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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 TRI-VALLEY CARES,

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF
14 ENERGY and NATIONAL NUCLEAR
15 SECURITY ADMINISTRATION, an
16 agency of the U.S. Department of Energy,

17 Defendants.

) Case No.

) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**

19 **I. INTRODUCTION**

20 1. Plaintiff Tri-Valley CAREs (Communities Against a Radioactive Environment)
21 (hereinafter "TVC") brings this action to redress violations of the Freedom of Information Act
22 (hereinafter "FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act (hereinafter
23 "APA"), 5 U.S.C. §§ 701-706. Congress enacted FOIA to provide members of the public the
24 right of access to federal agency records, except for those records (or portions thereof) that are
25 protected from disclosure by exemptions and exclusions. Plaintiff challenges the failure of
26 defendants United States Department of Energy (hereinafter "DOE") and National Nuclear
27 Security Administration (hereinafter "NNSA"), to provide all responsive, non-exempt, and non-
28 excluded records (or portions thereof) requested by plaintiff in FOIA requests made to

1 defendants seeking agency records pertaining to DOE and NNSA operations and activities.
2 Defendants have failed to respond to FOIA requests in a timely manner, as provided by the
3 statute, and this conduct amounts to a constructive denial of these requests. This repeated
4 constructive denial of plaintiff's FOIA requests by greatly exceeding the statutory time
5 requirements exhibits defendants' pattern and practice of violating FOIA.

6 **II. JURISDICTION, VENUE, AND BASIS FOR RELIEF**

7 2. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B)
8 (FOIA citizen suit provision) and 28 U.S.C. § 1331 (federal question) because this action arises
9 under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

10 3. Venue in this Court is proper because plaintiff's principal place of business is in this
11 district. *See* 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e).

12 4. Declaratory relief is appropriate under 28 U.S.C. § 2201 and 5 U.S.C. § 552(a)(4)(F).

13 5. Injunctive relief is appropriate pursuant to 28 U.S.C. § 2202.

14 **III. PARTIES**

15 6. Plaintiff TVC is a non-profit public benefit corporation organized under the laws of
16 the State of California. TVC's offices are located at 2582 Old First Street in Livermore,
17 California. Tri-Valley CAREs is a community-based environmental organization that was
18 founded in 1983 by concerned neighbors living around Lawrence Livermore National
19 Laboratory (hereinafter "LLNL"), a DOE NNSA site where research, design, and development
20 of nuclear weapons is conducted. TVC monitors nuclear weapons and environmental cleanup
21 activities throughout the national nuclear weapons complex, with a special focus on LLNL and
22 the surrounding communities. TVC's overarching mission is to promote peace, justice, and a
23 healthy environment. TVC holds two technical assistance grants from the U.S. Environmental
24 Protection Agency (hereinafter "EPA") to monitor environmental cleanup at LLNL's main site
25 and its Site 300 Experimental Test Site, both of which are on the federal "Superfund" list of the
26 most contaminated sites in the nation. TVC publishes and distributes a free newsletter, as well
27 as fliers, fact sheets, web content and technical reports; information derived from FOIA requests
28 is regularly used in the preparation of these materials. In addition, TVC maintains a community

1 “reading room” at its office in Livermore and a website at www.trivalleycares.org as part of its
2 commitment to public outreach and education. A major, founding goal of TVC is to investigate
3 and achieve remedies for the public health and environmental threats posed by LLNL. Tri-
4 Valley CAREs currently has approximately 5,600 members, the majority of whom reside or
5 work in the vicinity of LLNL. TVC brings this action on its own behalf and on behalf of its
6 adversely affected members.

7 7. Plaintiff and its members suffer an informational harm by being denied access to the
8 requested records, which are crucial to the ability of plaintiff and its members to carry out
9 educational, advocacy, and oversight activities regarding DOE, NNSA and the nuclear weapons
10 complex. Plaintiff’s injuries can be redressed by this suit and granting of the remedies
11 requested herein.

