

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

ERIC LIPTON and THE NEW YORK
TIMES COMPANY,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

No. 17-cv-02588 (JDB)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

David A. Schulz (Bar No. 459197)
Charles Sims, *pro hac vice*
John Langford, *pro hac vice*
Allison Douglis (law student intern)
Jeffrey Guo (law student intern)
Delbert Tran (law student intern)
MEDIA FREEDOM &
INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Tel: (203) 432-9387

Counsel for Plaintiffs

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 2

 A. FOIA’s Proactive Disclosure Requirements 2

 B. Public Access to Administrator Pruitt’s Calendar 4

 C. Plaintiffs’ Request That EPA Make Available Administrator Pruitt’s Detailed Calendar In Its Reading Room..... 7

ARGUMENT..... 9

 I. DEFENDANT IS OBLIGATED UNDER FOIA TO MAKE ADMINISTRATOR PRUITT’S DETAILED CALENDAR AVAILABLE IN AN ELECTRONIC READING ROOM 10

 A. The EPA Administrator’s Detailed Calendar Has Been Previously Released Pursuant To Section 552(a)(3)..... 11

 B. The EPA Administrator’s Detailed Calendar Has Been the Subject of More Than Three FOIA Requests 11

 C. The EPA Administrator’s Detailed Calendar Will Undeniably Be The Subject Of Subsequent Requests..... 12

 II. COURTS HAVE BROAD EQUITABLE AUTHORITY TO ENFORCE FOIA’S REQUIREMENTS 13

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

Campaign for Accountability v. U.S. Dep’t of Justice,
 No. 16-CV-1068 (KBJ), 2017 WL 4480828 (D.D.C. Oct. 6, 2017)..... 10

Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice (“CREW”),
 846 F.3d 1235 (D.C. Cir. 2017)*passim*

Consumer Fed’n of Am. v. Dep’t of Agric.,
 455 F.3d 283 (D.C. Cir. 2006) 14

F.E.R.C. v. Elec. Power Supply Ass’n,
 136 S. Ct. 760 (2016) 12

NLRB v. Robbins Tire & Rubber Co.,
 437 U.S. 214 (1978) 16

Payne Enters., Inc. v. United States,
 837 F.2d 486 (D.C. Cir. 1988) 16, 17

Tereshchuk v. Bureau of Prisons,
 67 F. Supp. 3d 441 (D.D.C. 2014) 10

Statutes

5 U.S.C. § 552*passim*

5 U.S.C. § 706 12

Electronic Freedom of Information Act Amendments of 1996,
 Pub. L. No. 104-231, 110 Stat. 3048 (1996)..... 3

FOIA Improvement Act of 2016,
 Pub. L. No. 114-185, 130 Stat. 538 (2016)..... 4

Other Authorities

S. Rep. No. 114-4 (2015) 3, 4

S. Rep. No. 89-813 (1965) 2

PRELIMINARY STATEMENT

Like any agency head, Environmental Protection Agency (EPA) Administrator Scott Pruitt has had a full schedule of meetings and appointments since he took office in February 2017. To understand EPA's policies and decisions on matters of great national importance—and to guard against potential conflicts of interest—the public must be informed about with whom and on what topics the Administrator meets. This case seeks to vindicate the public's right to Administrator Pruitt's detailed daily calendar, which the Freedom of Information Act (FOIA) obligates EPA to make available on an ongoing basis in its electronic FOIA reading room.

