

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRACY FORWARD
FOUNDATION
1333 H Street, N.W.
Washington, D.C. 20005

Plaintiff,

v.

U.S. DEPARTMENT OF ENERGY,
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Defendant.

Case No.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff Democracy Forward Foundation brings this action against Defendant U.S. Department of Energy (“DOE”) or (“Department”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

2. In August 2018, the Department abruptly and arbitrarily decided to cancel a \$46 million funding opportunity announcement designed to encourage needed innovation in solar energy technology. The Department did so after prospective grantees had already applied, and right before the Department was scheduled to announce its finalists. Yet the Department provided virtually no explanation for its change of course, nor for why it decided to disregard the substantial time and energy those grantees had devoted to their applications.

3. The Department did, however, notify applicants that it intended to publish *another* funding opportunity using the same pool of money, for which those applicants would have to reapply. Now, several weeks later, the Department has published that opportunity, which contains substantial similarities to the original proposal. Again, however, the Department

provided no explanation for why it chose to wipe the slate clean and start again, to the detriment of the public.

4. Notwithstanding the Department's silence, there is substantial concern in the regulated community that the Department's decision--and its approach to funding innovation more broadly--is politically motivated. Advocates worry that the administration intends to direct funding to its preferred recipients, regardless of the merit of their applications. Whether or not these concerns are well-founded, the public deserves to know why the Department elected to waste the time and money of prospective grantees, and of the Department itself.

5. Despite the significance of these records, Defendant has failed to sufficiently respond to Plaintiff's request. Plaintiff therefore respectfully requests that the Court compel Defendant to comply with FOIA and produce all responsive, non-exempt records.

Jurisdiction and Venue

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

7. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

8. Because Defendant has failed to comply with the applicable time limit provisions of FOIA, Plaintiff is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

Parties

9. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part, by educating the public on government actions and policies.

10. Defendant the U.S. Department of Energy (“DOE”) is a federal agency within the meaning of FOIA (*see* 5 U.S.C. § 552(f)(1)) that is headquartered in Washington, D.C., and has possession, custody, and control of records to which Plaintiff seeks access.

**The Department’s Unexplained Cancellation
of a Multi-Million Dollar Funding Opportunity**

11. On April 17, 2018, Secretary Rick Perry announced a \$105.5 million funding opportunity announcement (“FOA”) directed toward innovation in solar technology. This funding was divided into four distinct topics, with Topic 1, Advanced Solar Systems Integration Technologies, setting aside up to \$46 million for approximately 14 projects.¹

12. Finalists for the Topic 1 grants were scheduled to be announced on September 3, 2018.²

13. On August 31, 2018, the Department, under the direction of Acting Assistant Secretary for the Office of Energy Efficiency and Renewable Energy (EERE) Cathy Tripodi, denied all applicants and posted a new Advanced Solar Systems Integration Technologies Notice of Intent (NOI).³

¹ Press Release, U.S. Dep’t of Energy, U.S. Sec’y of Energy Rick Perry Announces \$105 Million in New Funding to Advance Solar Tech. (Apr. 17, 2018), <https://www.energy.gov/articles/us-secretary-energy-rick-perry-announces-105-million-new-funding-advance-solar-technologies>.

² U.S. Dep’t of Energy, Funding Opportunity Announcement: FY 2018 Solar Energy Technologies Office, Announcement No. DE-FOA-0001840 (Apr. 17, 2018), <https://www.energy.gov/eere/solar/funding-opportunity-announcement-fy-2018-solar-energy-technologies-office>.

³ U.S. Dep’t of Energy, Advanced Solar Systems Integration Technologies Notice of Intent (NOI), Announcement No. DE-FOA-0001986 (Aug. 31, 2018), <https://www.grants.gov/web/grants/view-opportunity.html?oppId=308651>.

14. On October 15, 2018, it was reported that the Department had made available \$46 million for approximately ten similarly focused solar projects.⁴ The Department anticipates that it will provide Selection Notifications for this funding on March 22, 2019.⁵

Plaintiff's FOIA Request

15. On September 10, 2018, Plaintiff submitted a FOIA request to the Department, seeking the following records for the time period of March 23, 2018 to the date the search is conducted:

