

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

CENTER FOR BIOLOGICAL DIVERSITY,
1411 K Street N.W. Suite 1300
Washington, DC 20005,

Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE,
1400 Independence Ave., SW
Washington, DC 20250

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Civil Action No.: _____

INTRODUCTION

1. This case challenges the Department of Agriculture’s (“USDA”) Rural Utilities Service’s (“RUS”) failure to timely and adequately search for, and disclose, records concerning millions of dollars in federal loans to rural electricity cooperatives that have frequently been used to fund fossil fuel power projects.

2. USDA RUS’s Loan program provides direct loans and loan guarantees to rural electric cooperates to finance the construction of electric generation, transmission, and distribution facilities, including system improvements and replacement required to furnish and improve electric service in rural areas.

3. Seeking to learn more about the extent to which these loans support fossil fuel infrastructure projects, Plaintiff the Center for Biological Diversity (“Center”) submitted two requests under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), one on March 17, 2020 for loan contract records with the North Carolina Electric Membership

Corporation (“NCEMC”), and another on April 3, 2020, for loan contract records with the Arizona Electric Power Cooperative (“AEPC”).

4. Because RUS identified relatively few records responsive to these FOIA requests, and withheld many of the records it did identify, on July 1, 2021 the Center filed administrative appeals pursuant to the FOIA. 5 U.S.C. § 552(6)(A)(i)(III). However, RUS has not produced any additional records in response to these appeals or resolved them as required by the FOIA and thus the Center brings this suit seeking declaratory and injunctive relief to require an adequate search for and production of all non-exempt responsive records related to the RUS loan contracts with AEPC and NCEMC.

JURISDICTION AND VENUE

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

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

7. Injunctive relief is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202. Declaratory relief is appropriate under 28 U.S.C. § 2201.

PARTIES

8. Plaintiff Center for Biological Diversity (“the Center”) is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 1.7 million members and online activists who care about the country’s urgent need to expedite the renewable energy transition and protecting human health, the natural environment, and species from the ravages of the climate emergency and environmental degradation. The Center’s Energy Justice Program focuses on environmental and energy justice in the new renewable energy system, and specifically fights to decarbonize the utility sector. The Center and its

members are harmed by Defendant's violations of FOIA, which are preventing the Center from gaining a full understanding of Defendant's activities, priorities, and decision-making, and are therefore undermining the Energy Justice Program's ability to further its programmatic objectives.

9. Defendant U.S. Department of Agriculture's Rural Utilities Service is a federal agency with custody and/or control of the records requested in the Center's FOIA requests and is subject to FOIA pursuant to 5 U.S.C. § 552.

STATUTORY BACKGROUND

10. FOIA's basic purpose is for government transparency. It establishes the public's right to access all federal agency records with certain narrow exceptions. 5 U.S.C § 552(b)(1)-(9).

11. FOIA imposes strict deadlines on federal agencies when they receive requests for records. Specifically, 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 and the reasons therefor, and the right to appeal an adverse agency determination. *Id.* § 552(a)(6)(A)(i).

12. FOIA requires each agency to make reasonable efforts to search for records in a manner reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). The cut-off date for the agency's search is the date that the agency conducts the search and not any earlier date.

13. FOIA requires federal agencies to promptly disclose requested records, *see id.* § § 552(a)(3)(A), (a)(6)(C)(i) and places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

14. FOIA provides that the U.S. district courts have 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).

15. FOIA provides that once an agency completes its response to a FOIA request, a requestor must file an administrative appeal to further pursue the matter. *Id.* § 552(a)(6)(A)(i)(III). Under the FOIA, once an appeal is filed the agency has twenty working days to respond. *Id.* § 552(a)(6)(A)(ii).

FACTUAL BACKGROUND

1. The RUS Electric Loan Program

16. The USDA RUS Electric Loan Program was originally established under the Rural Electrification Act of 1936 to provide direct loans and loan guarantees to electric utilities that serve customers in rural areas. 74 Pub. L. No. 74-605, 49 Stat. 1363 (1936).