EPA has already disclosed a static snapshot of Administrator Pruitt's detailed calendar record for February 12, 2017, to June 20, 2017, pursuant to its obligations under FOIA. Yet EPA refuses to affirmatively make the detailed calendar available on an ongoing basis, despite receiving at least eight requests for the record. This is in direct contravention of FOIA's proactive disclosure requirements in section 552(a)(2)(D) of FOIA—a provision that was meant to streamline the very sort of inefficiency EPA's current practice perpetuates. As a result, journalists and other members of the public who wish to learn about the Administrator's meetings and other activities must continually re-submit FOIA requests, often waiting for months or longer to obtain the information to which they are entitled.¹

¹ This lawsuit also encompasses EPA's failure to disclose to The Times the retrospective portion of the EPA Administrator's calendar from April 1, 2017, to the date the agency searched for the record, in violation of 5 U.S.C. § 552(a)(3). Complaint, ECF No. 1. This motion is solely for partial summary judgment on EPA's obligation to prospectively disclose the calendar pursuant to 5 U.S.C. § 552(a)(2)(D), which is a discrete legal issue from EPA's failure to disclose the retrospective portion of the calendar. Pursuant to the Court's March 9, 2018, Scheduling Order, ECF No. 19, the parties will separately meet and confer regarding Defendant's production of the retrospective records not later than April 20, 2018, and, if any issues remain, Defendant shall move for summary judgment regarding those records by not later than May 8, 2018.

BACKGROUND

A. FOIA's Proactive Disclosure Requirements

Congress enacted FOIA in 1966 “to establish a general philosophy of full agency disclosure” in order to create “an informed electorate . . . vital to the proper operation of a democracy.” *See* S. Rep. No. 89-813, at 3 (1965). To effectuate that goal, Congress created three disclosure requirements under FOIA.

First, agencies must publish an enumerated set of information in the Federal Register, including points of contact for the public, rules of procedure, and substantive rules of general applicability, as well as the general methods by which each agency accomplishes its functions. *See* 5 U.S.C. § 552(a)(1).

Second, agencies must make certain records available for public inspection in an electronic format, including final opinions, orders, statements of policy and interpretation, administrative staff manuals, other records containing administrative guidance, and frequently requested records. *See* 5 U.S.C. § 552(a)(2). This is referred to as the “reading room” provision because it requires agencies to make records available in a centralized, consolidated location; every agency must have an electronic reading room that houses records that must be proactively disclosed under section 552(a)(2).

Third, agencies must disclose records upon any request that reasonably describes the records requested and is made in accordance with any published rules stating the time, place, fees, and procedures to be followed. *See* 5 U.S.C. § 552(a)(3).

In 1996, Congress amended FOIA to require agencies to disclose in their electronic reading rooms “copies of all records, regardless of form or format, which have been released to any person under [section 552(a)(3)] and which, because of the nature of their subject matter, the

agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.” Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, sec. 4, § 552(a)(2)(D), 110 Stat. 3048, 3049 (1996). Despite the 1996 amendments mandating proactive disclosure of these records, agencies did not uniformly respond to requests in a manner that promoted FOIA’s goals of access and accountability. *See* S. Rep. No. 114-4, at 2-3 (2015).

Although FOIA’s request mechanism was meant to give the public broad access to information about its government and the 1996 amendments were meant to streamline public access, government agencies have long failed to fully realize the statute’s mandate. Since then, the number of requests have skyrocketed—in Fiscal Year 2016 all federal government agencies received 788,769 requests, a 41% increase since 2009, Plaintiffs’ Statement of Material Facts as to Which There Is No Genuine Issue (“SMF”) ¶¶ 4-5. So too have government backlogs and delays. Despite FOIA’s requirement that requests receive a response in 20 days, the average processing time for “complex” FOIA requests—requests that seek a large volume of records or that require additional steps to process—was 128 days in Fiscal Year 2016. SMF ¶ 6. At the end of Fiscal Year 2016, there were 115,080 backlogged requests in total across all agencies—*i.e.*, requests pending at an agency beyond the time limit imposed by FOIA. SMF ¶ 7. For example, EPA took an average of 152 days to process the more than 2,000 complex FOIA requests it had received in Fiscal Year 2016, SMF ¶ 9, a 100% increase in the time it took EPA to process the same category of requests in Fiscal Year 2015. SMF ¶ 8. In total, EPA had 1,284 backlogged requests at the end of Fiscal Year 2016. SMF ¶ 12.

