

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

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant.

Civil Action No. 17-0652 (BAH)

DEFENDANT’S MOTION FOR ENLARGEMENT OF TIME

Defendant United States Environmental Protection Agency (“EPA”), by and through undersigned counsel, respectfully moves this Court, under Federal Rule of Civil Procedure 6(b), and this Court’s Standing Order for Civil Cases (ECF No. 4), for an enlargement of time to comply with the Court’s Order, dated June 1, 2018, as described below. The grounds for this motion are set forth below and a proposed order is attached.

On June 1, 2018, the Court issued a Memorandum Opinion and Order denying EPA’s motion for summary judgment and granting Plaintiff Public Employees for Environmental Responsibility’s (“PEER”) motion for summary judgment. Mem. Op., June 1, 2018 (ECF No. 23); Order, June 1, 2018 (ECF No. 24). The Court directed EPA: (1) to conduct and complete a search for records responsive to both parts of PEER’s [Freedom of Information Act] FOIA request by July 2, 2018; (2) to disclose promptly to Plaintiff on a rolling basis any responsive, non-exempt records; and (3) to produce to Plaintiff by July 11, 2018, an explanation for any documents withheld in full or in part. June 1 Order at 1.

EPA requests that the Court modify the June 1 Order as follows: (1) EPA shall conduct a search for records responsive to part one of Plaintiff PEER's FOIA request by August 6, 2018, and disclose to Plaintiff any responsive, non-exempt documents by August 16, 2018; (2) EPA shall provide Plaintiff an explanation for any documents withheld in full or in part in response to the first part of Plaintiff's FOIA request by August 24, 2018; and (3) EPA shall initiate a search for records responsive to part two of Plaintiff's FOIA request by July 16, 2018, and file a joint status report on or before July 30, 2018, updating the Court on the status and results of EPA's search efforts and recommending the course of further proceedings.

EPA reserves the right to seek appellate review of the June 1, 2018 Memorandum Opinion and Order now or at a later time. EPA also reserves the right to seek reconsideration of the Court's Order and/or renew its motion for summary judgment to reassert that the requests, in whole or in part, are improper and/or unduly burdensome.

Notwithstanding its reservation of rights, EPA is taking steps to comply with the Court's Order. As of today, however, EPA and its counsel are still working on developing an appropriate search methodology for parts one and two of Plaintiff's FOIA request. While EPA continues to maintain that part one of Plaintiff's request is improper, the Agency will develop a search strategy and in light of the Court Order complete the search by August 6, 2018, and produce any non-exempt, responsive records, if any, by August 16, 2018.

Conducting a search for the second part of the request, which seeks "[a]ny EPA documents, studies, reports or guidance materials that support the conclusion that human activity is not the largest factor driving global climate change," is far more complicated. The Agency has an extensive history of working on climate change issues, and there are multiple offices within the EPA that conduct climate change work and/or have responsibility for issues related to climate

change. Further, there are no limitations on the second part of the request, such as a date restriction or other limitation, such as Agency-generated documents in the last twelve months. Instead, the request could be read to encompass any and all documents that support a particular conclusion concerning climate change in the Agency's custody and control.¹

Without any restrictions on the scope of the request, in time, custodians, or otherwise, it is challenging to develop appropriate search criteria. Given the considerable breadth of the request, EPA needs additional time to plan a reasonable search. Further, once EPA has identified the scope of potentially responsive documents, the Agency will need to identify an appropriate review strategy as Plaintiff's request appears to call for a subjective judgment as to what documents support the conclusion that "human activity is not the largest factor driving global climate change." As such, EPA requests to defer setting the remainder of the schedule on part two of the request until the parties file their next joint status report on July 30, because by that time EPA should be in a better position to report to the Court on the results of the searches conducted as of that date.

Based on the foregoing, EPA requests a 35-day extension to complete its search related to part one of Plaintiff's request and a two-week extension of the deadline to initiate the search for part two of the request and then to file a status report by July 30, 2018, updating the Court on the status and results of EPA's search efforts taken to date and recommendations for next steps.

¹ After reviewing EPA's draft motion for enlargement of time, PEER helpfully clarified that it is not seeking public comments submitted to EPA related to, for example, the proposed repeal of the Clean Power Plan, the proposed Clean Power Plan rule, and the 2009 Endangerment Finding issued pursuant to section 202 of the Clean Air Act. Those rulemaking dockets include over five million comments, and while PEER has indicated that EPA need not search such dockets for public comments, we reference the magnitude of those dockets here only to provide a sense of the size and scope of the Agency's work on climate change. See <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2017-0355> (last visited June 26, 2018); <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2013-0602> (last visited June 26, 2018); <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2009-0171> (last visited June 26, 2018).

EPA therefore requests to defer setting the remainder of the schedule for part two of Plaintiff's FOIA request at this time.

This is EPA's fourth enlargement motion in this matter, but the first request for enlargement of the deadlines in the Court's June 1 Order. Granting this extension will not affect any other preexisting deadlines in this matter. EPA consulted with PEER on this extension request and PEER, through counsel, opposes the request.

WHEREFORE, for good cause shown, Defendant requests that the Court grant this motion and modify the Court's scheduling order as proposed herein.

June 26, 2018

Respectfully submitted,

JESSIE K. LIU
D.C. Bar 472845
United States Attorney

DANIEL F. VAN HORN
D.C. Bar 924092
Chief, Civil Division

By: /s/ Daniel P. Schaefer
DANIEL P. SCHAEFER
D.C. Bar 996871
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2531
Daniel.Schaefer@usdoj.gov