

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Northeastern Division**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant.

Civil Action No.: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The Center for Biological Diversity (“Center”) brings this action to challenge the U.S. Fish and Wildlife Service’s (“Service’s”) failure and refusal to provide public records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”). Specifically, this action concerns an unfulfilled FOIA request the Center submitted to the Service on February 27, 2018, seeking public records regarding the spring pygmy sunfish—a threatened and federally protected fish—and the construction and operation of a new automobile manufacturing facility directly adjacent to one of the last places it lives. The Service has ignored the Center’s request in violation of FOIA.

2. The Center seeks declaratory relief establishing that the Service violated and continues to violate FOIA. The Center also seeks injunctive relief ordering the Service to provide the Center with all responsive records without further delay.

JURISDICTION AND VENUE

3. 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 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

4. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

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

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

PARTIES

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization that works to protect native plants and wildlife and their habitats. The Center has offices throughout the United States and more than 63,000 members. The Center submitted the FOIA request at issue here. The Service’s failure to comply with FOIA harms the Center’s ability to provide full, accurate, and current information to the public on a matter of public interest.

8. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency of the federal government within the U.S. Department of the Interior. The Service possesses and controls the records the Center seeks, and it is subject to FOIA pursuant to 5 U.S.C. § 552(f) and responsible for fulfilling the Center’s FOIA request.

STATUTORY BACKGROUND

9. FOIA requires federal agencies to release requested records about their activities to the public unless one or more specific statutory exemptions applies. 5 U.S.C. § 552.

10. FOIA places the burden on federal agencies to prove they may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

11. Within 20 working days of receiving a FOIA request, an agency must determine if it will release requested records and notify the requester of its determination. *Id.* § 552(a)(6)(A)(i). The notification must include the reasons for the agency's determination. It also must inform the requester of its right to seek assistance from a FOIA Public Liaison and its right to appeal an adverse agency determination. *Id.*

12. An agency may extend its time to make a determination by no more than 10 additional working days if "unusual circumstances exist," but to do so, it must provide written notice to the requester setting forth the unusual circumstances 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 within 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." *Id.* § 552(a)(6)(B)(ii). It also "shall make available its FOIA Public Liaison" to "assist in the resolution of any disputes between the requester and the agency." *Id.*

13. Federal agencies must construe and conduct any search under FOIA in a manner that is reasonably calculated to locate all responsive records. *Id.* § 552(a)(3)(C)–(D).

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

15. Agencies may withhold responsive records in certain limited instances, if any of nine specific exemptions apply. *Id.* § 552(b). However, both Congress and courts narrowly

construe these nine exemptions as FOIA's objective is to disclose, not to hide, government actions and activities.

16. 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).

STATEMENT OF FACTS

Background to the FOIA Requests

17. The spring pygmy sunfish (*Elassoma alabamae*) is a small, striped fish that rarely grows larger than one inch and inhabits natural springs and pools in the Tennessee River watershed in northern Alabama.

18. The sunfish lives a precarious existence. Since its discovery in 1937, biologists have twice presumed it was extinct. Human development has degraded and destroyed the sunfish's habitat, eliminating populations of the species from two of the three natural spring systems it once inhabited.

19. Only two populations of spring pygmy sunfish still exist today, and the fate of the entire species lies with one of these remaining populations, which is clinging to survival in a small vestige of its only remaining habitat: the Beaverdam Spring and Creek Complex, a watershed of natural, spring-fed wetlands and streams near Huntsville, Alabama.

20. The Service proposed adding the spring pygmy sunfish to the list of "threatened" species under the Endangered Species Act on October 2, 2012. 77 Fed. Reg. 60,180 (Oct. 2, 2012). The Service's proposal cited the spring pygmy sunfish's staggering decline and encroaching development into the Beaverdam Spring and Creek Complex as reasons the sunfish was at risk of extinction.