12 8. Defendant United States Department of Energy is a federal agency whose
13 overarching mission is to advance the national, economic, and energy security of the nation; to
14 promote scientific and technological innovation in support of that mission; and to ensure the
15 environmental cleanup of the national nuclear weapons complex. DOE is in possession and
16 control of the records sought by plaintiff. As an agency of the executive branch of the United
17 States government, DOE is subject to FOIA pursuant to 5 U.S.C. § 552(f).

18 9. Defendant United States National Nuclear Security Administration, a separately
19 organized agency within the U.S. Department of Energy, is responsible for the management and
20 security of the nation’s nuclear weapons, nuclear nonproliferation, and naval reactor programs.
21 NNSA is in possession and control of the records sought by plaintiff. As an agency of the
22 executive branch of the United States government, NNSA is subject to FOIA pursuant to 5
23 U.S.C. § 552(f).

24 **IV. LEGAL FRAMEWORK OF FOIA RELEVANT TO ALL CLAIMS**

25 10. FOIA requires, *inter alia*, that all federal agencies must promptly provide copies of
26 all non-exempt and non-excluded agency records (or portions thereof) to those persons who
27 make requests for records that reasonably describes such records and are made in conformance
28 with applicable rules and procedures. *See* 5 U.S.C. § 552(a)(3)(A).

1 11. FOIA requires a federal agency to make a final determination on all FOIA requests
2 that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays)
3 after the receipt of such request, unless the agency provides notice to the requester of “unusual
4 circumstances” meriting additional time for responding to a FOIA request. 5 U.S.C. §
5 552(a)(6)(A)-(B).

6 12. FOIA also requires a federal agency to make a final determination on FOIA
7 administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and
8 legal public holidays) after the receipt of such appeal, unless the agency provides notice to the
9 requester of “unusual circumstances” meriting additional time for responding to a FOIA
10 request. 5 U.S.C. § 552(a)(6)(A)-(B).

11 13. FOIA expressly provides that persons shall be deemed to have exhausted their
12 administrative remedies if the agency fails to comply with the applicable time limitations
13 provided by 5 U.S.C. § 552(a)(6)(A)(i)-(ii). 5 U.S.C. § 552(a)(6)(C).

14 14. FOIA provides that any person who has not been provided records requested
15 pursuant to FOIA, after exhausting their administrative remedies, may seek legal redress from
16 an appropriate federal district court to “enjoin the agency from withholding agency records and
17 to order the production of any agency records improperly withheld from the complainant.” 5
18 U.S.C. § 552(a)(4)(B).

19 15. Under FOIA, a federal agency has the burden to sustain its actions. 5 U.S.C. §
20 552(a)(4)(B).

21 16. Pursuant to FOIA, this Court may assess attorney fees and litigation costs against
22 the United States if plaintiff substantially prevails in this action. 5 U.S.C. § 552(a)(4)(E).

23 **V. FACTUAL ALLEGATIONS FOR PLAINTIFF’S FOIA REQUESTS**

24 **Plaintiff’s May 30, 2007 FOIA Request to NSNA: FOIA-07-153-P**

25 17. On or about May 30, 2007, plaintiff, by and through its FOIA Officer, Michael
26 Stanker, sent a FOIA request to DOE seeking records created or modified since November 29,
27 2005 relating to the shipments of radioactive plutonium, whether to or from LLNL.

28 18. On or about June 8, 2007, Shirley L. Peterson, Information Programs Specialist at

1 NNSA sent a response to plaintiff acknowledging receipt of the May 30, 2007 request. Ms.
2 Peterson's correspondence provided the control number for the request: FOIA 07-153-P.

3 19. On or about July 5, 2007, Ms. Peterson emailed Mr. Stanker stating that NNSA had
4 been notified by its Livermore Site Office (LSO) that the scope of plaintiff's request was too
5 broad and that LSO had proposed language as a way to narrow the request.

