

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN'S )  
GLOBAL TRADE WATCH )  
 )  
Plaintiff, )  
 )  
V. )  
 )  
OFFICE OF THE UNITED )  
STATES TRADE REPRESENTATIVE )  
 )  
Defendant. )  
 )  
 )  
\_\_\_\_\_ )

C.A. No. 01-1654 (RWR)

**MOTION FOR JUDGMENT ON THE PLEADINGS**

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, to secure the release of certain agency records. Plaintiff's request for the records has been pending before the Office of the United States Trade Representative for three months. The Office of the United States Trade Representative has failed to produce any records, has failed to provide any determination of when it will produce these records, and has failed to provide any justification for this three-month delay. Accordingly, plaintiff seeks entry of judgment on the pleadings ordering the agency to respond to the request and produce the records forthwith.

**BACKGROUND**

Three months ago, plaintiff requested any and all records pertaining to the substantiation of a declaration made by Robert M. Zoellick, United States Trade Representative, to the Council of the Americas in Washington, D.C., on May 7, 2001 in a speech entitled "Free Trade and the Hemispheric Hope." Complaint ¶ 5. Zoellick's declaration stated that conservative estimates showed that "NAFTA and the Uruguay Round have resulted in higher incomes and lower prices for goods, with benefits amounting to \$1,300 to \$2,000 a year for a family of four." Robert B.

Zoellick, Free Trade and Hemispheric Hope, Prepared Remarks Before the Council of the Americas (May 7, 2001) (transcript available at [http://www.ustr.gov/speech-test/zoellick/zoellick\\_2.pdf](http://www.ustr.gov/speech-test/zoellick/zoellick_2.pdf)). Zoellick's controversial claim was not accompanied by any supporting analysis or documentation. Complaint ¶ 1.

Pursuant to the FOIA, by letter dated June 13, 2001, to the Office of the United States Trade Representative's Freedom of Information Office, Patrick Woodall, the Research Director of Public Citizen's Global Trade Watch, requested copies of the records, if any, that supported Zoellick's claim. Complaint ¶ 5. By letter dated June 26, 2001, the Office of the United States Trade Representative acknowledged receipt of the request filed by Public Citizen's Global Trade Watch. Complaint ¶ 6. The Office of the United States Trade Representative has not produced any records, nor has it provided any explanation or justification for the delay.

Defendant has filed its Answer to the Complaint, but the Answer does not cite any FOIA exception that would justify withholding the records that plaintiff requests. As explained further below, defendant's Answer to the Complaint concedes plaintiff's *prima facie* case, pleads no justification for the Office of the United States Trade Representative's failure to respond within the statutory time limits, and offers no basis for withholding the records that plaintiff seeks. Accordingly, the plaintiff now moves for judgment on the pleadings against the Office of the United States Trade Representative with respect to the June 13, 2001 request. The Court may order production of the records by entering judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

## ARGUMENT

### **THIS COURT SHOULD ORDER DEFENDANT TO DISCLOSE THE RECORDS BY ENTERING JUDGMENT ON THE PLEADINGS**

The Office of the United States Trade Representative's Answer establishes plaintiff's right to relief under FOIA and fails to set forth any defense for the failure to produce the records pertaining to Zoellick's May 7, 2001 declaration. Accordingly, the Court may order production of the records by entering judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

The FOIA provides a statutory right to examine an agency's records upon the submission of a request that reasonably describes the records. 5 U.S.C. § 552(a)(3). “An agency must disclose agency records to any person under §552(a), ‘unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).’” United States v. Tax Analysts, 492 U.S. 136, 150-51 (1989) (quoting Department of Justice v. Julian, 486 U.S. 1, 8 (1988)).

Moreover, upon receiving such a request, the statute provides that the agency “shall make the records promptly available,” 5 U.S.C. § 552(a)(3) (emphasis added), and shall “determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after receipt of any such request whether to comply with such a request and shall immediately notify the person making such request of such determination and the reasons therefor . . . .” Id. 552(a)(6)(A)(i) (emphasis added).

