

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

STORY OF STUFF PROJECT, 1442
A Walnut St. #272, Berkeley, CA
94709; and COURAGE CAMPAIGN
INSTITUTE, 7119 West Sunset Blvd.
No. 195, Los Angeles, CA 90046,

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG
ADMINISTRATION, 10903 New
Hampshire Avenue, Silver Spring, MD
20993,

Defendant.

Civil No. 17-1358

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

I. INTRODUCTION

1. The Defendant United States Food and Drug Administration has violated the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), by failing to make a determination on a request for documents filed with it by Plaintiffs Story of Stuff Project and Courage Campaign Institute. This lawsuit requests an order declaring that the agency has violated FOIA, and enjoining the agency to immediately make the required determination and to provide the Plaintiffs with the records they have requested.

II. JURISDICTION AND VENUE

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

3. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

III. PARTIES

4. Plaintiff STORY OF STUFF PROJECT (“The Project”) is a non-profit corporation headquartered in California. The Project’s staff facilitate an interactive online community of more than one million members worldwide dedicated to transforming the way we make, use, and throw away disposable consumer items. The Project, its staff and its community members have been actively involved in environmental sustainability and resource conservation efforts since its founding in 2008. The Project has more than 30,000 members in California, including more than 800 who live in San Bernardino County, near the San Bernardino National Forest, which is managed by the Defendant. The Project’s members have expressed profound concern about the diversion of water resources from the Forest and the impact that has to the flora and fauna that depend on that water, which are critically impacted by the ongoing drought conditions. Its FOIA request relates to these concerns.

5. Plaintiff COURAGE CAMPAIGN INSTITUTE (“Courage Campaign”) is a non-profit corporation in California. Courage Campaign Institute is the educational arm of the Courage Campaign family of organizations with more than 1,000,000

members. Its mission is to fight for a more progressive California and United States by defending and extending human rights through innovative leadership-development training, strategic research and public education. Courage Campaign's members and staff have been actively involved in various responses to the historic California drought, including a campaign asking Nestlé to cease bottling water in California. Courage Campaign has 9,167 members who live in San Bernardino County, near the San Bernardino National Forest. Courage Campaign's members regularly visit or recreate in and near the Forest, and intend to continue to visit and recreate in the affected areas regularly in the future for various educational, scientific, aesthetic and other purposes. Courage Campaign's members have expressed profound concern about the diversion of scarce water resources from public lands, and the impact that has to the flora and fauna that depend on that water, especially where critically impacted by the on-going drought conditions. Its FOIA request relates to these concerns.

6. Defendant UNITED STATES FOOD AND DRUG ADMINISTRATION ("FDA") is a federal agency under the U.S. Department of Health and Human Services. The FDA is responsible for responding to document requests submitted to it, and so is sued as a Defendant in this action.

7. The Defendant's violation of law has denied Plaintiffs the information to which they are entitled, and Plaintiffs and their members are injured by its inability to protect the San Bernardino National Forest, and by the deprivation of government documents to which they are entitled.

IV. FACTS AND LAW

8. At the time of filing this complaint, the California State Water Resources Control Board is preparing a report regarding disputed water rights in the San Bernardino National Forest. Upon issuance of the report, the public has only 30 days to give input. Plaintiffs seek the information requested so that they will be adequately informed and positioned to give input on the State Water Resources Control Board's report.

9. On March 27, 2017, the Plaintiffs sent a FOIA request to the FDA, Division of Freedom of Information, requesting the following: "Copies of any and all records pertaining in any way to the following entities with regard to the San Bernardino National Forest: Nestlé Waters North America, Inc., Arrowhead, or the parents, subsidiaries, or 'doing business as' entities of the above two entities." Plaintiff also requested expedited processing.

10. The request was sent via the FDA's online FOIA request form, and the agency confirmed receipt of the request on April 3, 2017.

11. The FDA assigned the March 27, 2017 FOIA request reference no. FDA1733618 and designated the request no. 2017-2977.

12. On April 7, 2017, the FDA denied Plaintiffs' request for expedited processing.

13. FOIA requires that an agency "shall— [] determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the

person making such request of such determination and the reasons therefor . . .” 5 U.S.C. § 552(a)(6)(A)(i). This deadline for responding to Plaintiffs’ request expired on May 1, 2017.

14. On June 14, 2017, when Plaintiffs had not received a determination on their request, they sent an email inquiry to the FDA as to the status of their request. The FDA responded on June 15, 2017 that the request was “open to the CFSAN [Center for Food Safety and Applied Nutrition] for response.”