6 20. On or about July 10, 2007, Mr. Stanker emailed Ms. Peterson back stating that
7 plaintiff was reviewing the request to narrow the language of the request.

8 21. On or about July 17, 2007, Mr. Stanker emailed Ms. Peterson stating that the
9 proposed language was too narrow and that plaintiff would like a search conducted using the
10 proposed language with some additions.

11 22. On or about July 18, 2007, Ms. Peterson emailed Mr. Stanker compromising on the
12 scope of plaintiff's request.

13 23. On or about August 29, 2007, Ms. Peterson emailed Loulena Miles, Staff Attorney
14 for plaintiff, asking whether plaintiff was still interested in receiving the information.

15 24. On or about September 7, 2007, Ms. Miles emailed Ms. Peterson stating that
16 plaintiff was still very much interested in receiving the information.

17 25. On or about December 3, 2007, Ms. Miles sent a *Notice of Statutory Violation/Offer*
18 *to Assist Letter* to NNSA stating that defendants were in violation of FOIA and offering to assist
19 in the release of the requested documents.

20 26. On or about October 13, 2009, plaintiff, by and through its legal intern, Iti Talwar,
21 sent DOE an appeal letter stating that the lack of response was being construed as a constructive
22 denial of the FOIA request and that plaintiff was hereby appealing NNSA's failure to make a
23 timely determination regarding the group's FOIA request.

24 27. On or about October 27, 2009, Poli A. Marmolejos, Director at the Office of
25 Hearings and Appeal (OHA) sent plaintiff a letter stating that the appeal had been dismissed.
26 The letter stated that OHA contacted NNSA and were informed that a large amount of
27 information had been identified as being responsive to plaintiff's request and that this
28 information was undergoing classification review at the NNSA's Livermore Site Office. The

1 letter also indicated that there was a memorandum of October 27, 2009 telephone conversation
2 between Steven Fine, OHA Attorney-Examiner and Shirley Peterson, NNSA. However, no
3 memorandum was attached to the letter.

4 28. On or about November 2, 2009, Ms. Talwar sent NNSA a letter regarding an
5 approximate date of when to expect the responsive documents.

6 29. On or about November 19, 2009, plaintiff received an e-mail from NNSA stating
7 that Ms. Peterson again contacted LSO and they have given her an estimated target date of
8 having the records to NNSA's office the week of November 23, 2009.

9 30. On or about March 2, 2010, Ms. Talwar sent a *Continuing Notice of Statutory*
10 *Violation/Offer to Assist Letter*.

11 31. On or about March 23, 2010, Karen Laney, Information Programs Specialist at
12 NNSA, sent plaintiff an email stating that LLNL located potentially responsive documents and
13 that those documents had been reviewed in LLNL's classification office. The documents were
14 sent that day to the DOE Office of Classification for the final review for classification and/or
15 declassification of information under Executive Order 12958.

16 32. As of the filing of this complaint, no documents or additional correspondence from
17 defendants have been received by plaintiff.

18 **Plaintiff's October 11, 2007 FOIA Request to NSNA: FOIA-07-273-P**

19 33. On or about October 11, 2007, plaintiff, by and through its Staff Attorney, Loulena
20 Miles, sent a FOIA request to DOE NNSA seeking records that disclose or refer to the amounts
21 of radioactive tritium, uranium, or toxic beryllium used in programs at the Site 300
22 Experimental Test Facility, from the years 1980-present. Activities at Site 300 include open air
23 explosive events that have involved these materials.

24 34. On or about October 17, 2007, Shirley Peterson, Information Programs Specialist at
25 NNSA, sent a response to plaintiff acknowledging receipt of the October 11, 2007 request. Ms.
26 Peterson's correspondence provided the control number for the request: FOIA 07-273-P.

