

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
HERITAGE FOUNDATION)	
214 Massachusetts Ave. N.E.)	
Washington, D.C. 20002)	
)	
MIKE HOWELL)	
214 Massachusetts Ave. N.E.)	
Washington, D.C. 20002)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 23-cv-23-3783
)	
U.S. CONSUMER PRODUCT SAFETY)	
COMMISSION)	
4330 East West Highway)	
Bethesda, MD 20814)	
)	
<i>Defendant.</i>)	
_____)	

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs THE HERITAGE FOUNDATION and MIKE HOWELL (collectively “Plaintiffs”) for their complaint against Defendant U.S. CONSUMER PRODUCT SAFETY COMMISSION (“CPSC” or “Commission”) allege on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the production of information from CPSC concerning the Commission’s plans to regulate or possibly ban gas stoves. In an interview with *Bloomberg*, CPSC Commissioner, Richard Trumka Jr., said gas stoves represent a “hidden hazard” and that with respect to regulating gas stoves, “[a]ny option is on the table. Products that can’t be safe can be banned.” Ari Natter, *US Safety Agency to Consider Ban on Gas Stoves Amid Health Fears*, *Bloomberg*

(Jan. 9, 2023) (Ex. 1). Commissioner Trumka’s comments sparked significant public debate and led to the House of Representatives passing a bill to prohibit the Commission from regulating or banning Gas Stoves. H.R. 1615, 118th Cong. Plaintiffs’ FOIA Request seeks records to understand the Commission’s plans to ban or otherwise ban gas stoves. FOIA Request No. 23-F-00294 (Feb. 6, 2023) (“Request” or “Plaintiffs’ FOIA Request”) (Ex. 2).

PARTIES

2. Plaintiff The Heritage Foundation is a Washington, D.C.-based nonpartisan public policy organization with a national and international reputation whose mission is to “formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Heritage Foundation, *About Heritage*, found at <https://www.heritage.org/about-heritage/mission> (last visited Dec. 15, 2023). Heritage is a not-for-profit section 501(c)(3) organization which engages in substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*.

3. Plaintiff Mike Howell leads The Heritage Foundation’s Oversight Project and is an author for *The Daily Signal*. The Oversight Project is an initiative aimed at obtaining information via Freedom of Information Act requests and other means in order to best inform the public and Congress for the purposes of Congressional oversight. The requests and analysis of information are informed by Heritage’s deep policy expertise. By function, the Oversight Project is primarily engaged in disseminating information to the public. *See, e.g.*, Oversight Project, found at <https://www.heritage.org/oversight> (last visited Dec. 15, 2023); X, found at @OversightPR (last visited Dec. 15, 2023). Staff for the Oversight Project routinely appear on

television, radio, print, and other forms of media to provide expert commentary on salient issues in the national debate.

4. Defendant CPSC is a federal agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) which “works to save lives and keep families safe by reducing the unreasonable risk of injuries and deaths associated with consumer products and fulfilling its vision to be the recognized global leader in consumer product safety. . .” About CPSC, *found at* <https://www.cpsc.gov/About-CPSC> (last visited Dec. 15, 2023).

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

6. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant CPSC’s principal place of business is in the District of Columbia.

PLAINTIFFS’ FOIA REQUEST

7. Plaintiffs submitted their FOIA Request on February 6, 2023.

8. The Request sought CPSC documents and communications related to the Commission’s work regarding natural gas stoves.

9. The Request sought records for the timeframe of December 1, 2021 to January 8, 2023. The Request specifically sought:

- A. All records related to CPSC Commissioner Richard L. Trumka’s memo titled *NPR Proposing Ban on Gas Stoves (Indoor Air Quality)*;
- B. All records regarding voluntary standards and natural gas stoves;
- C. All records regarding ANSI Z21.1-2016 or CSA 1.1-2016;
- D. All communications with other federal agencies, including but not limited to the Department of Energy, Environmental Protection Agency, and the Federal Energy Regulatory Commission, regarding natural gas stoves; and

- E. All communications with the Office of the President or Executive Office of the President regarding natural gas stoves.

Id. at 1. The Request asked CPSC to “produce responsive documents as soon as they become available.” *Id.* at 3.

10. The Request sought a fee waiver based on the public interest because CPSC Commissioner Richard Trumka Jr. stated in an interview that the CPSC is considering banning gas stoves amid health fears. Plaintiff Heritage Foundation is a not-for-profit section 501(c)(3) organization which engages in substantial dissemination of information to the public and that Plaintiff Howell is an author for *The Daily Signal*, a major news outlet operated by the Heritage Foundation. *Id.* at 3–4.

