 than ninety calendar days after July 26, 2018, the date that EPA concluded its response to  
7 NWEA's FOIA Request.

8 26. As indicated on FOIA Online, EPA estimated that it would complete review of  
9 NWEA's FOIA Appeal by November 26, 2018.

10 27. EPA did not issue a determination on NWEA's FOIA Appeal by November 26,  
11 2018, nor did EPA update NWEA on the status of its determination.

12 28. On December 6, 2018, NWEA notified EPA of its failure to meet the FOIA  
13 deadline for responding to NWEA's FOIA Appeal and inquired into the status of EPA's  
14 response to NWEA's FOIA Appeal.

15 29. On February 7, 2019, NWEA again reminded EPA of its FOIA obligations and  
16 inquired into the status of EPA's response to NWEA's FOIA Appeal.

17 30. As of the date this action was filed, EPA has not responded to NWEA's FOIA  
18 Appeal, nor has EPA responded to NWEA's December 6, 2018 and February 7, 2019 requests  
19 for information about the status of NWEA's FOIA Appeal.

20 31. As of the date this action was filed, EPA has not requested additional information  
21 from NWEA regarding NWEA's FOIA Appeal.

22 32. NWEA is directly and adversely affected and aggrieved by EPA's failure to  
23 respond to NWEA's FOIA Appeal by the statutory deadline; by EPA's failure to conduct an  
24 adequate search for all records responsive to NWEA's FOIA Request; and by EPA's unlawful  
25 and improper withholding of and redaction of responsive records.

26 33. Based on the nature of NWEA's organizational activities, it will undoubtedly  
27 continue to employ the FOIA's provisions in record requests to EPA in the foreseeable future.  
28

1 34. Unless enjoined and made subject to a declaration of NWEA’s legal rights by this  
2 Court, EPA will continue to violate the FOIA and NWEA’s rights to receive public records  
3 under the FOIA.

4 35. NWEA has been required to expend costs and to obtain the services of a law firm  
5 to prosecute this action.

6 36. Because EPA has failed to respond to NWEA’s FOIA Appeal within the period  
7 required by the FOIA, NWEA has constructively exhausted all administrative remedies required  
8 by the FOIA and may seek immediate judicial review. 5 U.S.C. §§ 552(a)(6)(A)(ii), (a)(6)(C)(i).

9 **CAUSES OF ACTION**

10 **CLAIM I**

11 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:  
12 VIOLATION OF FOIA DEADLINE**

13 37. NWEA hereby incorporates by reference the allegations in the preceding  
14 paragraphs.

15 38. NWEA has a statutory right to have the EPA process NWEA’s FOIA Appeal in a  
16 manner that complies with the FOIA. EPA violated NWEA’s rights in this regard when EPA  
17 unlawfully delayed its response to NWEA’s FOIA Appeal beyond the deadline imposed by the  
18 FOIA.

19 39. NWEA is directly and adversely aggrieved by EPA’s failure to respond to  
20 NWEA’s FOIA Appeal by the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(ii).

21 40. NWEA is entitled to reasonable costs of litigation, including attorneys’ fees  
22 and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

23 **CLAIM II**

24 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:  
25 UNLAWFUL WITHHOLDING OF RESPONSIVE RECORDS AND REASONABLY  
26 SEGREGABLE PORTIONS OF RESPONSIVE RECORDS**

27 41. NWEA hereby incorporates by reference the allegations in the preceding  
28 paragraphs.

42. NWEA has a statutory right to the records it seeks, which are “agency records”



1 within the meaning of the FOIA.

2 43. NWEA has a statutory right to all the records it seeks, including to any reasonably  
3 segregable portions of responsive records that contain information lawfully exempted pursuant to  
4 5 U.S.C. § 552(b).

5 44. On information and belief, and in light of the absence of certain records in EPA’s  
6 FOIA Response, EPA has violated NWEA’s rights by withholding from public disclosure  
7 records, or portions of records, to which NWEA is entitled and to which the FOIA exemptions at  
8 5 U.S.C. § 552(b) do not apply. This includes EPA’s unlawful withholding of records in their  
9 entirety; EPA’s unlawful withholding of reasonably segregable portions of responsive records  
10 that were withheld in their entirety; and EPA’s unlawful withholding of portions of responsive  
11 records that were produced in redacted form pursuant to the FOIA exemptions.

12 45. NWEA is entitled to reasonable costs of litigation, including attorneys’ fees  
13 and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

14 **CLAIM III**  
15 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**  
16 **FAILURE TO CONDUCT AN ADEQUATE SEARCH**

17 46. NWEA hereby incorporates by reference the allegations in the preceding  
18 paragraphs.

19 47. The FOIA requires federal agencies to respond to FOIA requests by conducting a  
20 search reasonably calculated to discover all responsive documents. An agency must take into  
21 account leads and other positive indications that suggest other records might be located outside  
22 the scope of its original search.

23 48. On information and belief, EPA violated the FOIA and NWEA’s right to an  
24 adequate FOIA search by failing to conduct a search reasonably calculated to uncover all  
25 documents responsive to NWEA’s FOIA Request and by failing to take into account leads and  
26 positive indications of responsive documents represented in the exhibits provided to Defendant  
27 by NWEA as part of NWEA’s FOIA Appeal.

1 49. NWEA is entitled to reasonable costs of litigation, including attorneys' fees and  
2 costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

3 **REQUESTS FOR RELIEF**

4 WHEREFORE, NWEA requests that this Court:

5 A. Adjudge and declare that EPA has violated the FOIA for the reasons set forth  
6 above;

7 B. Order EPA to comply immediately with the FOIA by conducting an adequate  
8 search for records responsive to NWEA's FOIA Request, with the cut-off date for such searches  
9 being the date the new searches are conducted;

10 C. Order EPA to produce to NWEA by a date certain all responsive records and  
11 reasonably segregable portions of exempt records sought in this action;

12 D. Order EPA to respond to NWEA's Administrative Appeal No. EPA-HQ-2019-  
13 000838;

14 E. Award NWEA its reasonable attorneys' fees and litigation expenses and costs  
15 pursuant to 5 U.S.C. §552(a)(4)(E), or any other applicable law;

16 F. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

17 G. Grant such further and additional relief as this Court may deem just and proper.

18 Respectfully submitted this 6th day of June 2019.

19  
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