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6 ECOLOGICAL RIGHTS FOUNDATION

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 ECOLOGICAL RIGHTS FOUNDATION, a
non-profit corporation,

12
13 Plaintiff,

14 v.

15 NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,

16
17 Defendant.

Civil Case No. 19-cv-6661

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 Plaintiff Ecological Rights Foundation (“EcoRights”) alleges as follows:

2 **INTRODUCTION**

3 1. EcoRights brings this action under the Freedom of Information Act (“FOIA”). FOIA,
4 amongst other things, allows an aggrieved party to seek relief when records are unlawfully withheld and
5 authorizes a reviewing court to enjoin the agency from withholding records and to order the production
6 of any agency records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights
7 seeks declaratory and injunctive relief for FOIA violations by the National Oceanic and Atmospheric
8 Administration (“NOAA”). EcoRights submitted a FOIA request to NOAA through the FOIAOnline
9 system on September 11, 2019 (“FOIA Request”), and this lawsuit addresses NOAA’s failure to comply
10 with the requirements of FOIA with regards to that FOIA Request.

11 2. FOIA “is plainly written so as to disfavor any effort by agency officials to shirk their
12 responsibilities to respond promptly and fully to requests for records.” *McGehee v. CIA*, 697 F.2d 1095,
13 1101 n.18 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983) (citation omitted).
14 Congress has shown “an increasing concern over the timeliness of disclosure, recognizing that delay in
15 complying with FOIA requests may be tantamount to denial.” *Am. Civil Liberties Union v. Dep’t of*
16 *Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (citations omitted).

17 3. Given the time-sensitive nature of FOIA requests, FOIA litigation is subject to expedited
18 judicial consideration. Unlike other civil litigation involving a federal agency, a responsive pleading is
19 required within thirty days of service. 5 U.S.C. § 552(a)(4)(C) (“Notwithstanding any other provision of
20 law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection
21 within thirty days after service upon the defendant of the pleading in which such complaint is made,
22 unless the court otherwise directs for good cause shown.”).

23 4. EcoRights’ FOIA Request seeks records related to alleged interference by President
24 Donald Trump and other White House officials with NOAA’s forecasting of Hurricane Dorian to align it
25 with President Trump’s debunked predication that the Hurricane would impact Alabama; President
26 Trump’s map of the predicted course of Hurricane Dorian that appears to have been changed with a
27 black marker to make it appear that Alabama would be impacted by the Hurricane; attempts by NOAA
28 staff to control messaging about Hurricane Dorian and the altered map; and information related to

1 whether NOAA's forecasting of Hurricane Dorian and handling of its conflict with President Trump
2 related to that forecasting violated any policies, including policies related to scientific integrity. FOIA
3 Request (attached as Exhibit 1).

4 5. The records sought by EcoRights are crucial to inform the public about the conflict that
5 arose when President Trump insisted that Hurricane Dorian could seriously impact Alabama. In the
6 wake of President Trump's statements, NOAA appeared to abdicate its duty to provide the public with
7 reliable storm reporting to avoid conflict with President Trump. This raises serious concerns about
8 NOAA's independence as a scientific agency, the veracity of its weather predications, and its ability to
9 provide independent weather predictions that keep the public safe. Incursions into these bedrock
10 functions raise fundamental questions about whether NOAA can reliably comply with its statutory
11 mandates.

12 6. For EcoRights' September 11, 2019 FOIA Request, NOAA has failed to issue a final
13 determination on the FOIA Request in compliance with FOIA's mandatory timelines, improperly
14 withheld agency records that are responsive to the FOIA Request, and failed to conduct an adequate
15 search for records that are responsive to EcoRights' FOIA Request. NOAA's violations of FOIA at issue
16 in this case have thwarted EcoRights' efforts to timely receive current information in NOAA's
17 possession and have hampered EcoRights' efforts to serve as an effective public interest watchdog over
18 governmental activities and to determine the extent to which it and the public can confidently rely on
19 NOAA data and reports.