11. The Request sought expedited processing on the grounds of immense media and Congressional interest in Commissioner Trumka’s statements that the CPSC is considering banning gas stoves. *Id.* at 6. As “person(s) primarily engaged in disseminating information,” Plaintiffs filed the Request with “an urgency to inform the public concerning actual or alleged Federal government activity” and thus demonstrated a “compelling need” for expedited processing. 16 C.F.R. § 1015.5(g). Specifically, United States Senators have announced plans to introduce bipartisan legislation to prohibit the CPSC from banning gas stoves, Congressional committees have sent oversight letters to the CPSC and White House about the Commission’s plans and questioned the Commission’s motives, and other stakeholders have raised concerns that any CPSC action on gas stoves will raise safety issues and increase costs. Request at 6–7. Plaintiffs supported their application for expedited processing with two detailed factual appendices.

CPSC HAS IMPROPERLY DENIED PLAINTIFFS' FOIA REQUEST

12. On February 13, 2023, CPSC acknowledged receipt of the Request and assigned it tracking number No. 23-F-00294. Letter from Abioye E. Mosheim to Roman Jankowski (Feb. 13, 2023) (Ex. 3). Later that day, CPSC sent Plaintiffs an “interim response” to the Request granting Plaintiffs expedited processing. Letter from Robert Dalton to Roman Jankowski (Feb. 13, 2023) (Ex. 4). The interim response explained that CPSC would “begin processing [Plaintiff’s] request immediately and will be making all releasable information available to [Plaintiffs] at the earliest date possible.” *Id.*

13. On June 21, 2023, CPSC provided an interim response to the Request. Letter from Robert Dalton to Roman Jankowski (June 21, 2023) (“June 21 Letter”) (Ex. 5). The June 21 Letter invoked the “unusual circumstances” provisions of 5 U.S.C. §§ 552(a)(6)(B)(i)–(iii) and 16 C.F.R. §§ 1015.5(b)(1)–(3). *Id.* The June 21 Letter further explained, that in processing the Request, CPSC identified “approximately 5,000 pages of emails” and estimated “it will take approximately 6–9 months from today’s date [June 21, 2023] for staff to review all of the records and process them prior to release.” *Id.* at 2. In sum, CPSC “estimate[s] it will take approximately one year from receipt date of [the] request to complete processing this request.” *Id.*

14. As of the date of this filing, Defendant has failed to produce any records, responsive or other, in response to the Request, nor has it otherwise demonstrated that the requested records are exempt from production. A review of the CPSC FOIA portal indicates that the Request is “in progress.” CSPC FOIA Portal, Request No. 23-F-000294 (last accessed Dec. 18, 2023) (Ex. 6).

15. Twenty business days from February 6, 2023, is March 7, 2023.

16. Thirty business days from February 6, 2023 is March 21, 2023.

FIRST CLAIM FOR RELIEF
Violation FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

17. Plaintiffs incorporate by reference all preceding paragraphs and incorporate each paragraph of each count as applicable to each other count.

18. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

19. Plaintiffs properly requested records within the possession, custody, and control of Defendant.

20. Defendant is subject to FOIA and therefore must make reasonable efforts to search for requested records.

21. Defendant has failed to promptly review agency records for the purpose of locating and collecting those records that are responsive to Plaintiffs’ FOIA Request.

22. Defendant’s failure to conduct searches for responsive records violates FOIA and DOJ regulations.

23. Plaintiffs have a statutory right to the information they seek.

24. Defendant is in violation of FOIA.

25. Plaintiffs are being irreparably harmed by reason of Defendant’s violation of FOIA. Plaintiffs are being denied information to which they are statutorily entitled and that is important to carrying out Plaintiffs’ functions as a non-partisan research and educational

institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

26. Plaintiffs have no adequate remedy at law.

27. Plaintiffs have constructively exhausted their administrative remedies.

SECOND CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

28. Plaintiffs incorporate by reference all preceding paragraphs and incorporate each paragraph of each count as applicable to each other count.

29. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

30. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

31. Defendant is subject to FOIA, and therefore must release to a FOIA requester any non-exempt records and provide a lawful reason for withholding any records.

32. Defendant is wrongfully withholding non-exempt records requested by Heritage by failing to produce any records responsive to Plaintiffs’ FOIA Request.

33. Defendant is wrongfully withholding non-exempt-agency records requested by Plaintiffs by failing to segregate exempt information in otherwise non-exempt records responsive to Plaintiffs’ FOIA Request.

