

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

CENTER FOR BIOLOGICAL DIVERSITY  
1411 K St. NW, Suite 1300,  
Washington, D.C. 20005

*Plaintiff,*

v.

NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION  
1401 Constitution Ave NW,  
Washington, DC 20230,

*Defendant.*

Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. In this action, the Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the National Oceanic and Atmospheric Administration (“NOAA”) to provide communications and schedules of Stuart Levenbach, NOAA Chief of Staff, in order to reveal any improper political or industry influence on NOAA’s top decision-makers, in violation of the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”).

2. Since January 20, 2017, NOAA has not had a Senate-confirmed Under Secretary of Commerce for Oceans and Atmosphere (commonly known as the NOAA “Administrator”). In the last 27 months there have been three Acting Administrators of NOAA. This is the longest period of time NOAA has operated without a Senate-confirmed Administrator since the agency’s formation in 1970.

3. The NOAA Chief of Staff reports directly to the Under Secretary of Commerce for Oceans and Atmosphere in administering the overall operations of NOAA. On behalf of the Under Secretary, the Chief of Staff ensures that NOAA offices comply with the policy directives and objectives of the Secretary of Commerce and resolves major policy and programmatic operational issues.

4. Stuart Levenbach was appointed as NOAA Chief of Staff in January 2018. Significant policy changes have occurred at NOAA during this time, such as authorizing seismic surveys in the Atlantic Ocean that can harm marine life, *see* 83 Fed. Reg. 63268 (Dec. 7, 2018), and proposing extensive changes to the regulations implementing the Endangered Species Act, *see* 83 Fed. Reg. 35178 (July 25, 2018) and 83 Fed. Reg. 35193 (July 25, 2018).

5. Plaintiff Center filed its first FOIA request for Stuart Levenbach's communications on April 4, 2018. After initial communications that took place between April 4 and May 30, 2018, during which the Center agreed to limit the scope of its initial request, NOAA has failed to respond.

6. Plaintiff Center filed its second FOIA request for Stuart Levenbach's communications, in addition to a FOIA request for Stuart Levenbach's schedules, on December 6, 2018. After initial communications that took place between December 6, 2018 and March 4, 2019, during which the Center similarly agreed to limit the scope of its initial requests, NOAA has failed to respond.

7. As of the filing of this Complaint, the Center has still received no response from NOAA to its follow-up inquiries or any responsive records to its requests.

8. NOAA's refusal to release records relating to the NOAA Chief of Staff's official communications and schedules violates FOIA's policy of government transparency.

9. NOAA is unlawfully withholding the records by failing to conduct an adequate search for responsive records and by refusing to provide all reasonably segregable portions of any records that contain material that may be lawfully exempt. Prompt access to these records is necessary to effectuate FOIA's purpose, thus the Center seeks declaratory relief establishing that NOAA violated FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing the agency to provide any improperly withheld records and all reasonable segregable portions of any lawfully exempt records without any further delay.

### **JURISDICTION AND VENUE**

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

11. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district and because a portion of the responsive records may be found in this district.

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

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

### **PARTIES**

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 69,500 members. The Center and its members are harmed by NOAA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of political or industry influence on NOAA's top decision-makers.

15. Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION is an agency of the executive branch of the U.S. government, under the U.S. Department of Commerce. NOAA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f). NOAA is a federal agency that is responsible for applying and implementing the federal laws and regulations at issue in this complaint.

### **STATUTORY BACKGROUND**

16. FOIA's basic purpose is for government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

17. Within 20 working days of receiving a FOIA request, an agency must determine if it will release requested records and must notify the requester of its determination and the reasons therefor, the right to seek assistance from the FOIA Public Liaison, and the right to appeal an adverse agency determination. *Id.* § 552(a)(6)(A)(i).

18. An agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

19. In "unusual circumstances," an agency may extend the time to make a determination by no more than 10 additional working days, but it must provide written notice to the requester setting forth the unusual circumstances for the extension and "the date on which a determination is expected to be dispatched." *Id.* § 552(a)(6)(B)(i). If the agency provides written notice that the request cannot be processed with the specified time limit, the agency shall provide "an opportunity to limit the scope of the request so that it may be processed within" the statutory time limit or "an opportunity to arrange with the agency an alternative time frame for processing

the request or a modified request” and “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.* § 552(a)(6)(B)(ii).

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

21. FOIA requires federal agencies to promptly disclose requested records. *Id.* §§ 552(a)(3)(A), (a)(6)(C)(i).

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

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

24. Alternatively, an agency’s response to a FOIA request is subject to judicial review under the APA, which confers a right of judicial review on any person who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2).

## **FACTUAL BACKGROUND**

### **A. FOIA Request: DOC-NOAA-2018-001143 (Stuart Levenbach Communications – First Request)**

25. On April 4, 2018, the Center for Biological Diversity submitted to NOAA a FOIA request seeking “all records,” hereinafter referred to as “the records requested on April 4, 2018,” (1) “of communications of Stuart Levenbach (‘Mr. Levenbach’), NOAA Chief of Staff,

including but not limited to, all letters, emails, text messages, instant messages, voicemails, and phone logs utilized by Mr. Levenbach from all agency and NOAA servers, cloud portals, secure websites, computers, tablets, and/or smart phones sent to and/or from Mr. Levenbach, with the exception of any records that are or will be publicly available.”