Citing “the growing backlog” in requests, Congress passed the FOIA Improvement Act of 2016 “to ensure that FOIA remains the nation’s premier transparency law.” S. Rep. No. 114-4,

at 2 (2015); *see* Pub. L. No. 114-185, 130 Stat. 538 (2016). The amendments codify the Obama Administration’s proactive disclosure policy established in 2009, S. Rep. No. 114-4, at 4, requiring agencies to “readily and systematically post information online in advance of any public request” since “[p]roviding more information online reduces the need for individualized requests and may help reduce existing backlogs” faced by government agencies. *See* SMF ¶ 2. Specifically, the Act once again amended the reading-room provision to make clear that records that have been released and for which there have been three or more requests for either the same records or substantially similar records qualify as “frequently requested” records and must be made available in agencies’ electronic reading rooms. *See* 5 U.S.C. § 552(a)(2)(D). By adopting this proactive disclosure policy into law, Congress recognized the importance of expeditious and regular access to certain types of government records that are routinely requested and produced. *See* S. Rep. No. 114-4, at 7 (explaining that the amendments clarify the definition and require disclosure of “frequently requested” records).

In sum, agencies today are obligated to proactively disclose and place in the agency’s reading room two separate but related categories of records. First, they must proactively release to the public copies of all records “that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D)(ii)(I). Second, they must proactively release all records “that have been requested 3 or more times.” 5 U.S.C. § 552(a)(2)(D)(ii)(II).

B. Public Access to Administrator Pruitt’s Calendar

The public has long sought access to agency heads’ calendars, prompting the EPA to disclose past administrators’ calendars proactively under previous administrations. Answer ¶ 12. Under the Reagan administration, for instance, EPA Administrator William D. Ruckelshaus

directed that a copy of his appointment calendar be “made available to the public” at the end of each week in order to “make the public fully aware of [his] contacts with interested persons” to ensure the “openness and integrity which alone can ensure public trust in the Agency.” SMF ¶ 13 & Declaration of John Langford (“Langford Decl.”) Ex. K. Ruckelshaus has recently criticized the current EPA for not maintaining this tradition of transparency, including by not releasing a full calendar that included a record of the topics discussed. SMF ¶ 14 & Langford Decl. Ex. L. Obama EPA Administrator Lisa Jackson continued this policy of openness, directing that “a working copy of [her] appointment calendar, showing meetings with members of the public, be provided to the EPA Office of Public Affairs, where it will be available to the public each day on the EPA Web site.” SMF ¶ 15.

When agency heads’ calendars have not been made available, they are the subject of frequent FOIA requests. Current EPA Administrator Pruitt’s daily schedule, in particular, has drawn specific attention. Since Administrator Pruitt began his tenure at EPA in February of 2017, there have been at least seven other FOIA requests—in addition to the request submitted by The Times—for his detailed calendar under FOIA’s request provision beyond plaintiffs’ request here. SMF ¶ 37.

For example, a request submitted by the Environmental Integrity Project sought Administrator Pruitt’s calendar in a form that would reflect his “schedule of appointments, the persons with whom the Administrator met, their organizational affiliations, and the topics discussed.” *Id.* Another request submitted by *POLITICO* sought a schedule or other documents reflecting Administrator Pruitt’s “activities and records of in-person, telephonic, or electronic meetings,” including “who participated in those meetings and all topics discussed.” *Id.* A third request, submitted by American Oversight, sought Administrator Pruitt’s calendar produced in

“memo” form to include “all invitees, any notes, and all attachments.” *Id.* A fourth request, submitted by Sierra Club, requested “[a]ll calendars, whether electronic or in paper format, of Mr. Pruitt.” *Id.* Others have similarly requested a calendar record reflecting the time and location of Administrator Pruitt’s meetings; the names and affiliations of those with whom Administrator Pruitt has met; any other EPA employees present at those meetings; the topics or subject lines of the meetings; and any other notes or attachments affixed to the calendar entries concerning those meetings. *Id.*