Defendant's Answer to the Complaint shows that defendant has expressly admitted or has not denied that plaintiff submitted a request for records over three months ago, but the Office of the United States Trade Representative has failed to release the documents or provide the determination required by the statute. Consequently, the essential allegations on which plaintiff bears the burden of proof are admitted. Specifically, defendant's Answer concedes plaintiff's averments that (1) the Court has jurisdiction over this action, Complaint ¶ 2, Answer ¶ 2; (2) the

Office of the United States Trade Representative is an agency subject to the FOIA, Complaint ¶ 4, Answer ¶ 4; (3) the Office of the United States Trade Representative received plaintiff's FOIA request dated June 13, 2001, Complaint ¶ 5, Answer ¶ 5; and (4) the Office of the United States Trade Representative has not produced the requested materials, Complaint ¶ 7, Answer ¶ 7. It is obvious that the twenty working days allowed for the Office of the United States Trade Representative to respond to the June 13, 2001 request has long since elapsed. Consequently, all the elements of plaintiff's *prima facie* case under the FOIA are admitted in the pleadings.

The burden of pleading and proving that the Office of the United States Trade Representative has a basis for delaying its response, or that exemptions apply, clearly falls on the Office of the United States Trade Representative. E.g. United States Dep't of Justice v. Ray, 502 U.S. 164, 174 (1991); John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). Defendant, however, has not alleged that any of the exemptions under the FOIA cover these records, nor has the Office of the United States Trade Representative set forth any allegations that would justify its delay in responding to the June 13, 2001 request.

The FOIA provides for an extension of the twenty-working day deadline of up to ten days if there are "unusual circumstances" and the agency provides written notice of how many additional days are necessary to process the request. 5 U.S.C. § 552(a)(6)(B)(i). The Office of the United States Trade Representative has not alleged that such "unusual circumstances" exist here. Moreover, even if the defendant alleged "unusual circumstances," the additional ten day period has long since expired.

The FOIA also provides that additional delay be permitted by a court "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." Id. § 552(a)(6)(C); see Open America v. Watergate Special

Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). If the Office of the United States Trade Representative requires an extension of more than ten days, it must provide a written notice to the requester and "shall provide the person an opportunity to arrange with the agency an alternative time frame for processing the request or modified request." 5 U.S.C. §552(a)(6)(B)(ii). The case law makes clear that the Office of the United States Trade Representative has the burden of proving "exceptional circumstances" and "due diligence." Morrow v. FBI, 2 F.3d 642, 644 (5th Cir. 1993) (FBI had "the burden of establishing that it exercised due diligence in not processing" request within statutory time limit); Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976) (agency has burden of establishing exceptional circumstances and due diligence under Open America).

The Office of the United States Trade Representative has identified no "exceptional circumstances" justifying its delay in processing this unexceptional request, see § 552(a)(6)(C). The June 13, 2001 request filed by Public Citizen's Global Trade Watch is not characterized by a level of generality or scope that would necessitate long processing time. Instead, the request identified particular documents used to substantiate a specific claim made by Zoellick regarding the monetary benefits accrued by American families of four due to the implementation of NAFTA. Complaint ¶¶ 1, 5.

The Office of the United States Trade Representative, moreover, has not pled or proven that it has exercised "due diligence" in responding to the request at issue. The Office of the United States Trade Representative also has not issued the written notice required by 5 U.S.C. § 552(a)(6)(B)(ii), providing the requester an opportunity to arrange a specific time limit for production of the requested materials. Because the defendant has not even alleged in the Answer that these defenses apply, there is no justification for the agency's failure to respond.

## **CONCLUSION**

Because the defendant's Answer to the Complaint concedes the essential elements of plaintiff's FOIA claim, and fails to plead any defenses that would justify the Office of the United States Trade Representative's failure to respond, the Court should enter judgment on the pleadings and order the Office of the United States Trade Representative to produce the requested records forthwith. A proposed order is attached.

Respectfully submitted,

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Attorney for Plaintiff

September 11, 2001

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 01-1654 (RWR)

**ORDER**

Upon consideration of plaintiff's Motion For Judgment On The Pleadings, defendant's response thereto, and the entire record in this case, it is this \_\_\_ day of \_\_\_\_\_, 2001.

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that defendant Office of the United States Trade Representative is directed to make available the records that are responsive to plaintiff's June 13, 2001 request within seven (7) days of the date of this Order.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Copies to:

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**CERTIFICATE OF SERVICE**

I, Michael E. Tankersley, hereby certify that on September 11, 2001, I caused copies of plaintiff's Motion For Judgment On The Pleadings to be by delivering an electronic copy to the CM/ECF system for the District Court for the District of Columbia.

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