20 JURISDICTION

21 7. This Court has jurisdiction pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), which allows an
22 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
23 court to enjoin the agency from withholding records and to order the production of any agency records
24 improperly withheld from the complainant. This Court also has jurisdiction over this action pursuant to
25 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United
26 States to perform his duty).

1 15. Any person who files a FOIA request is deemed to have standing to invoke the
2 jurisdiction of the federal courts to carry out the judicial review provisions of FOIA. EcoRights filed the
3 FOIA Request at issue and has standing to bring this FOIA suit.

4 16. EcoRights works in furtherance of its goals in part by acquiring information regarding
5 federal programs and activities through FOIA. EcoRights then compiles and analyzes that information
6 and, subsequently, disseminates that information to its membership, the general public, and public
7 officials through various sources, including reports posted on its website and other websites and through
8 television and radio interviews. EcoRights' successful efforts at educating the public on issues
9 concerning federal government programs and activities contribute significantly to the public's
10 understanding of governmental operations and activities. EcoRights also uses the information that it
11 acquires through FOIA to participate in federal decision-making processes, to file administrative appeals
12 and civil actions, and generally to ensure that federal agencies comply with federal laws.

13 17. EcoRights regularly uses FOIA as an important avenue for gaining information about
14 agency activities. EcoRights is harmed when it is denied timely access to documents to which it is
15 entitled, as it has been here. This harm is ongoing as EcoRights is still unable to use this information to
16 educate the public.

17 18. EcoRights intends to continue its use of FOIA to access agency records in the possession
18 of NOAA. Specifically, EcoRights has concrete plans to submit additional FOIA requests to NOAA as
19 EcoRights' advocacy efforts continue, and to follow up on the information learned while reviewing
20 agency records responsive to the present FOIA Request.

21 19. One of the purposes of FOIA is to promote the active oversight role of public advocacy
22 groups incorporated in many federal laws applicable to federal agencies, including the Administrative
23 Procedure Act. *See, e.g.*, 5 U.S.C. §§ 551, *et seq.* EcoRights uses FOIA to publicize activities of federal
24 agencies and to mobilize the public to participate in advocacy to elected and other government officials.
25 EcoRights intends to continue using FOIA requests to fulfill its oversight and advocacy role through
26 scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. The
27 FOIA Request seeks to understand NOAA's actions and policies that appear to have violated the law
28

1 and principles of good governance. This harm can be remedied in part by ensuring EcoRights has
2 prompt access to public records going forward.

3 20. EcoRights, its staff, or one or more of its members have and will suffer direct injury by
4 NOAA's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this
5 litigation will redress that injury. NOAA's refusals to provide timely FOIA access to agency records
6 interferes with EcoRights' ability to participate as an informed watchdog, looking over NOAA's actions
7 to ensure that it adequately follows the law.

8 21. Defendant NOAA is a federal agency of the United States within the U.S. Department of
9 Commerce, and, as such, is an agency subject to the FOIA, pursuant to 5 U.S.C. § 552(f). FOIA charges
10 NOAA with the duty to provide public access to agency records in its possession or control. NOAA
11 possesses records responsive to EcoRights' FOIA Request. NOAA is denying EcoRights access to its
12 records in contravention of federal law.

13 22. NOAA failed to lawfully make a determination on EcoRights' FOIA Request within the
14 statutory twenty-working-day limit. As of the date of this filing, NOAA possesses, controls, and
15 unlawfully withholds agency records responsive to EcoRights' FOIA Request that are not subject to a
16 FOIA exemption. As of the date of this filing, NOAA has not completed a FOIA-compliant search for
17 records responsive to EcoRights' FOIA Request.

18 STATUTORY AND REGULATORY BACKGROUND

19 23. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek
20 to "ensure that the Government remains open and accessible to the American people and is always based
21 not upon the 'need to know' but upon the fundamental 'right to know.'" Pub. L. No. 110-175, 121 Stat.
22 2524, Section 2 ¶ 6 2007).