In early October 2017, in response to litigation over the American Oversight request, EPA disclosed a detailed version of Administrator Pruitt’s calendar for the dates of February 12, 2017, to May 18, 2017. SMF ¶¶ 17, 37. The released record reflects the names and institutional affiliations of those who met with the Administrator; a subject line for each meeting; any EPA staff scheduled to attend each meeting; a timeframe for each meeting; and the location of each meeting. SMF ¶ 17 & Langford Decl. Ex. U. These disclosures reveal, among other things, the interest groups with whom Administrator Pruitt consulted as he enacted changes to EPA policy benefiting them. Langford Decl. Ex. U.

In mid-March 2018, in response to litigation over the Sierra Club request, EPA disclosed a detailed version of Administrator Pruitt’s calendar for the dates of May 19, 2017, to June 20, 2017. SMF ¶¶ 18, 37. The released record reflects the same categories of information included in the calendar released to American Oversight. SMF ¶ 18 & Langford Decl. Ex. V.

Notably, EPA now publishes a public version of the Administrator’s schedule on its website, SMF ¶ 19—but in a format that provides significantly less information for the same time period than the detailed version of Administrator Pruitt’s calendar released to American Oversight and Sierra Club and already repeatedly requested under FOIA. Unlike the calendar

released to American Oversight and Sierra Club, it does not provide the names of those meeting with the Administrator, SMF ¶ 21, and occasionally provides institutional affiliations that do not accurately reflect the affiliation of all those meeting with Administrator Pruitt at a given time, SMF ¶ 22. The public calendar does not provide subject lines or any notes about the topics to be covered at each meeting. SMF ¶ 23. It further omits many internal meetings and briefings, start and end times for scheduled meetings and events, and the other EPA staff scheduled to attend each meeting. SMF ¶¶ 24-27. Moreover, the public calendar is updated weeks after events and meetings occur. *See* SMF ¶ 20. In short, the currently available public calendar EPA provides is considerably less detailed than the calendar record provided in response to American Oversight's and Sierra Club's FOIA requests.

C. Plaintiffs' Request That EPA Make Available Administrator Pruitt's Detailed Calendar In Its Reading Room

Plaintiff Eric Lipton is an investigative reporter in the New York Times' D.C. Bureau who reports on federal regulatory policy in the United States, how federal agencies operate, and how the operation of those agencies impacts the American public. Declaration of Eric Lipton ("Lipton Decl.") ¶¶ 1-2. Lipton won a Pulitzer Prize in 2015 for a series of news articles detailing corporate lobbying of state attorneys general. SMF ¶ 38-39.

As part of his reporting, Lipton has extensively covered the Trump Administration, including corporate influence and conflicts of interest within the EPA. SMF ¶ 28-33. For instance, in October 2017, Lipton reported that, although Administrator Pruitt has met with very few representatives of environmental or health and safety interests, he has met with a large array of lobbyists and top executives affiliated with the automobile, oil coal, and chemical industries, including several of whom Administrator Pruitt had prior connections to through his position as Oklahoma's Attorney General. SMF ¶ 29-30. Lipton's reporting further revealed that

Administrator Pruitt has met with representatives of those same industries around the country, often as part of trips taken at taxpayer expense. SMF ¶ 31.

To further their ongoing reporting, plaintiffs The New York Times Company and Lipton submitted a FOIA request to EPA on July 12, 2017, requesting the release of Administrator Pruitt's schedule pursuant to FOIA's general request provision, 5 U.S.C. § 552(a)(3). SMF ¶ 34 & Langford Decl. Ex. A. At that time, plaintiffs also requested a fee waiver and expedited processing, demonstrating a compelling need for the record. SMF ¶ 34. On July 13, 2017, EPA granted plaintiffs' request for expedited processing and concluded that a fee waiver was unnecessary because the request would not meet the minimum billable amount. SMF ¶ 35 & Langford Decl. Ex. B.