21. Determining it is essential to the conservation of the sunfish, the Service also proposed to designate the Beaverdam Spring and Creek Complex as “critical habitat” for the species. *Id.*; see 16 U.S.C. § 1533(a)(3)(A) (requiring Service to designate critical habitat at the time of listing species as threatened or endangered). The Service finalized its protection of the spring pygmy sunfish as a threatened species under the Endangered Species Act on October 2, 2013. 78 Fed. Reg. 60,766, 60,667 (Oct. 2, 2013). The Service has not finalized a critical habitat designation for the spring pygmy sunfish.¹

22. In 2016, the Tennessee Valley Authority certified 1,252 acres of land located directly adjacent to the Beaverdam Spring and Creek Complex as the “Huntsville Mega Site,” positioning it for large-scale industrial development.

23. In January 2018, the city of Huntsville announced that Toyota Motor Corporation and Mazda Motor Corporation (together, “Toyota-Mazda” or the “automobile companies”) chose the Huntsville Mega Site and surrounding lands for a new, joint-venture automobile-manufacturing plant (“Auto Plant”). If constructed and operated as planned, the Auto Plant will cover roughly 2,400 acres and produce up to 300,000 cars annually.

24. Preliminary construction activities for the Auto Plant started in June 2018, including vegetation removal, land-clearing, and grading. These activities harm the spring pygmy sunfish and degrade crucial natural spring-fed habitat in the Beaverdam Spring and Creek Complex.

25. There is no indication the automobile companies have applied for a required “incidental take permit” or prepared a “habitat conservation plan” under the Endangered Species

¹ The Center has a separate lawsuit pending in the District Court for the District of Columbia regarding the Service’s delay in designating critical habitat. *Ctr. for Biological Diversity v. Zinke*, No. 118-CV-1375 (D.D.C.); 16 U.S.C. § 1533(a)(3)(A)(i).

Act, which is required when an activity may cause harm, death, or significant habitat degradation of a federally protected species. 16 U.S.C. § 1539(a)(1)(B), (a)(2).

26. In July 2018, the Service gave a statement to the local media, in which it claimed that it has been working closely with the automobile companies since February 6, 2018, to guide them through the permitting process.

27. If released, the records at issue in this case would reveal the federal government's activities and decisions, as FOIA requires. Specifically, the requested records would reveal whether the Service has met its obligations under the Endangered Species Act and other laws in connection with the Auto Plant. Disclosure would shed light on these agency actions, analyses, and decisions.

FOIA Request to the U.S. Fish and Wildlife Service
(Tracking Number FWS-2018-00552)

28. To assess the Auto Plant's potentially dire consequences for the spring pygmy sunfish, the Center submitted a FOIA request to the Service on February 27, 2018. The Center requested all records mentioning, including, and/or referencing the potential impacts to the spring pygmy sunfish and/or other protected species from a new Auto Plant in the sunfish's habitat on the outskirts of Huntsville, Alabama.

29. On March 21, 2018, Tiffany McClurkin, the Service's open government specialist and FOIA coordinator for the agency's regional office in Atlanta, acknowledged that the Service received the Center's FOIA request on February 27, 2018, and assigned it "tracking number" FWS-2018-00552. Ms. McClurkin stated that the Service had put the Center's FOIA request in its "exceptional/voluminous" queue, meaning that it would take more than 60 workdays to process. Nevertheless, Ms. McClurkin acknowledged that the Service's use of multi-track processing does not alter its statutory deadline to comply with the Center's FOIA request, and

she offered the Center the opportunity to narrow the scope of its request to obtain quicker processing.

30. On April 18, 2018, the Service's field supervisor for the Alabama Ecological Services Field Office, William J. Pearson, informed the Center via email that an initial, partial response to the FOIA request would be forthcoming or may have been received already. Mr. Pearson also asked for a phone call to clarify the request.