23 24. Administrative remedies are deemed exhausted whenever an agency fails to comply with
24 the applicable time limits of FOIA, and this puts all questions of FOIA compliance, including but not
25 limited to failure to comply with the twenty-business-day determination deadline, within the jurisdiction
26 of the federal courts. 5 U.S.C. § 552(a)(6)(C)(i).

27 25. FOIA requires that an agency disclose records to any person except where the record falls
28 under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow

1 scope of these exemptions and “the strong policy of the FOIA that the public is entitled to know what its
2 government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C.
3 Cir. 1980).

4 26. When an agency decides to withhold records under a claim of exemption, it must notify
5 the person making the request of that determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).
6 Government agencies bear the burden of proof to show that any withheld records are exempt from the
7 otherwise complete duty to disclose. 5 U.S.C. § 522(a)(4)(B).

8 27. The FOIA Improvement Act of 2016 made significant amendments to FOIA, effective as
9 of enactment on June 30, 2016. *See* Department of Justice Office of Information Policy Summary of the
10 FOIA Improvement Act of 2016, available at [https://www.justice.gov/oip/oip-summary-foia-](https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016)
11 [improvement-act-2016](https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016) (“OIP FOIA 2016 Summary”). The amendments include changes to the standard
12 by which NOAA must evaluate potential withholdings. The FOIA Improvement Act of 2016 dictates
13 that agencies shall withhold information only if disclosure would harm an interest protected by an
14 exemption – what is referred to as the “foreseeable harm standard” – even if that information is arguably
15 subject to an exemption claim by the agency. 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.
16 This represents an additional thumb on the scale in favor of disclosure.

17 28. 5 U.S.C. § 552(a)(6)(A)(i) requires that the agency provide enough information,
18 presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what
19 has not been produced and “the reasons therefore.”

20 29. FOIA also requires an agency to consider partial disclosure whenever the agency
21 determines that full disclosure of a requested record is not possible and to take reasonable steps
22 necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A).

23 30. An agency’s process for processing FOIA requests constitutes “withholding” if its net
24 effect is to significantly impair the requester’s ability to obtain the records or significantly increase the
25 amount of time he or she must wait to obtain them. *McGehee*, 697 F.2d at 1110.

26 31. FOIA requires that an agency, upon any request for records, shall promptly make the
27 records available. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply
28 with a request within twenty business days after the receipt of the request and shall immediately notify

1 the party making the request of such determination, the reasons for the determination, and the party's
2 right to appeal. 5 U.S.C. § 552(a)(6)(A)(i).

3 32. Federal agencies are under a duty to conduct a reasonable search for records responsive
4 to a party's request using methods that can be reasonably expected to produce the records requested to
5 the extent those records exist. 5 U.S.C. § 522(a)(3)(C).

6 33. FOIA disputes are normally resolved on summary judgment, with the burden of proving
7 FOIA compliance falling on the agency. The agency must carry its burden of demonstrating all elements
8 of FOIA compliance. The agency may meet its litigation burdens by providing declarations, and
9 disclosing contravening evidence in its possession, that address, among other things: a broad
10 interpretation of the FOIA Request, lawful search, lawful cut-off date for each search for documents
11 responsive to the request, and the justification for withholding any agency record or part thereof in a
12 "*Vaughn Index*."

13 FACTUAL BACKGROUND

14 34. On September 11, 2019, EcoRights submitted the FOIA Request to NOAA via
15 FOIAOnline.gov. This FOIA Request, and NOAA's violations of FOIA related to it, is the basis for this
16 lawsuit.

17 35. EcoRights' FOIA Request seeks several specific categories of records relating to
18 NOAA's reporting of Hurricane Dorian and how that may have been compromised by interference from
19 President Trump and/or others in the White House. The documents EcoRights requests constitute the
20 best available evidence of this potentially unethical and illegal activity.

21 36. On information and belief, NOAA has never attempted to or made contact with
22 EcoRights related to the FOIA Request.

23 37. EcoRights contacted NOAA on October 10, 2019 to inquire into the status of the FOIA
24 Request. EcoRights made it clear that NOAA's determination was now overdue and that EcoRights
25 would bring a lawsuit to remedy this violation of FOIA if NOAA did not produce all records within one
26 week. NOAA completely failed to respond to this email, necessitating this lawsuit.