34. Defendant’s failure to provide all non-exempt responsive records violates FOIA and DOJ regulations.

35. Plaintiffs have a statutory right to the information they seek.

36. Defendant is in violation of FOIA.

37. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied information to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

38. Plaintiffs have no adequate remedy at law.

39. Plaintiffs have constructively exhausted their administrative remedies.

THIRD CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552
Wrongful Denial of Fee Waiver

40. Plaintiffs incorporate by reference all preceding paragraphs and incorporate each paragraph of each count as applicable to each other count.

41. FOIA requires all doubts to be resolved in favor of disclosure. "Transparency in government operations is a priority of th[e Biden] . . . Administration." *Attorney General, Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

42. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

43. Defendant has constructively denied Plaintiffs' application for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) & (iii) and 28 C.F.R. §16.10(k).

44. The Request does not have a commercial purpose because Heritage is a 501(c)(3) nonprofit, Howell acts in his capacity as a Heritage employee, and release of the information sought does not further Plaintiffs' commercial interest.

45. Plaintiffs are members of the news media as they "gather[] information of potential interest to a segment of the public, use[] . . . [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience" via Heritage's major news outlet, *The Daily Signal*. 5 U.S.C. § 552(a)(4)(a)(ii).

46. Disclosure of the information sought by the Request also "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

47. Defendant has "failed to comply with a[]time limit under paragraph (6)" as to the Request. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

48. Plaintiffs have a statutory right to a fee waiver.

49. Defendant is in violation of FOIA by denying a fee waiver.

50. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied a fee waiver to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

51. Plaintiffs have no adequate remedy at law.

52. Plaintiffs have constructively exhausted their administrative remedies.

FOURTH CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552
Statutory Bar Against Charging Fees

53. Plaintiffs incorporate by reference all preceding paragraphs and incorporate each paragraph of each count as applicable to each other count.

54. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

55. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

56. The Request does not have a commercial purpose because Heritage is a 501(c)(3) nonprofit, Howell acts in his capacity as a Heritage employee, and release of the information sought does not further Plaintiffs’ commercial interest.

57. Plaintiffs are members of the news media as they “gather[] information of potential interest to a segment of the public, use[] . . . [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience” via Heritage’s major news outlet, *The Daily Signal*. 5 U.S.C. § 552(a)(4)(a)(ii).

58. Disclosure of the information sought by the Request also “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).

59. Defendant has “failed to comply with a[]time limit under paragraph (6)” as to the Request. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

60. Defendant is currently statutorily barred from charging fees related to Plaintiffs' FOIA Request. Therefore, Plaintiffs have a statutory right to have their request processed without being charged any fees.

61. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

62. Plaintiffs have no adequate remedy at law.

63. Plaintiffs have constructively exhausted their administrative remedies.

FIFTH CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552

Failure to Provide Expedited Processing Despite Purported Grant of Request to Expedite

64. Plaintiffs re-allege the foregoing paragraphs as if fully set out herein.

65. FOIA requires all doubts to be resolved in favor of disclosure. "Transparency in government operations is a priority of th[e Biden] . . . Administration." *Attorney General, Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

66. Plaintiffs requested expedited processing in the Request pursuant to 5 U.S.C. § 552(a)(6)(E) and 16 C.F.R. § 1015.5.

67. The Department has failed to process the Request in an expedited manner. While the Department purported to grant expedited processing by its February 13, 2023 letter, the Department did not indicate when it would provide agency records and Plaintiffs have received no records responsive to the Request.

68. Defendant has failed to process the Request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii).

69. Defendant's failure to expeditiously provide all non-exempt responsive records violates FOIA and DOJ regulations.

70. Plaintiffs have a statutory right to the information they seek.

71. Defendant is in violation of FOIA.

72. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied information to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

73. Plaintiffs have no adequate remedy at law.

74. Plaintiffs have constructively exhausted their administrative remedies.

WHEREFORE as a result of the foregoing, Plaintiffs pray that this Court:

- A. Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Plaintiffs' FOIA Request;
- B. Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiffs' FOIA Request and indexes justifying the withholding of any responsive records withheld in whole or in part under claim of exemption;
- C. Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiffs' FOIA Request;
- D. Enjoin Defendant from assessing fees or costs for Plaintiffs' FOIA Request;
- E. Retain jurisdiction over this matter as appropriate;

- F. Award Plaintiffs their costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 522(a)(4)(E); and
- G. Grant such other and further relief as this Court may deem just and proper.

Dated: December 20, 2023

Respectfully submitted,

/s/ Samuel Everett Dewey
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