

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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| -----X | |
| STATE OF NEW YORK, | : |
| | : |
| Plaintiff, | : |
| | : |
| -against- | : |
| | : |
| THE UNITED STATES ENVIRONMENTAL | : |
| PROTECTION AGENCY and the NATIONAL | : |
| HIGHWAY TRAFFIC SAFETY | : |
| ADMINISTRATION, | : |
| | : |
| Defendants. | : |
| -----X | |

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Civil Action No.

Plaintiff State of New York, by its attorney, Letitia James, Attorney General of New York,
alleges as follows:

NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for declaratory, injunctive and other appropriate relief against the United States Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA), for continued violations of Sections 552(a)(6)(A)(i) and (a)(6)(B)(i) of FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(a)(6)(B)(i).

2. The agencies have failed to timely respond to FOIA requests sent to them by the State in early September 2018. The State seeks immediate release of the requested agency records from EPA and NHTSA, and other relief as set forth below.

JURISDICTION AND VENUE

3. The Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii), and 28 U.S.C. § 1331.

4. Venue is proper in this district pursuant under 5 U.S.C. § 552(a)(4)(B) because New York resides in this district.

DEFENDANTS

5. EPA is an independent agency of the United States federal government with responsibility for environmental protection. It is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). EPA has possession of and control over records that New York seeks and has requested pursuant to FOIA.

6. NHTSA is a component agency of the United States Department of Transportation charged with, inter alia, adopting and enforcing motor vehicle fuel economy standards. NHTSA is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). NHTSA has possession of and control over records that New York seeks and has requested pursuant to FOIA.

STATUTORY AND REGULATORY BACKGROUND

7. FOIA requires federal agencies to make promptly available to any person any requested records, except for those records that properly fall within one of the statute's exemptions. 5 U.S.C. § 552(a)(3)(A).

8. Once an agency receives a FOIA request, it has twenty business days to respond with a determination of whether such responsive documents exist and whether they may be released. 5 U.S.C. § 552(a)(6)(A)(i).

9. An agency may only delay its response to a request in the event that "unusual circumstances" as defined by FOIA exist. Even in this event, it may extend its time to respond by no more than ten days. 5 U.S.C. § 552(a)(6)(B)(i); 40 C.F.R. § 2.104(d); 49 C.F.R. § 7.34(a).

10. If the agency fails to comply with the statutory time limits, the person making the request will be deemed to have exhausted their administrative remedies and may bring suit. 5 U.S.C. § 552(a)(4)(B), (a)(6)(C)(i).

11. FOIA permits the Court to grant “reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i).

FACTS

The Federal Agencies’ Proposal

12. In August 2018, EPA and NHTSA issued a joint proposal entitled “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks” (“Proposal”), 83 Fed. Reg. 42,986 (Aug. 24, 2018).

13. In the “Compliance and Enforcement” portion of the Proposal, 83 Fed. Reg. at 43,476, the agencies discuss Executive Order 13,132 (“Executive Order”), which establishes requirements for federal agencies to address federalism concerns in formulating and implementing policies. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

14. The Executive Order requires federal agencies, including EPA and NHTSA, to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” 64 Fed. Reg. at 43,257.

15. Specifically, when promulgating regulations that have federalism implications or preempt state law, agencies are required to (1) consult with State and local officials early in the process of developing the proposed regulation; (2) submit to the Office of Management and Budget (“OMB”) a federalism summary impact statement; and (3) make available to the OMB Director any written communications submitted to the agency by state and local officials. *Id.* at 43,258.

16. The agencies assert that they “complied with the [Executive] Order’s requirements” with respect to the Proposal but provide no explanation of how they purportedly complied, nor do they set forth any facts or identify any documents or other records to substantiate their assertion. *Id.* 83 Fed. Reg. at 43,476.

The State’s Request to EPA

17. On September 5, 2018, the State sent a FOIA request to EPA requesting records pertaining to: (1) communications with states or state officials regarding the Executive Order and/or the federalism implications of the proposal; (2) all communications with NHTSA regarding the same; (3) all communications with OMB regarding compliance with the Executive Order, including any federalism summary impact statement; and (4) any federalism impact statement(s) and any other agency records supporting the assertion of compliance. The State also requested expedited processing and a fee waiver, pursuant to FOIA Sections 552(a)(6)(E) and 552(a)(4)(A)(iii), respectively.