27 38. As of the filing date of this Complaint, EcoRights has not received NOAA's final
28 determination on the FOIA Request.

1 39. As of the filing date of this Complaint, NOAA currently possesses or controls, and is
2 withholding, agency records responsive to EcoRights' FOIA Request that are not subject to a FOIA
3 exemption. NOAA's withholding of agency records is unlawful.

4 40. As of the filing date of this Complaint, NOAA continues to withhold agency records
5 responsive to the FOIA Request. NOAA has not made and communicated a final determination on the
6 FOIA Request. NOAA has not completed a FOIA-compliant search. NOAA has not provided the "cut-
7 off date" used for any search, thereby frustrating EcoRights' intent to file a follow-up FOIA request.
8 NOAA has provided no sufficient basis for withholding any of the specific agency records being
9 withheld in full or in part.

10 41. EcoRights now turns to this Court to provide relief that ensures EcoRights, its
11 membership, and the public have the prompt public access to agency records guaranteed by FOIA. 5
12 U.S.C. § 552(a)(6).

13 **FIRST CLAIM FOR RELIEF**

14 **Violation of FOIA: Constructive Denial and Unlawfully Withholding**

15 **Agency Records Responsive to the FOIA Request**

16 42. EcoRights repeats and incorporates by reference the allegations in the above paragraphs
17 and all paragraphs of this Complaint.

18 43. NOAA has not communicated to EcoRights the scope of the documents it intends to
19 produce and withhold in response to the FOIA Request or its reasons for withholding any documents,
20 and has not disclosed to EcoRights records responsive to the FOIA Request.

21 44. NOAA violated FOIA (5 U.S.C. § 552(a)) by failing to provide a lawful determination
22 and response to EcoRights' September 11, 2019, FOIA Request within the statutory twenty-day period.
23 5 U.S.C. § 552(a)(6)(A)(i).

24 45. This failure to make a lawful determination on EcoRights' FOIA Request within the time
25 frame required by FOIA is a constructive denial and wrongful withholding of the records EcoRights
26 requested in violation of FOIA. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(C)(i).

27 46. NOAA continues to violate FOIA by not making responsive records promptly available
28 to EcoRights. 5 U.S.C. § 552(a).

1 B. Enter findings and declare that NOAA violated FOIA by unlawfully withholding agency
2 records responsive to EcoRights' FOIA Request;

3 C. Enter findings and declare that NOAA violated FOIA by failing to conduct a search
4 reasonably calculated to locate the records responsive to EcoRights' FOIA Request;

5 D. Direct by injunction that NOAA provide EcoRights a lawful determination on EcoRights'
6 FOIA Request by a date certain;

7 E. Direct by order that NOAA conducts a lawful search for responsive records;

8 F. Direct by order that NOAA provides proof that it conducted a lawful search with a cutoff
9 date set as the date of such order;

10 G. Direct by injunction that NOAA promptly provide all agency records responsive to
11 EcoRights' FOIA Request that are not subject to withholding pursuant to one of the nine recognized
12 FOIA exemptions;

13 H. Direct by order that NOAA provide EcoRights with a detailed statement justifying each
14 withholding of an agency record, or portions thereof, in accordance with the indexing requirements of
15 *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);

16 I. Direct by order that NOAA provide EcoRights with all responsive agency records by a
17 date certain, within twenty working days of any such order;

18 J. Grant EcoRights' costs of litigation, including reasonable attorney fees as provided by
19 FOIA, 5 U.S.C. § 552(a)(4)(E); and,

20 K. Provide such other relief as the Court deems just and proper.
21

22 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

23 Based on Plaintiff's knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned
24 certifies that, as of this date, other than the named parties, there is no such interest to report.

25 Dated: October 17, 2019

Respectfully submitted,

26
27 By:

Christopher a. sproul

Christopher Sproul
Counsel for Ecological Rights Foundation
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