26. Along with the records request sent on April 4, 2018, the Center requested a fee waiver.

27. On April 4, 2018, NOAA acknowledged the Center’s FOIA request and assigned it tracking number DOC-NOAA-2018-001143.

28. On April 9, 2018, NOAA denied the Center’s fee waiver request, stating that the Center’s FOIA request would be “processed under the ‘Other’ fee category.”

29. On May 23, 2018, NOAA provided the Center with a fee estimate of \$56.00 to produce the records requested on April 4, 2018.

30. On May 23, 2018, NOAA FOIA Officer Mark Graff informed the Center that a “10 day extension of the due date is necessary,” and indicated that the Center should receive a completed response to its records request by May 29, 2018.

31. On May 25, 2018, the Center replied to NOAA’s fee waiver denial by giving notice that the Center was willing to pay \$25 under protest.

32. On May 30, 2018, the Center spoke with NOAA’s Mark Graff by telephone to discuss the agency’s denial of the Center’s fee waiver request.

33. On May 30, 2018, the Center agreed to limit the scope of the FOIA request DOC-NOAA-2018-001143 to Mr. Levenbach’s email communications involving “@noaa.gov” email addresses as requested by NOAA.

34. On May 30, 2018, NOAA granted the Center’s fee waiver request for the amended FOIA request.

35. Since May 30, 2018 the Center has received no further communications from NOAA concerning the records requested.

36. On January 18, 2019, the Center e-mailed NOAA's FOIA Office regarding the deadline violation. The Center requested an estimated date of completion and offered to provide any assistance NOAA might need to fulfil its obligation to deliver the requested records or to otherwise provide an explanation for its refusal to produce the records.

37. The Center has received no response to its January 18, 2019 communication.

38. As of the date of this complaint, NOAA has provided no responsive records to the Center.

**B. FOIA Request: DOC-NOAA-2019-000394 (Stuart Levenbach Communications – Second Request)**

35. On December 6, 2018, the Center for Biological Diversity submitted to NOAA a second FOIA request seeking “all records of communications of Stuart Levenbach (‘Mr. Levenbach’), NOAA Chief of Staff, including but not limited to, all letters, emails, text messages, instant messages, voicemails, and phone logs utilized by Mr. Levenbach from all agency and NOAA servers, cloud portals, secure websites, computers, tablets, and/or smart phones sent to and/or from Mr. Levenbach, with the exception of any records that are or will be publicly available.”

36. This second FOIA request for Mr. Levenbach's communications asked for records from the date when the Center filed request DOC-NOAA-2018-001143, on April 4, 2018, through the date NOAA conducts the search for records pertaining to this second request.

37. On December 6, 2018, NOAA acknowledged the Center's FOIA request and assigned it tracking number DOC-NOAA-2019-000394.

38. On January 8, 2019, the Center contacted NOAA to discuss a fee waiver for this FOIA request. NOAA FOIA Officer Mark Graff replied on January 28, 2019 after returning to work following the federal government shutdown.

39. On February 11, 2019, FOIA Officer Mark Graff informed the Center through email that if the Center was willing to agree to limit the scope of DOC-NOAA-2019-000394, NOAA would be willing to grant the Center's fee waiver.

40. On February 14, 2019, the Center agreed to limit the scope of the FOIA request DOC-NOAA-2019-000394 to Mr. Levenbach's email communications involving "@noaa.gov" email addresses as requested by NOAA.

41. On March 4, 2019, NOAA confirmed that it was processing this amended FOIA request and stated that the estimated date of completion would be April 1, 2019.

42. Since March 4, 2019 the Center has received no further communications from NOAA concerning the records requested.

43. As of the date of this complaint, NOAA has provided no responsive records to the Center.

**C. FOIA Request: DOC-NOAA-2019-000395 (Stuart Levenbach's Schedules)**

44. On December 6, 2018, the Center for Biological Diversity submitted to NOAA a FOIA request seeking "all schedules, including but not limited to travel and/or meeting schedules, of Stuart Levenbach ('Mr. Levenbach'), NOAA Chief of Staff' from January 1, 2018 through the date NOAA responds to this FOIA request.

45. On December 6, 2018, NOAA acknowledged the Center's FOIA request and assigned it tracking number DOC-NOAA-2019-000395.

46. On January 8, 2019, the Center contacted NOAA to discuss a fee waiver for this FOIA request. NOAA FOIA Officer Mark Graff replied on January 28, 2019 after returning to work following the federal government shutdown.

47. On February 11, 2019, FOIA Officer Mark Graff informed the Center through email that if the Center was willing to agree to limit the scope of DOC-NOAA-2019-000395, NOAA would be willing to grant the Center's fee waiver.