17. In the 1960s and 1970s, rural electric cooperatives were incentivized by the RUS Electric Loan Program’s low interest loans to purchase fossil fuel generation resources and form cooperatives to deliver electric services. Cooperatives incurred substantial debts to finance fossil fuel generation and related transmission infrastructure, including many coal generation plants, which has left these cooperatives deeply in debt and reliant on coal.

18. Today, although coal generation often operates at a higher cost than cleaner renewable energy sources, even without including the costs of pollution, electric cooperatives’ debts and legacy investments in fossil fuels make it difficult to transition to less expensive and cleaner generation sources.

2. The Center's NCEMC FOIA Request

19. On March 17, 2020, seeking to understand and learn more about RUS loan agreements with NCEMC, the Center sent RUS a FOIA request for the following:

“[f]rom January 2010 to the date RUS conducts the search:

- (1) The loan contracts and supporting records between RUS and NCEMC including but not limited to the:
 - (a) initial loan contract outlining the loan's amount and terms and conditions;
 - (b) requisite records from NCEMC required to obtain each loan, including power purchase agreements, insurance or environmental compliance documents, and/or other associated risk documentation;
 - (c) loan guarantee records, including privately held debt documentation, with which RUS loans have been leveraged or packaged; and
 - (d) the loan extension and refinancing contracts.
- (2) The power supply contracts in RUS's custody or control between NCEMC and the aforementioned electric cooperatives it serves, or between RUS itself and any of these same electric cooperatives; and
- (3) The power supply contracts or agreements in RUS's custody or control between NCEMC and the electric utilities serving North Carolina, including Duke Energy Carolinas, Duke Energy Progress, and Dominion Energy North Carolina.”

20. After 11 months of correspondence, on April 21, 2021, the Center received a final determination letter with an attached 177 pages of records. Based upon bates labels and the response letter, RUS uncovered 207 pages of responsive records and produced (in part) 176 pages.

21. On July 1, 2021, the Center filed an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(i)(III). The appeal explained that RUS conducted an inadequate search for responsive records and failed to demonstrate that the agency could not release non-exempt, reasonably segregable portions of otherwise lawfully withheld records.

22. On September 7, 2021, RUS informed the Center that the agency had identified additional responsive records and invited the Center to convert its pending appeal into a new

request, which the agency indicated would lead to more expedited processing. The Center rejected this approach, which risked further delays by requiring the Center to file yet another administrative appeal.

23. On September 21, 2021, RUS informed the Center that a new search had uncovered 553 pages of additional responsive records, and that the agency sent the records to NCEMC for review before release with a deadline of October 16, 2021. But RUS did not acknowledge the issues with the previous search raised by the Center, nor did it indicate that the agency would review the previous search and the pages redacted from that search. As of the date of this filing, the Center has received no additional records.

3. The Center's AEPC FOIA Request

24. For the same purpose as the NCEMC FOIA request, the Center submitted a separate FOIA request to RUS on April 3, 2020, concerning AEPC, requesting the following:

“[f]rom January 1, 2010, to the date RUS conducts this search:

- (1) The loan contracts and supporting records between AEPC and RUS, including but not limited to the:
 - (a) initial loan contract outlining the loan's amount and terms and conditions;
 - (b) requisite records from AEPC required to obtain each loan, including power purchase agreements, insurance, or environmental compliance documents, and/or other associated risk documentation;
 - (c) loan guarantee records, including privately held debt documentation, with which RUS loans have been leveraged or packaged; and
 - (d) the loan extension and refinancing contracts.
- (2) The power supply contracts in RUS's custody or control between AEPC and the aforementioned electric cooperatives it serves, or power supply contracts or between RUS itself and any of these same electric cooperatives; and
- (3) The power supply contracts or agreements in RUS's custody or control between AEPC and the electric utilities serving Arizona, including APS, SRP, and Tucson Electric Power.”

25. After nearly 13 months of correspondence, on April 27, 2021, the Center received a final determination letter with an attached four pages of responsive records. Based upon the bates labels and the response letter, RUS identified 365 pages of records and produced (in part) four pages.