On October 19, 2017, following EPA's release of the detailed version of Administrator Pruitt's calendar to American Oversight, *see supra* page 6, plaintiffs updated their original request to ask that Administrator Pruitt's detailed calendar be released and regularly updated pursuant to FOIA's "reading-room" provision, 5 U.S.C. § 552(a)(2)(D). The revised request, in full, sought:

- a. Administrator Pruitt's daily schedule from January 20, 2017 through the date of the search pursuant to 5 U.S.C. § 552(a)(3), including any calendars maintained on behalf of Administrator Pruitt, detailing daily events or meetings Administrator Pruitt attended or was scheduled to attend; who was expected to be at the meetings or events; which staff were in charge of organizing the meetings or events; and any notes attached to the scheduled meetings or events; and
- b. if the EPA had ever released the Administrator's schedule under § 552(a)(3), that Administrator Pruitt's daily schedule, as described in paragraph A of the request, be made available for public inspection in an electronic format and regularly updated throughout his time as a federal employee pursuant to 5 U.S.C. § 552(a)(2)(D).

SMF ¶ 36 & Langford Decl. Ex. C. Plaintiffs again sought expedited processing and a fee waiver. EPA's response to the revised request was due twenty business days later, on November 17, 2017, but EPA failed to respond to, or even acknowledge receipt of, plaintiffs' revised request. Following EPA's constructive denial of plaintiffs' reading room request, plaintiffs filed a complaint with this Court on December 4, 2017.

Plaintiffs now submit this partial summary judgment motion seeking declaratory relief and injunctive relief to compel EPA to comply with the unambiguous statutory mandate set forth in FOIA's reading-room provision.

ARGUMENT

EPA's failure to make Administrator Pruitt's detailed calendar available in the agency's electronic reading room is a violation of FOIA's reading room provision as amended in 2016. EPA has already released the detailed calendar in response to American Oversight's FOIA request. This record is of significant public interest and will almost certainly be the subject of repeated future requests, and indeed has already been the subject of at least seven FOIA requests. EPA therefore has an affirmative obligation to make the detailed calendar available in its reading room.

As the D.C. Circuit has made clear, this Court has broad equitable authority to compel EPA to comply with its obligations under FOIA, including the reading-room provision. As such, this Court should order EPA to produce that record on an ongoing basis to plaintiffs, and it may and should make clear that the EPA Administrator's detailed calendar is subject to the new reading room provision.

I. DEFENDANT IS OBLIGATED UNDER FOIA TO MAKE ADMINISTRATOR PRUITT'S DETAILED CALENDAR AVAILABLE IN AN ELECTRONIC READING ROOM

The EPA Administrator's detailed calendar must be proactively disclosed in EPA's electronic reading room on an ongoing basis. FOIA's reading-room provision unambiguously mandates the electronic public disclosure of records that have been released pursuant to 5 U.S.C. § 552(a)(3) and either that the agency determines have become or are likely to be subject to subsequent requests for substantially the same record, or that have been the subject of at least three requests. 5 U.S.C. § 552(a)(2)(D).

Compliance with the reading-room provision in section 552(a)(2)(D) is not optional. The reading-room provision imposes an "affirmative disclosure obligation" on agencies to release records that fall under the provision. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice* ("CREW"), 846 F.3d 1235, 1240 (D.C. Cir. 2017). This obligation "require[s] agencies to act *proactively* with respect to the publication of certain types of records and information; *i.e.*, the agency must disclose the records without waiting for a request." *Campaign for Accountability v. U.S. Dep't of Justice*, No. 16-CV-1068 (KBJ), 2017 WL 4480828, at *2 (D.D.C. Oct. 6, 2017); *see Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 456 (D.D.C. 2014) ("FOIA requires certain agency determinations *not merely to be provided upon written request, but to be made available continuously* in the agency's reading room." (emphases added)).