- a. All correspondence, including any attachments, regarding the approval process for issuance and cancellation of DOE's Solar Energy Technology Office FOA FY 2018 (eventually titled DOE-FOA-0001840) and issuance of DOE's Advanced Solar Systems Integration Notice of Intent (eventually titled DOE-FOA-0001986), sent to or from the following individuals [hereinafter "Covered Individuals"]:
 - i. Cathy Tripodi, Acting Assistant Secretary (EERE)
 - ii. Brian McCormack, Chief of Staff
 - iii. Mark Menezes, Under Secretary for Energy
 - iv. Sophia Varnasidis, Chief of Staff, Under Secretary for Energy
 - v. Daniel Simmons, Acting Assistant Secretary (EERE)
 - vi. Alex Fitzsimmons, Chief of Staff (EERE)
 - vii. Kevin Jayne, Special Advisor to the PDAS (EERE)
 - viii. Tim Unruh, Deputy Assistant Secretary, Renewable Energy
 - ix. Ian Hamos, Chief of Staff, Renewable Energy
 - x. Jennifer Garson, Chief of Staff, Renewable Energy
 - xi. Charlie Gay, Director, Solar Energy Technologies Office
 - xii. Becca Jones-Albertus, Deputy Director, Solar Energy Technologies Office
 - xiii. Bindu Jacobs, Deputy Assistant Secretary, Operations (EERE)
 - xiv. Leslie Pezzulo, Chief of Staff, Operations (EERE)
 - xv. John Barth, Budget Director (EERE)
 - xvi. Derek Passarelli, Director, Golden Field Office
 - xvii. Diana Bobo, Grants Manager, Golden Field Office

⁴ *DOE Offers 46m for Solar Projects to Combat Cyber Threats*, Politico Pro (Oct. 2018), <https://subscriber.politicopro.com/cybersecurity/whiteboard/2018/10/doe-offers-46m-for-solar-projects-to-combat-cyber-threats-2071379>.

⁵ U.S. Dep't of Energy, Funding Opportunity Announcement: Advanced Systems Integration for Solar Technologies (ASSIST), Announcement No. DE-FOA-0001987 (Oct. 15, 2018) <https://www.energy.gov/eere/solar/funding-opportunity-announcement-advanced-systems-integration-solar-technologies-assist>.

- xviii. Clay Pfrangle, Grant Management Specialist, Golden Field Office
- xix. Bruce Walker, Assistant Secretary, Office of Electricity
- xx. Karen Evans, Assistant Secretary, Cybersecurity, Energy Security, and Emergency Response
- xxi. Catherine Jereza, Deputy Assistant Secretary, Transmission Permitting and Technical Assistance
- xxii. John Vonglis, Chief Financial Officer
- xxiii. Christopher Johns, Director of Budget (CFO)

- b. All correspondence, including any attachments, regarding Acting Assistant Secretary Tripodi's use of the terms "political", "midterms", or "geographic diversity", sent to or from the Covered Individuals.
- c. All correspondence, including any attachments, regarding the cost of the merit review process for part or all of DOE's Solar Energy Technology Office FOA FY 2018 (eventually titled DOE-FOA-0001840) or DOE's Advanced Solar Systems Integration Notice of Intent (eventually titled DOE-FOA-0001986), sent to or from the Covered Individuals.
- d. All correspondence, including any attachments, regarding the use of dollars appropriated for the Solar Energy Technologies Office to other applied energy offices, including, but not limited to, the Office of Electricity Delivery and Energy Reliability (OE) and the Office of Cybersecurity and Emergency Response (CESR), sent to or from the Covered Individuals.

16. Plaintiff sought a waiver of search and duplicating fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

17. On September 11, 2018, the Department confirmed receipt of Plaintiff's FOIA request and assigned it a tracking number of HQ-2018-01594-F.

18. On October 19, 2018, the Department granted Plaintiff's request for a waiver of fees.

19. As of the date of this Complaint, Defendant has failed to notify Plaintiff whether and when it will comply with Plaintiff's FOIA request (*see* 5 U.S.C. § 552(a)(6)(A)(i)), whether it will produce all requested records, or whether it will demonstrate that they are lawfully exempt

from production (*see id.* § 552(a)(6)(C)). Nor has Defendant notified Plaintiff of the scope of any responsive records Defendant intends to produce or withhold, and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

20. Because Defendant has “fail[ed] to comply with the applicable time limit provisions” of the FOIA, even with the benefit of any extensions of time that Defendant might have claimed, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *See id.* § 552(a)(6)(C)(i).

Count One
(Violation of the FOIA, 5 U.S.C. § 552)

21. By failing to respond to Plaintiff’s request within the statutorily prescribed time limit, Defendant has violated its duties under FOIA, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information.

Request for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. order Defendant to conduct a search for any and all records responsive to Plaintiff’s FOIA request using search methods reasonably likely to lead to discovery of all responsive records;
2. order Defendant to produce, by a date certain, any and all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt responsive records;
4. order Defendant to grant Plaintiff’s request for a fee waiver;

5. award Plaintiff its attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

6. grant Plaintiff such other relief as this Court deems just and proper.

Dated: October 25, 2018

Respectfully submitted,

/s/ John T. Lewis

Javier M. Guzman (D.C. Bar No. 462679)

John Lewis (D.C. Bar No. 1033826)

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