26. On July 1, 2021, the Center filed an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(i)(III). The appeal explained that RUS conducted an inadequate search for responsive records, and it failed to demonstrate that the agency could not release non-exempt, reasonably segregable portions of otherwise lawfully withheld records.

27. On September 7, 2021, RUS informed the Center that the agency had identified additional responsive records and invited the Center to convert its pending appeal into a new request, which the agency indicated would lead to more expedited processing. The Center rejected this approach, which risked further delays by requiring the Center to file yet another administrative appeal.

28. On September 15, 2021, RUS informed the Center that a new search had uncovered 298 pages of additional responsive records, and that the agency sent the records to AEPC for review before release with a deadline of October 1. But again, RUS did not acknowledge the issues with the previous search raised by the Center, nor did it indicate that it would review the previous search and the pages redacted from that search. As of the date of this filing, the Center has received no additional records.

CLAIMS FOR RELIEF

NCEMC CLAIMS

FIRST CLAIM FOR RELIEF

(Failure to Promptly Disclose Records)

29. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

30. RUS is violating FOIA by failing to promptly disclose records responsive to the Center's NCEMC FOIA request.

31. None of FOIA's statutory exemptions apply to the records that the Center seeks.

32. The Center has a statutory right to the records it seeks.

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

34. The Center's organizational activities are adversely affected by RUS's failure to produce the requested records.

SECOND CLAIM FOR RELIEF

(Failure to Conduct Adequate Searches for Records Responsive)

35. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

36. The Center has a statutory right to have RUS process its NCEMC FOIA request in a manner that complies with FOIA, 5 U.S.C. § 552(a)(3).

37. RUS is violating the Center's rights in this regard by unlawfully failing to complete a search reasonably calculated to locate all records responsive to the Center's FOIA request.

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

39. The Center's organizational activities will be adversely affected if RUS is allowed to continue violating FOIA's disclosure provisions.

THIRD CLAIM FOR RELIEF

(Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records)

40. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

41. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

42. RUS is violating the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's NCEMC FOIA request.

43. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to RUS in the foreseeable future. The Center's organizational activities will be adversely affected if RUS is allowed to continue violating FOIA's disclosure provisions.

AEPC CLAIMS

FOURTH CLAIM FOR RELIEF

(Failure to Promptly Disclose Records Responsive)

44. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

45. RUS is violating FOIA by failing to promptly disclose records responsive to the Center's AEPC FOIA request.

46. None of FOIA's statutory exemptions apply to the records that the Center seeks.

47. The Center has a statutory right to the records it seeks.

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

49. The Center's organizational activities are adversely affected by RUS's failure to produce the requested records.

FIFTH CLAIM FOR RELIEF

(Failure to Conduct Adequate Searches for Records Responsive)

50. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

51. The Center has a statutory right to have RUS process its AEPC FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3).

52. RUS is violating the Center's rights in this regard by unlawfully failing to complete a search reasonably calculated to locate all records responsive to the Center's AEPC FOIA request.

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

54. The Center's organizational activities will be adversely affected if RUS is allowed to continue violating FOIA's disclosure provisions.

SIXTH CLAIM FOR RELIEF

(Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records)

55. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

56. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

57. RUS is violating the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's AEPC FOIA request.

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

59. The Center's organizational activities will be adversely affected if RUS is allowed to continue violating FOIA's disclosure provisions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Declare that Defendant's failures to timely undertake a search for and disclose to Plaintiff all records responsive to Plaintiff's two FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i).

2. Order Defendant to conduct searches reasonably calculated to locate all records responsive to the Center's two FOIA requests, utilizing a cut-off date for such searches that is the date the searches are conducted, and to provide the Center, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

3. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

4. Grant such other and further relief as the Court may deem just and proper.

DATED: November 18, 2021

Respectfully submitted,

/s/ Howard M. Crystal
Howard M. Crystal
(D.C. Bar No. 446189)

/s/ Lauren A. Parker
Lauren A. Parker
(D.C. Bar No. 1670885)
Pro hac vice pending

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