Administrator Pruitt's detailed calendar has already been released in response to section 552(a)(3) FOIA requests by American Oversight and Sierra Club. EPA is therefore obligated to make it proactively available in its electronic reading room, both because the record has already

been requested three times and because there are patently likely to be subsequent requests for substantially the same record.

A. The EPA Administrator’s Detailed Calendar Has Been Previously Released Pursuant To Section 552(a)(3)

The Administrator’s detailed daily calendar has already been released pursuant to 5 U.S.C. § 552(a)(3), as required by section 552(a)(2)(D)(i). As detailed *supra* page 6, EPA released 316 pages of Administrator Pruitt’s detailed calendar to the nonprofit group American Oversight in early October 2017, after American Oversight was forced to sue EPA when it received no response to its request for Administrator Pruitt’s calendar. SMF ¶ 17 & Langford Decl. Ex. U. This record included specific information about with whom and when the Administrator met, on what topics, and with which additional EPA staff. *See id.* EPA released 103 additional pages of Administrator Pruitt’s detailed calendar to Sierra Club this month, after Sierra Club also initiated a lawsuit against EPA for failure to comply with its FOIA obligations. SMF ¶ 18 & Langford Decl. Ex. V. In addition, EPA acknowledges that it has released the Administrator’s Calendar pursuant to FOIA under previous administrations. Answer ¶ 12, ECF No. 14.

B. The EPA Administrator’s Detailed Calendar Has Been the Subject of More Than Three FOIA Requests

Because the EPA Administrator’s detailed calendar has been requested at least three times under FOIA, EPA is required to proactively release the record in its electronic reading room pursuant to section 552(a)(2)(D)(ii)(II)’s rule-of-three provision, as introduced in the 2016 FOIA amendments. Here, in addition to plaintiffs’ request, at least seven requests have been submitted for a detailed version of Administrator Pruitt’s schedule that reflects information including with whom he meets, when and where he meets, the topics of his meetings, and other

EPA staff in attendance. SMF ¶ 37. This is a clear-cut case of a record subject to the new rule-of-three provision, and EPA has violated its obligations under FOIA by refusing to affirmatively disclose the record in its reading room.

C. The EPA Administrator’s Detailed Calendar Will Undeniably Be The Subject Of Subsequent Requests

In addition, EPA is required to proactively release the Administrator’s detailed calendar because it is likely to become the subject of subsequent requests. In addition to posting those records which have been released once and the subject of three or more requests, agencies must also post copies of “all records” which have been released once and which, “because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D)(ii)(I). Although agencies exercise discretion in determining which records qualify under this provision, an agency’s determination that records are not likely to be requested must not be arbitrary or capricious. *Cf.* 5 U.S.C. § 706(2)(A). In other words, there must, at a minimum, be “a rational connection between the facts found and the choice made” in determining that records are not likely to be the subject of future requests. *Cf. F.E.R.C. v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016).

Given the history of past requests for the EPA Administrator’s detailed calendar and the public interest in accessing the record in the future, any determination that the detailed calendar is not likely to be subject to subsequent requests is unreasonable and irrational. As discussed above, *see supra* pages 4-6, EPA administrators’ calendars are the subject of persistent public interest and FOIA requests. Administrator Pruitt’s detailed calendar has been routinely and repeatedly requested by a variety of individuals and organizations. SMF ¶ 37. There will certainly be additional requests, as members of the press and public, including plaintiffs,

continue to seek up-to-date records reflecting the Administrator's meeting and activities in office. *See* Lipton Decl. ¶¶ 6-8. Accordingly, even if proactive publication of the Administrator's detailed calendar were not required by the FOIA reading-room's rule-of-three, EPA is nevertheless obligated to release the detailed calendar pursuant to section 552(a)(2)(D)(ii)(I).