18. On September 11, 2018, EPA acknowledged receipt of the request and assigned it the tracking number of EPA-HQ-2018-011354. EPA acknowledged that the deadline for response was October 10, 2018, twenty working days from EPA’s receipt of the request.

19. On September 12, 2018, EPA notified the State that the State’s requested fee waiver would be granted because the request did not meet the minimum billable amount.

20. On October 9, 2018, the day before the original deadline was set to expire, EPA notified the State by email that it would require a ten-day extension to respond to the request under 40 C.F.R. § 2.104(d), due to unusual circumstances, pushing the due date for EPA’s response to October 24, 2018. EPA also stated that it would contact the State “on or before that date to provide

[the State] with a status update.” In the same correspondence, EPA stated that, pursuant to the State’s request, it would provide responsive records on a rolling basis.

21. Since the October 9, 2018 correspondence, EPA has not provided the State with the promised status update, the final determination, or any of the requested records. It has been several weeks since even the extended deadline passed, and there has been no communication from EPA on this matter whatsoever.

22. The State has exhausted all administrative remedies because EPA has failed to comply with the time limit under FOIA for responding to New York’s request.

The State’s Request to NHTSA

23. On September 5, 2018, the State sent a FOIA request to NHTSA requesting records pertaining to: (1) communications with states or state officials regarding the Executive Order and/or the federalism implications of the proposal; (2) all communications with EPA regarding the same; (3) all communications with OMB regarding compliance with the Executive Order, including any federalism summary impact statement; and (4) any federalism impact statement(s) and any other agency records supporting the assertion of compliance. The State also requested expedited processing and a fee waiver, pursuant to FOIA Sections 552(a)(6)(E) and 552(a)(4)(A)(iii), respectively.

24. On September 10, 2018, NHTSA acknowledged receipt of the request and assigned it the tracking number ES18-003327. The letter did not mention a deadline, but stated that “a simple request for a specific record or a small number of records is typically processed within 20-30 business days,” indicating that NHTSA would respond sometime between October 8, 2018 (the FOIA-mandated deadline) and October 22, 2018, at the latest.

25. Subsequently, NHTSA and the State communicated regarding the request on two occasions. On September 17, 2018, NHTSA and the State exchanged emails in which the parties agreed to narrowed search terms for the request. On September 19, 2018, NHTSA denied expedited processing of the request.

26. Since the September 19, 2018 correspondence, there has been no other communication from NHTSA. NHTSA has not provided the State with a final determination, a status update, or any of the requested records. At no point did NHTSA invoke the extension provision under FOIA. But even assuming EPA's invocation of the 10-day extension also applied to NHTSA, any arguable 10-day deadline extension for NHTSA has also passed.

27. The State has exhausted all administrative remedies because NHTSA has failed to comply with the time limit under FOIA for responding to New York's.

CLAIMS FOR RELIEF

First Claim – EPA Violation of FOIA

28. Paragraphs 1-27 are realleged and incorporated herein by reference.

29. EPA's failure to respond to the State's September 5, 2018 request for records violates FOIA, 5 U.S.C. §§ 552(6)(A)(i) and 552(6)(B)(i), and EPA's own corresponding regulations, 40 C.F.R. § 2.104(d).

Second Claim – NHTSA Violation of FOIA

30. Paragraphs 1-27 are realleged and incorporated herein by reference.

31. NHTSA's failure to respond to the State's September 5, 2018 request for records violates FOIA, 5 U.S.C. § 552(6)(A)(i), and NHTSA's own corresponding regulations, 49 C.F.R. § 7.31(a)(2).

PRAYER FOR RELIEF

WHEREFORE, the State of New York respectfully requests that this Court grant the following relief:

1. Declare that EPA's and NHTSA's failures to respond to the State's respective FOIA requests are unlawful;
2. Direct EPA and NHTSA to immediately make available to the State all responsive, non-exempt agency records;
3. Retain jurisdiction over this action to rule on any assertions by EPA or NHTSA that any responsive records, in whole or in part, are exempt from disclosure;
4. Award the State its costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
5. Grant such other relief as this Court may deem just and proper.

Respectfully Submitted,

LETITIA JAMES
Attorney General

Dated: January 24, 2019

/s/ Yueh-ru Chu
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