1 35. On or about October 26, 2007, Ms. Miles responded via email to a request from Ms.
2 Peterson to narrow the scope of the request. Ms. Miles responded by stating that she was going
3 to discuss with the issue with TVC's Executive Director, Marylia Kelley.

4 36. On or about, January 29, 2008, Ms. Peterson emailed Ms. Miles to say that the
5 Livermore Site Office has a small stack of unclassified documents that they could provide now
6 or hold while waiting for a response about narrowing the scope of the request.

7 37. On or about January 30, 2008, plaintiff, by and through its Staff Attorney, Robert
8 Schwartz, emailed Ms. Peterson requesting more details about narrowing the scope of the
9 request and for the documents held by the Livermore Site Office to be sent.

10 38. On or about January 31, 2008, Mr. Schwartz emailed Ms. Peterson with approval to
11 narrow the scope of the request to the years 1995-2005.

12 39. On or about February 29, 2008, Ms. Peterson emailed back to say that she had been
13 out sick and to apologize for the delay.

14 40. On or about July 30, 2008, Mr. Schwartz, sent a *Notice of Statutory Violation/Offer*
15 *to Assist Letter* to NNSA stating that defendants were in violation of FOIA and offering to assist
16 in the release of the requested documents.

17 41. On or about October 14, 2009, plaintiff, by and through its legal intern, Iti Talwar,
18 sent DOE an appeal letter stating that the lack of response was being construed as a constructive
19 denial of plaintiff's FOIA request and that plaintiff was hereby appealing NNSA's failure to
20 make a timely determination regarding plaintiff's FOIA request.

21 42. On or about October 27, 2009, Poli A. Marmolejos, Director at the Office of
22 Hearings and Appeal (OHA) sent plaintiff a letter stating that the appeal has been dismissed.
23 The letter stated that OHA contacted NNSA and was informed that a large amount of
24 information had been identified as being responsive to plaintiff's request and that this
25 information was undergoing classification review at the NNSA's Livermore Site Office. The
26 letter also indicated that there was a memorandum of October 27, 2009 telephone conversation
27 between Steven Fine, OHA Attorney-Examiner and Shirley Peterson, NNSA. However, no
28 memorandum was attached to the letter.

1 43. On or about November 2, 2009, Ms. Talwar sent NNSA a letter regarding an
2 approximate date of when to expect the responsive documents.

3 44. On or about November 19, 2009, plaintiff received an e-mail from NNSA stating
4 that Ms. Peterson again contacted LSO and they have given her an estimated target date of
5 having the records to NNSA's office the week of November 23, 2009.

6 45. On or about March 2, 2010, Ms. Talwar, sent a *Continuing Notice of Statutory*
7 *Violation/Offer to Assist Letter*.

8 46. As of the filing of this complaint, no documents or additional correspondence from
9 defendants have been received by plaintiff.

10 **Plaintiff's October 5, 2009 FOIA Request to NSNA: FOIA-10-00003-K**

11 47. On or about October 5, 2009, plaintiff, by and through its legal intern, Iti Talwar,
12 sent a FOIA request to DOE NNSA seeking a copy of the following documents:

- 13 • The report from the Tritium Facility Modernization Laboratory Readiness
14 Assessment that was issued on August 28, 2009
15 • The Startup Plan for the Tritium Facility Modernization at LLNL
16 • The LLNL Management self-assessment
17 • The White Paper on the safety function for the safety significant gloveboxes
18 processing more than 600 Ci of tritium.

19 48. On or about October 15, 2009, Karen Laney, Information Programs Specialist at
20 NNSA, sent a response to plaintiff acknowledging receipt of the October 5, 2009 request. Ms.
21 Laney's correspondence provided the control number for the request: FOIA 10-00003-K.

22 49. On or about December 16, 2009, Ms. Talwar sent a *Notice of Statutory*
23 *Violation/Offer to Assist Letter* to NNSA stating that defendants were in violation of FOIA and
24 offering to assist in the release of the requested records.