* * * * *

In sum, EPA is currently in violation of its statutory obligations under section 552(a)(2)(D) and will continue to be in violation of those obligations for as long as it does not release and continually update the EPA Administrator's detailed calendar in its electronic reading room.

II. COURTS HAVE BROAD EQUITABLE AUTHORITY TO ENFORCE FOIA'S REQUIREMENTS

The D.C. Circuit has already explained that the appropriate remedy in these circumstances is a prospective injunction imposing an affirmative duty on EPA to produce Administrator Pruitt's detailed calendar to plaintiffs. In *CREW*, the D.C. Circuit explained that FOIA vests courts with broad equitable discretion. *CREW*, 846 F.3d at 1242 (explaining that the D.C. Circuit had "little trouble concluding that a district court possesses authority to grant . . . a prospective injunction with an affirmative duty to disclose"); *see also* 5 U.S.C. § 552(a)(4)(B) (establishing injunctive authority for district courts to enforce FOIA). *CREW* acknowledged that "courts' remedial authority under [FOIA] is not boundless." *CREW*, 846 F.3d at 1242.

[A] court has no authority under FOIA to issue an injunction mandating that an agency make available for *public inspection* documents subject to the reading-room provision Authorizing a court to order an agency to make documents available for *public inspection* would reach beyond section 552(a)(4)(B)'s focus on relieving the injury suffered by the individual complainant to

remedy an injury suffered by the general public—a result our precedent forecloses.

Id. at 1243 (internal quotation marks omitted) (emphases added). But “nothing . . . prevents a district court from, consistent with section 552(a)(4)(B), ordering an agency to provide *to the plaintiff* documents covered by the reading-room provision.” *Id.* (emphasis in original). In sum, a plaintiff “may, in a FOIA suit to enforce section 552(a)(2), seek an injunction that would (1) apply prospectively, and would (2) impose an affirmative obligation to disclose upon [an agency], but that would (3) require disclosure of documents and indices only to [the plaintiff], not disclosure to the public.” *Id.* at 1244.

In *CREW*, the D.C. Circuit explained that a prospective injunction under FOIA’s reading room provision is appropriate where a requestor has an “undeniable right to the sought-after information” and there is a likelihood that an agency will nevertheless refuse to produce the information; and, similarly, where an agency’s “policy or practice” will “impair [a] party’s lawful access to information *in the future*.” *Id.* at 1242 (internal quotation marks omitted) (emphasis in original).

Here, plaintiffs are plainly entitled to the EPA Administrator’s detailed calendar. The EPA Administrator’s detailed calendar is an agency record subject to release under 5 U.S.C. § 552(a)(4)(B). *See Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 288-93 (D.C. Cir. 2006) (holding that where agency administrators’ calendars were created by agency employees, regularly updated on the agency’s computer system, and used to conduct agency business, they constituted agency records subject to FOIA). Nor is the balance of the information in the calendar subject to redaction, as evidenced by EPA’s repeated disclosure of the Administrator’s detailed calendar. SMF ¶¶ 17-18.

In addition, EPA's refusal to make the Administrator's detailed calendar available on a rolling basis is impairing, and will impair in the future, the public's and plaintiffs' lawful access to the calendar. Despite the public's right to the detailed calendars, EPA has repeatedly neglected its duties under FOIA, failing to produce the records in a timely manner, or at all. Administrator Pruitt's detailed calendar, for example, has been requested by a number of parties across a span of many months, yet EPA has rarely satisfied these requests in compliance with FOIA's statutory deadlines. Instead, EPA has forced parties, including plaintiffs here, to wait months and to incur unnecessary and wasteful expense litigating their right to receive the full calendar. *See also* Complaint, *Sierra Club v. EPA*, No. 17-1906 (D.D.C. Sept. 18, 2017) (filing a complaint based on EPA's failure to provide the calendar record approximately three months after the request was submitted); Complaint, *Am. Oversight v. EPA*, No. 17-1261 (D.D.C. June 27, 2017) (filing a complaint based on EPA's failure to provide the calendar record over two months after the FOIA request was submitted).

