

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

GOVERNMENT ACCOUNTABILITY)	
PROJECT,)	
1612 K St. NW, Suite #1100)	
Washington, DC 20006)	
)	
Plaintiff,)	
)	
v.)	
)	
ENVIRONMENTAL PROTECTION)	
AGENCY,)	
1200 Pennsylvania Ave, N.W.)	
Washington, DC 20460)	
)	
Defendant.)	

COMPLAINT

1. Plaintiff GOVERNMENTAL ACCOUNTABILITY PROJECT brings this suit to force Defendant ENVIRONMENTAL PROTECTION AGENCY to produce records on an expedited basis that would shed light on the EPA's response to the East Palestine train derailment. In violation of the Freedom of Information Act, Defendant EPA claims that there is no urgency or compelling need to inform the public about EPA's decisions and actions on how to conduct, or not conduct, effective testing for the presence of potentially life-threatening chemicals in the local environment as a result of the derailment and other response measures. As a result, to date, EPA has produced no responsive records to GAP in violation of FOIA's expedited processing provision.

PARTIES

2. Plaintiff GOVERNMENTAL ACCCOUNTABILITY PROJECT (“GAP”) is a nonprofit whistleblower protection and advocacy organization and is the FOIA requester in this case.

3. Defendant ENVIRONMENTAL PROTECTION AGENCY (“EPA”) is a federal agency and is subject to the Freedom of Information Act, 5 U.S.C. § 552.

JURISDICTION AND VENUE

4. This case is brought under 5 U.S.C. § 552(a)(4)(B) and presents a federal question conferring jurisdiction on this Court. *See* 28 U.S.C. § 1331.

5. Venue is proper under 5 U.S.C. § 552(a)(4)(B). EPA personnel have been on site in the East Palestine area since the onset of the train derailment and are leading the on-the-ground response efforts. Upon information and belief, therefore, records responsive to the request are situated in this District.

AUGUST 25, 2023 FOIA REQUEST TO EPA

6. On August 25, 2023, Plaintiff submitted the following FOIA request to EPA for records dated February 3, 2023, to present:

1. Any and all records from the aforementioned time period regarding the USEPA and the Federal On-Scene Coordinator (FOSC), the National Response Team (NRT), the US Coast Guard (USCG), Unified Area Command (UAC), East Palestine Fire Department and Norfolk Southern (NS) regarding the decision to do a controlled burn [of] the chemicals spilled by the EPTD;
 - a. Records including but not limited to the terms: burn, controlled burn, ignite, plume, fire, ablaze, blaze, smoke, atmospheric, and dioxin(s)
 - b. a full list of chemicals including quantities that were spilled and ignited during the EPTD disaster
2. Any and all records related to evacuating residents and announcing it was safe to return home. (etc.)
3. Any and all records from the aforementioned time period regarding the USEPA and the decision to delay, forgo, postpone, and eventually to test for dioxins and dioxin-related compounds in soil, water, and in homes.

- a. key terminology includes but is not limited to "sampling," "monitoring," "air," "air quality," "air monitoring," "community," "communities," "exposure," "CTEH," "Dixon," "health effects," "toxic," "delay," "postpone," "panic," "liability," and "detection."
4. Any and all records regarding the USEPA's work with NS and its contractor Center for Toxicology and Environmental Health (CTEH) to do environmental sampling of air, water, and soil as well as in residential homes and businesses, and to test or not test for dioxins and dioxin-related compounds.
 - a. key terminology includes but is not limited to "sampling," "monitoring," "air," "air quality," "air monitoring," "community," "communities," "exposure," "CTEH," "Dixon," "health effects," "toxic," "delay," "postpone," "panic," "liability," and "detection."
 - b. Results should include all sampling data, lab reports, lab data packages and QAQC documents provided to EPA by CTEH and NS and created by the EPA through its own testing and sampling.
5. Any and all records in possession of the EPA regarding independent scientist Scott Smith and his dioxin and dioxin-related compound testing and sampling at EPTD.
 - a. Email addresses to include but not limited to: ssmith@aqflx.com (Scott Smith); durno.mark@epa.gov; Reagan.michael@epa.gov; William.Burgess2@nscorp.com, Alan.Shaw@nscorp.com; and all other emails ending in @nscorp.com; @cteh.com; @epa.gov; and @epa.ohio.gov.
 - b. Any and all records from the aforementioned time period regarding EPA's decision in June 2023 and offer to clean residents' homes in East Palestine. Includes all communications involving the email addresses ending in @epa.gov; @nscorp.com; @ceq.oep.gov; and @cteh.com.
 - c. *NOTE:* in addition to email addresses ending in @epa.ohio.gov; @epa.gov; @nscorp.com; @ceq.oep.gov; and @cteh.com, please also include in all the above searches: [list of 30 email addresses].
7. A true and correct copy of the original FOIA request is attached as Exhibit 1.
8. On August 25, 2023, EPA acknowledged receipt of the FOIA request and assigned tracking number EPA-2023-006256 to the matter. EPA later changed the tracking number to EPA-R5-2023-006256.
9. True and correct copies of the acknowledgement and tracking number emails are attached as Exhibits 2 and 4.
10. On August 29, 2023, EPA asserted an extension of ten business days to respond to the request.

11. A true and correct copy of the extension letter is attached as Exhibit 3.
12. On September 6, 2023, EPA denied Plaintiff's request for expedited processing and denied GAP's request for a fee waiver.
13. True and correct copies of the letters are attached as Exhibits 5 and 6.
14. Under FOIA, an agency must process a request on an expedited basis when (1) failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or (2) the request is made by a person primarily engaged in disseminating information, and there is an urgency to inform the public concerning actual or alleged federal government activity.
15. The EPA has publicly stated that it is "committed to protecting the health and safety of the East Palestine, Ohio community." See <https://www.epa.gov/east-palestine-oh-train-derailment>. It has also spoken publicly about the kind of testing it is performing, and that it considers to be adequate to protect local residents. See e.g. <https://www.epa.gov/system/files/documents/2023-09/eptd-jic-media-update-20230915-508.pdf>.
16. If the EPA's testing methodologies are inadequate, the health of East Palestine residents could reasonably be expected to be threatened.
17. There is an urgency to inform the public about the EPA's activities regarding its response to the derailment, including its decisions about how to conduct testing.
18. As of the date of this filing, the EPA has not issued a determination and has not produced any records.

COUNT I – EPA'S FOIA VIOLATIONS

19. The above paragraphs are incorporated by reference.
20. Plaintiffs' FOIA request seeks the disclosure of agency records and was properly made.

21. Defendant EPA is a federal agency subject to FOIA.
22. EPA failed to grant expedited processing in violation of the statute.
23. Included within the scope of the request are one or more records or portions of records that are not exempt under FOIA.
24. Defendant EPA has failed to conduct a reasonable search for records responsive to the request.
25. Defendant EPA has failed to issue a determination.
26. Defendant EPA has failed to produce all non-exempt records responsive to the request.

WHEREFORE, Plaintiff asks the Court to:

- i. declare that Defendant has violated FOIA;
- ii. order Defendant to conduct a reasonable search for records and to produce the requested records as soon as practicable under FOIA's expedited processing provisions;
- iii. enjoin Defendant from withholding non-exempt public records under FOIA;
- iv. award Plaintiffs attorneys' fees and costs; and
- v. award such other relief the Court considers appropriate.

Dated: September 21, 2023

RESPECTFULLY SUBMITTED,

/s/ Tara Thompson

*Counsel for Plaintiff Government
Accountability Project*

Tara Thompson
Matthew Topic (motion for admission
forthcoming)
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