25 50. On or about March 2, 2010, Ms. Talwar sent a second *Notice of Statutory*
26 *Violation/Offer to Assist Letter*.

27 51. As of the filing of this complaint, no documents or additional correspondence from
28 defendants have been received by plaintiff.

1 **Plaintiff's March 1, 2010 FOIA Request to NSNA: FOIA-10-00125-H**

2 52. On or about March 1, 2010, plaintiff, by and through its legal intern, Iti Talwar,
3 sent a FOIA request to NNSA seeking a copy of all documents related to a recent beryllium
4 “industrial hygiene exposure” at LLNL. According to the DOE’s Office of Health, Safety and
5 Security's 'Weekly Summary of Significant Occurrences' from February 15-19, 2010, a
6 journeyman machinist in Building 321A at LLNL was accidentally exposed while working on a
7 beryllium 'part' that was incorrectly indentified as non-hazardous.

8 53. On or about March 9, 2010, Christina H. Hamblen, Information Programs Specialist
9 at NNSA sent a response to plaintiff acknowledging receipt of the March 1, 2010 request. Ms.
10 Hamblen’s correspondence provided the control number for the request: FOIA 10-00125-H.

11 54. On or about August 16, 2010, Ms. Talwar sent a *Notice of Statutory Violation/Offer*
12 *to Assist Letter* to NNSA stating that defendants were in violation of FOIA and offering to assist
13 in the release of the requested records.

14 55. As of the filing of this complaint, no documents or additional correspondence from
15 defendants have been received by plaintiff.

16 **Plaintiff's March 31, 2010 FOIA Request to NSNA: FOIA-10-169-J**

17 56. On or about March 31, 2010, plaintiff, by and through its legal intern, Iti Talwar,
18 sent a FOIA request to DOE NNSA seeking a copy of all documents concerning an audit of
19 financial cost transfer practices at LLNL. The documents sought include, but are not limited to,
20 those produced by any LLNL Internal Audit and Oversight organization. Specifically those
21 related, but not limited to, a recently performed audit of financial cost transfer practices at the
22 Laboratory made during Fiscsal Year 2008.

23 57. On or about April 15, 2010, Ben C. Jaramillo, Information Program Specialist at
24 NNSA sent a response to plaintiff acknowledging receipt of the March 31, 2010 request. Mr.
25 Jaramillo’s correspondence provided the control number for the request: FOIA 10-169-J.

26 58. On or about August 16, 2010, Ms. Talwar sent a *Notice of Statutory Violation/Offer*
27 *to Assist Letter* to NNSA stating that defendants were in violation of FOIA and offering to assist
28 in the release of the requested records.

1 59. As of the filing of this complaint, no documents or additional correspondence from
2 defendants have been received by plaintiff.

3 **Plaintiff's April 12, 2010 FOIA Request to NSNA: FOIA-10-00173-H**

4 60. On or about April 12, 2010, plaintiff, by and through its legal intern, Iti Talwar,
5 sent a FOIA request to DOE NNSA seeking a copy of all documents, from 2005 to present, that
6 concern the activities of the Institutional Bio-Safety Committee (IBC) at Lawrence Livermore
7 National Laboratory including: IBC rosters, qualifications of all members, agendas, minutes,
8 decisional documents, electronic communication concerning the IBC or its activities, rules and
9 procedures under which the IBC operates, written records, and meetings. (This request was an
10 update to a previous request for the same information through 2005. Relevant documents were
11 eventually produced in response to that prior request. Moreover, plaintiff has requested that the
12 information be produced on an ongoing basis to no avail.)

13 61. On or about April 20, 2010, Christina H. Hamblen, Information Programs Specialist
14 at NNSA, sent a response to plaintiff acknowledging receipt of the April 12, 2010 request. Ms.
15 Hamblen's correspondence provided the control number for the request: FOIA 10-00173-H.