Nor has EPA remedied the problem with what it has released as the public version of the Administrator's calendar—that calendar omits critical information to which the public is entitled, and which members of the public have repeatedly requested and already received in response to a previous FOIA request. This information includes the names of those meeting with Administrator Pruitt and the subjects, times, and locations of those meetings. SMF ¶¶ 21-27. To obtain that information, the public must regularly re-submit FOIA requests to vindicate its right to the more detailed record that EPA has already provided to American Oversight. *See* Lipton Decl. ¶ 8.

This is the sort of baroque bureaucratic inefficiency Congress intended to streamline in the FOIA Improvement Act of 2016. The timely, affirmative disclosure of such a record is

essential to plaintiffs' rights under FOIA. Otherwise, plaintiffs would become the recipients of "stale information" that "is of little value yet more costly than fresh information ought to be." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Congress expressly enacted the reading-room provision to impose "affirmative obligations to make information available to the public." *CREW*, 846 F.3d 1240 (emphasis added). Indeed, the EPA Administrator's detail-laden calendar is precisely the kind of record that motivated Congress to enact the new "rule-of-three" reading-room provision, as it is clearly a record of significant public interest. *See supra* pages 3-4.

Regular and expeditious access to the Administrator's detailed calendar is particularly important. When the public knows which parties have the ear of an agency head, for how long, and what interests they represent, the public is better equipped to ensure that agencies remain accountable and free from undue influence. *See* Langford Decl. Ex. D (noting that access to records about Government officials, including "their meetings," will allow the American public to "better judge, weigh, analyze, and scrutinize the activities of public officials, making sure at every turn that Government is being operated by, of, and for the people"); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). When the public does not have access to the record detailing how Administrator Pruitt is receiving input on agency decisions, this threatens the goals that have underpinned FOIA since its inception.

Where, as here, an agency continues to contravene the rights and requirements established by Congress, this Court should exercise its equitable power to enforce Congress' law. As the D.C. Circuit recognized in *CREW*, this Court has the power to order an agency to produce

records on a prospective basis in order to prevent a “return to its illicit practice of delay.” 846 F.3d at 1242 (quoting *Payne Enters., Inc.*, 837 F.2d at 495). In light of EPA’s repeated practice of unlawfully delaying and withholding its Administrator’s detailed calendars—a record that the public has a right and need to view in a timely manner—an injunction is necessary.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ motion for summary judgment and enter an order (a) entering declaratory relief and clarifying that EPA is in violation of FOIA’s reading room provision; and (b) issuing a permanent injunction requiring EPA to produce to Lipton and The New York Times an updated version of the EPA Administrator’s detailed calendar once a month.

Dated: March 20, 2018

Respectfully Submitted,

/s/ John Langford

John Langford, *pro hac vice*
David A. Schulz (Bar No. 459197)
Charles Sims, *pro hac vice*
Allison Douglis (law student intern)
Jeffrey Guo (law student intern)
Delbert Tran (law student intern)
MEDIA FREEDOM &
INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School²
P.O. Box 208215
New Haven, CT 06520
Tel: (203) 436-5831
Fax: (203) 432-3034
Email: john.langford@ylsclinics.org

² This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School but does not purport to present the school’s institutional views, if any.

CERTIFICATE OF SERVICE

I certify that on March 20, 2018, I electronically filed the foregoing memorandum using the Court's CM/ECF system.

/s/ John Langford

John Langford, *pro hac vice*

MEDIA FREEDOM &

INFORMATION ACCESS CLINIC

ABRAMS INSTITUTE

Yale Law School

P.O. Box 208215

New Haven, CT 06520

Tel: (203) 432-9387

Attorney for Plaintiffs