15. CFSAN is a branch of the FDA that provides services to consumers and industry groups about food and cosmetics.

16. Ms. Melissa McIntosh-Ball, Government Information Specialist for CFSAN responded to Plaintiffs inquiry on June 15, 2017 in pertinent part as follows:

FOIA law requires us to respond to FOIA requests in [*sic*] a first-in-first out basis. We have several requests ahead of your request. Please feel free to check back with our office next we and can [*sic*] let you know the status.

17. Plaintiffs responded on the same date restating the request, and further requesting an indication of when the responses will be received and how many requests were ahead of Plaintiffs’ requests. CFSAN did not respond.

18. On June 19, 2017, the Plaintiffs sent an email inquiry to Melissa McIntosh-Ball at CFSAN as instructed in the June 15, 2017, email requesting an update as to the status of their request. On June 20, 2017, Ms. McIntosh-Ball responded in pertinent part as follows:

There are currently 11 request [sic] ahead of yours. I will review the documents for you [sic] request by on [sic] Thursday June 22, 2016 [sic] to analyze the documents that were sent from the program office. Please feel free to check bay [sic] with our office on June 27, 2017 to find out the status.”

19. On the same date Plaintiffs asked CFSAN to advise whether the 11 requests were received by the FDA prior to March 27, 2017, and, if not, whether any received later were granted expedited processing. Plaintiff also asked CFSAN to advise of the cut-off date for the FDA’s search so that Plaintiff could decide whether a follow up request would be appropriate. Ms. McIntosh-Ball at CFSAN responded on June 23, 2017 in pertinent part as follows:

Yes, the 11 request [sic] were received by FDA prior to March 27, 2017. No, none of the 11 request [sic] received expedite [sic] processing. The cut-off date for the search for your request was April 18, 2017. I hope this information was helpful. Please feel free to check back the [sic] status of your request on June 30, 2017.

20. On June 23, 2017 Plaintiffs submitted a second FOIA request and request to expedite to the FDA requesting additional records from the April 18, 2017 cut-off date to the date of receipt of the request. This request was designated request number 2017-5736. This request is pending and is not at issue in this complaint.

21. On June 30, 2017 counsel for Plaintiffs contacted Ms. McIntosh-Ball at CFSAN by telephone, who restated that the FDA must respond to requests in the order in which they are received. She stated that there were 10 requests ahead of Plaintiffs’ March 27, 2017, request and that she had reviewed some of the documents and would review more the following week.

22. On the same date, Plaintiffs sent an email connecting the recipient employee of the June 23, 2017, FOIA request, Ms. Paula Rohde, with the CFSAN contact assigned to the March 27, 2017, FOIA request, Ms. McIntosh-Ball. Plaintiffs reiterated that time is of the essence with regard to these requests. Plaintiffs received a response that same day from Ms. McIntosh-Ball at CFSAN restating that there were still 10 requests ahead of Plaintiffs' March 27, 2017 request and inviting Plaintiffs to contact CFSAN on Thursday, July 7, 2017 for an update on the status of the request (although July 7, 2017 was a Friday).

23. On Thursday, July 6, Plaintiffs sent an email inquiry to Ms. McIntosh-Ball at CFSAN regarding the March 27, 2017, FOIA request. Ms. McIntosh-Ball responded in pertinent part as follows: "I am reviewing the records for 2017-2977. I am not sure I [*sic*] when I will complete the review because I have not accessed the page count and attachment."

24. As of the date of this complaint, the FDA has not made any determination on Plaintiffs' March 27, 2017 record request, Plaintiffs have not been provided an estimated completion date for response to the request, Plaintiffs have not been notified whether records will be withheld, and Plaintiffs have not received any records.

V. CLAIM FOR RELIEF

25. The above paragraphs are incorporated here by reference.

26. The Defendant United States Food and Drug Administration has exceeded the deadline for making a determination on Plaintiffs' March 27, 2017,

records request, in violation of FOIA, 5 U.S.C. § 552(a)(6).

VI. REQUEST FOR RELIEF

FOR THESE REASONS, the Plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that Defendant violated FOIA by failing to make a timely determination on Plaintiffs' March 27, 2017, record request;
2. Direct by injunction that Defendant immediately make a determination on Plaintiffs' record request and provide the Plaintiffs with the records they have requested;
3. Grant the Plaintiffs their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and
4. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED July 11, 2017.

/s/Matt Kenna
Matt Kenna, D. D.C. Bar # CO0028
Public Interest Environmental Law
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 749-9149
matt@kenna.net

Attorney for Plaintiffs