48. On February 14, 2019, the Center agreed to limit the scope of the FOIA request DOC-NOAA-2019-000395 for Mr. Levenbach's schedules involving "@noaa.gov" email addresses as requested by NOAA.

49. On March 4, 2019, NOAA confirmed that it was processing this amended FOIA request and stated that the estimated date of completion would be April 1, 2019.

50. Since March 4, 2019 the Center has received no further communications from NOAA concerning the records requested.

51. As of the date of this complaint, NOAA has provided no responsive records to the Center.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF:** **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

##### **Failure to Provide a Determination on the FOIA Requests**

52. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

53. NOAA violated FOIA by failing to make a timely determination on the Center's following FOIA requests: DOC-NOAA-2018-001143; DOC-NOAA-2019-000394; and DOC-NOAA-2019-000395. 5 U.S.C. § 552(a)(6)(A)(i).

54. The Center has a statutory right to receive a determination from NOAA, as well as to promptly receive the underlying records they seek.

55. NOAA has still not given the Center a determination on the FOIA requests that describes the scope of the records it intends to produce or withhold and the reasons for withholding any records or informs the Center that it may appeal any specific adverse determination within the relevant time periods in 5 U.S.C. § 552(a)(6)(A)(i) or 5 U.S.C. § 552(a)(6)(B). *See also* 5 U.S.C. § 552(a)(7).

56. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

57. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to provide a lawful determination on the Center's FOIA requests.

58. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

**SECOND CLAIM FOR RELIEF:**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**Failure to Conduct an Adequate Search for Records Responsive to the FOIA Requests**

59. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

60. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the Center's following FOIA requests: DOC-NOAA-2018-001143; DOC-NOAA-2019-000394; and DOC-NOAA-2019-000395.

61. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

62. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to provide a lawful determination on the Center's FOIA requests.

63. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

**THIRD CLAIM FOR RELIEF:**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**Failure to Promptly Disclose Records Responsive to FOIA Requests**

64. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

65. NOAA violated FOIA, 5 U.S.C. § 552(a)(3), by failing to promptly disclose records that are responsive to the Center's following FOIA requests: DOC-NOAA-2018-001143; DOC-NOAA-2019-000394; and DOC-NOAA-2019-000395.

66. Based on the nature of the Center's organizational activities, they will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

67. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's disclosure provisions as it has in this case.

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

**FOURTH CLAIM FOR RELIEF:**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records**

69. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

70. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

71. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's following FOIA requests: DOC-NOAA-2018-001143; DOC-NOAA-2019-000394; and DOC-NOAA-2019-000395.

72. Based on the nature of the Center's organizational activities, they will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

73. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

74. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

**FIFTH CLAIM FOR RELIEF:**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**(In the Alternative to the First through Fourth Claims)**

Unlawfully Withholding or Unreasonably Delaying Actions that FOIA Requires

75. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

76. NOAA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide a timely determination on the Center's FOIA requests, (2) conduct an adequate search for records that are responsive to the Center's FOIA requests, (3) promptly disclose records that are responsive to the Center's FOIA requests, and (4) provide the Center with reasonably segregable portions of responsive records in the event that records may be subject to an exemption. NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

77. Alternatively, NOAA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide a timely determination on the Center's FOIA requests, (2) conduct an adequate search for records that are responsive to the Center's FOIA requests, (3) promptly disclose records that are responsive to the Center's FOIA requests, and (4) provide the Center with reasonably segregable portions of

responsive records in the event that records may be subject to an exemption. NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

78. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is a violation of its statutory duties under the APA.

79. The Center has other adequate remedy at law to redress the violations noted above.

80. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

**SIXTH CLAIM FOR RELIEF:**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**(In the Alternative to the First through Fifth Claims)**

Violations of FOIA's Requirements Are Arbitrary, Capricious, An Abuse of Discretion, or  
Otherwise Not in Accordance with Law

81. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

82. NOAA violated FOIA's statutory mandates due to its failure and refusal to: (1) provide a timely determination on the Center's FOIA requests, (2) conduct an adequate search for records that are responsive to the Center's FOIA requests, (3) promptly disclose records that are responsive to the Center's FOIA requests, and (4) provide the Center with reasonably segregable portions of responsive records in the event that records may be subject to an exemption. By repeatedly violating FOIA's statutory mandates, NOAA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore are actionable pursuant to the APA, 5 U.S.C. § 706(2).

83. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is a violation of its statutory duties under the APA.

84. The Center has no other adequate remedy at law to redress the violations noted above.

85. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant to respond to Plaintiff's FOIA requests as required by the FOIA;
2. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA requests, with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action;
3. Declare that Defendant's failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA requests, as alleged above, are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2);
4. Declare that Defendant's failure to timely make a determination on Plaintiff's FOIA requests is unlawful under FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and (ii), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5

U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2);

5. Declare that Defendant's failure to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(a)(7)(b), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2);
6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412; and
7. Grant such other and further relief as the Court may deem just and proper.

DATED: May 6, 2019

Respectfully submitted,

/s/

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