

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

NATIONAL PUBLIC RADIO, INC.

and

TIM MAK,

Plaintiffs,

v.

Case No. 20-cv-556

**UNITED STATES TRANSPORTATION
SECURITY ADMINISTRATION,**

Defendant.

COMPLAINT

Plaintiffs National Public Radio, Inc. and Tim Mak (collectively, “NPR”), by their undersigned attorneys, allege as follows:

INTRODUCTION

1. This is an action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, seeking the release of agency records from the United States Transportation Security Administration (“TSA”).

2. Through this action, NPR seeks to compel TSA to release information regarding communications with high-ranking officials in the earliest stages of the current COVID-19 pandemic. These records will help the public better understand TSA’s early response to the pandemic and evaluate the adequacy of that response and officials’ public characterizations of what they knew and what they did.

3. On March 11, 2020, NPR requested the records at issue here in this action. To

date, NPR has not received any determination regarding its FOIA request. This is a violation of TSA's duties pursuant to FOIA and a constructive denial of NPR's FOIA request. As a matter of law, TSA should be required to fulfill its statutory obligations and release the requested records immediately.

PARTIES

4. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization organized under the laws of the District of Columbia with its principal place of business in Washington, D.C. It is the leading provider of non-commercial news, information and entertainment programming to the American public. NPR's fact-based, independent journalism helps the public stay on top of breaking news, follow the most critical stories of the day, and track complex issues over the long term. NPR reaches approximately 52 million people on broadcast radio, podcasts, NPR apps, and NPR.org each week. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities.

5. Plaintiff Tim Mak is an investigative reporter for NPR based in Washington, D.C. Among other topics, he covers the federal government's response to the COVID-19 pandemic.

6. Defendant TSA is an agency of the federal government. It has possession, custody and/or control of the records that NPR seeks. TSA is located at 601 South 12th Street, Arlington, Virginia, 20598.

JURISDICTION AND VENUE

7. This action arises under FOIA. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B).

8. Venue is proper in this judicial district under 5 U.S.C. § 552(a)(4)(B).

FACTUAL ALLEGATIONS

9. The Freedom of Information Act “focuses on the citizens’ right to be informed about ‘what their government is up to’” by fostering the release of “[o]fficial information that sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not secrecy, is the dominant objective” of FOIA. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (citation omitted).

10. NPR plays a critical role in providing information to citizens about “what their government is up to.” Indeed, the First Amendment’s guarantee of freedom of the press is meant to enable journalists to play an “essential role in our democracy,” to “bare the secrets of government and inform the people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

11. Through this FOIA request (and through this litigation), NPR seeks to fulfill its journalistic function and to shine a public light on the operations of the TSA in the early weeks of the COVID-19 crisis.

THE REQUEST

12. On March 11, 2020, Mak, on behalf of himself and NPR, sent a FOIA request via his colleague Meghan Anderson to TSA (the “Request”). The Request seeks certain communications to and from TSA officials David P. Pekoske, Matthew Barton, and Kathryn Maxwell from December 1, 2019 through January 31, 2020, containing the following Coronavirus-related words and phrases: ‘coronavirus’, ‘severe acute respiratory syndrome coronavirus 2’, ‘Wuhan’, ‘2019-nCoV’, ‘SARS-CoV-2’, and ‘COVID-19’. A true and correct

copy of the Request is attached hereto as Exhibit 1.

13. TSA responded on March 16, 2020, referring to the Request by tracking number 2020-TSFO-00358, and seeking clarification from Mak about the request. A true and correct copy of that response is attached hereto as Exhibit 2.

14. Mak replied via his colleague Jingnan Huo on March 17, 2020, specifying that NPR is seeking “all communications to and from each of the three – David Pekoske, Matthew Barton and Kathryn Maxwell. This should include communications between them.” A true and correct copy of that reply is attached hereto as Exhibit 3.

15. Pursuant to FOIA, an agency must make and communicate to the requester its determination regarding a request within 20 working days, or within 30 working days if it can show “unusual circumstances.” *See* 5 U.S.C. § 552(6)(a)(i) & (a)(6)(B)(i). A requester is deemed to have exhausted their administrative remedies and may file suit if the agency misses the deadline to make and communicate its determination. 5 U.S.C. § 552(6)(C)(i).

16. The deadline to communicate a determination regarding the Request expired on April 8, 2020. Still, TSA has not communicated a determination regarding this request to date.

17. NPR therefore has exhausted its administrative remedies regarding the Request pursuant to 5 U.S.C. § 552(6)(C)(i).

CLAIM FOR RELIEF

COUNT I

(Declaratory and Injunctive Relief:

Violation of the Freedom of Information Act, 5 U.S.C. § 552)

18. NPR realleges and incorporates by reference all previous paragraphs as if fully set forth herein.

19. TSA is an agency subject to FOIA, 5 U.S.C. § 552(f), and therefore must disclose in response to a FOIA request all responsive records in its possession at the time of the request

that are not specifically exempt from disclosure under FOIA, and must provide a lawful reason for withholding any records (or portions thereof) as to which they are claiming an exemption.

20. The records requested are subject to release pursuant to FOIA.

21. TSA's failure to comply with its statutory duties and timely disclose the records sought by the Request constitutes a constructive denial of the Request and violates FOIA, 5 U.S.C. § 552(a)(3)(A).

REQUEST FOR RELIEF

WHEREFORE, NPR respectfully requests that this Court:

- A. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- B. Declare that the records sought by the Request, as more particularly described above, are public records pursuant to FOIA and must be disclosed;
- C. Order TSA to provide the requested records to NPR, including electronic copies of records stored in electronic format, within 10 business days of the Court's order;
- D. Award NPR the costs of this proceeding, including its reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- E. Grant NPR such other and further relief as this Court deems just and proper.

Dated: May 15, 2020

Respectfully submitted,

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