31. On April 30, 2018, the Center's open government staff attorney, Margaret Townsend, emailed Mr. Pearson to confirm a call she had with Mr. Powell from the Service the week prior.

32. The Center emailed the Service on May 25, 2018, to ask for an update on the status of the Center's FOIA request and to notify the Service that more than 60 workdays had passed since the Center submitted its request. The Center asked the Service to provide an estimated completion date for its determination, as FOIA requires. 5 U.S.C. § 552(a)(7)(B)(ii).

33. By email on June 8, 2018, Ms. McClurkin told the Center she was following up with the Service's "Program Office" and would respond to the Center with an estimated completion date soon.

34. To date, the Service has not provided the Center with a final determination on its FOIA request.

35. To date, the Service has not described the scope of the responsive records the Service intends to produce or withhold, or the reasons for withholding any such records. *Id.* § 552(a)(6)(A)(i); (a)(6)(B).

36. To date, the Service has not informed the Center that it may appeal any adverse determination within the relevant time periods as FOIA allows. *Id.* § 552(a)(6)(A)(i)(III).

37. To date, the Service has not provided any records in response to the Center's February 27, 2018 FOIA request. The Service also has not provided an estimated date by which the Service will complete the processing of the Center's request.

38. The Service has no lawful basis for its delay or to withhold or redact the records included in the Center's February 27, 2018 FOIA request.

39. The Center has exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

40. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Service Missed FOIA's Mandatory Determination Deadline for the Center's FOIA Request

41. The Center re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

42. The Center properly requested records within the control of the Service through its February 27, 2018 FOIA request to the agency (tracking number FWS-2018-00552).

43. The Center has a statutory right to a lawful final determination from the Service on its FOIA Request, tracking number FWS-2018-00552, in a manner that complies with FOIA. The Service has violated the Center's rights in this regard by unlawfully delaying its response beyond the mandatory FOIA deadline. 5 U.S.C. § 552(a)(6)(A)(i).

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

45. The Center's organizational activities will be adversely affected so long as the Service is allowed to violate FOIA's disclosure provisions.

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

47. The Center is entitled to reasonable costs of litigation, including attorney's fees, pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF

The Service Failed to Conduct an Adequate Search for Records Responsive to the Center's FOIA Request

48. The Center re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

49. The Center has a statutory right to have the Service process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Service has violated the Center's rights in this regard by failing to conduct an adequate search that is reasonably calculated to locate all records that are responsive to the Center's FOIA request.

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

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

52. The Center is entitled to reasonable costs of litigation, including attorney's fees, pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

THIRD CLAIM FOR RELIEF

The Service Failed to Disclose All Records That Are Responsive to the Center's FOIA Request

53. The Center re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

54. The Center has a statutory right to the records it seeks, and there is no legal basis for the Service to assert that any of FOIA's nine, narrow exemptions to mandatory disclosure allow it to withhold records from the Center. *See* 5 U.S.C. § 552(b). The Service has violated the Center's rights in this regard by withholding records that are responsive to the Center's FOIA request.

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

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

57. The Center is entitled to reasonable costs of litigation, including attorney's fees, pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, the Center respectfully requests that this Court:

(1) Declare that the Service violated the Freedom of Information Act by failing to lawfully satisfy the Center's February 27, 2018 FOIA request;

- (2) Order the Service to search for all responsive records to the Center's February 27, 2018 FOIA request, using search methods that are reasonably likely to locate all responsive records;
- (3) Order the Service to produce, by a date certain, all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption at no cost to the Center;
- (4) Enjoin the Service from continuing to withhold all non-exempt responsive records;
- (5) Retain jurisdiction of this action to ensure the processing of the Center's FOIA requests and that no agency records are improperly withheld;
- (6) Award the Center its costs and reasonable attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412; and
- (7) Grant such other and further relief as the Court may deem just and proper.

DATED: August 16, 2018

Respectfully submitted,

/s/ Mark E. Martin

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