16 62. On or about August 17, 2010, Ms. Talwar sent a *Notice of Statutory Violation/Offer*
17 *to Assist Letter* to NNSA stating that defendants were in violation of FOIA and offering to assist
18 in the release of the requested records.

19 63. As of the filing of this complaint, no documents or additional correspondence from
20 defendants have been received by plaintiff.

21 **Plaintiff's May 11, 2010 FOIA Request to NSNA: FOIA-10-00196-J**

22 64. On or about May 11, 2010, plaintiff, by and through its legal intern, Iti Talwar,
23 sent a FOIA request to NNSA seeking a copy of all underlying documents concerning
24 Livermore Valley Open Campus (LVOC). Specifically, documents regarding environmental,
25 security, and cost implications of this concept. Plaintiff learned about the LVOC via a LLNL
26 Public Affairs News Release on August 5, 2009, which was attached to the request.

27 65. On or about June 2, 2010, Ben Jaramillo, Information Programs Specialist at NNSA
28 Office of Public Affairs, sent a response to plaintiff acknowledging receipt of the May 11, 2010

1 request. Mr. Jaramillo's correspondence provided the control number for the request: FOIA 10-
2 00196-J.

3 66. On or about September 27, 2010, Ms. Talwar sent a *Notice of Statutory*
4 *Violation/Offer to Assist Letter* to NNSA stating that defendants were in violation of FOIA and
5 offering to assist in the release of the requested records.

6 67. As of the filing of this complaint, no documents or additional correspondence from
7 defendants have been received by plaintiff.

8 VI. CLAIMS FOR RELIEF

9 **Count I: Violation of the Freedom of Information Act: FOIA-07-153-P**

10 68. The allegations made in all preceding paragraphs are realleged and incorporated by
11 reference herein.

12 69. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
13 non-exempt records, and non-excluded records (or portions thereof), requested by plaintiff in its
14 May 30, 2007 FOIA request to DOE.

15 70. By failing to provide plaintiff with all records responsive to its May 30, 2007 FOIA
16 request to DOE, defendants have denied plaintiff's right to this information provided by law
17 under the Freedom of Information Act.

18 71. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
19 rights to access the records requested in plaintiff's May 30, 2007 FOIA request to DOE.

20 72. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
21 provide all non-exempt and non-excluded records (or portions thereof) responsive to its May 30,
22 2007 FOIA request to DOE.

23 73. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
24 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
25 records (or portions thereof) responsive to its May 30, 2007 FOIA request to DOE.

26 74. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant
27 to FOIA. 5 U.S.C. § 552(a)(4)(E).

28

1 **Count II: Violation of the Administrative Procedure Act: FOIA-07-153-P**

2 75. The allegations made in all preceding paragraphs are realleged and incorporated by
3 reference herein.

4 76. Defendants' failure to disclose records responsive to plaintiff's May 30, 2007 FOIA
5 request to DOE constitutes agency action unlawfully withheld and unreasonably delayed, in
6 violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants' failure in this
7 manner is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and
8 without observance of procedure required by law; all in violation of the APA.

9 77. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply with
10 the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
11 records (or portions thereof) responsive to plaintiff's May 30, 2007 FOIA request to DOE has
12 injured plaintiff's interests in public oversight of governmental operations and constitutes a
13 violation of defendants' statutory duties under the APA.

14 78. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
15 U.S.C. §§ 702, 706.

16 79. Plaintiff is entitled to costs of disbursements and costs of litigation, including
17 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
18 2412.

19 **Count III: Violation of the Freedom of Information Act: FOIA-07-273-P**

20 80. The allegations made in all preceding paragraphs are realleged and incorporated by
21 reference herein.

22 81. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
23 non-exempt and non-excluded records (or portions thereof), requested by plaintiff in its October
24 11, 2007 FOIA request to DOE.

25 82. By failing to provide plaintiff with all records responsive to its October 11, 2007
26 FOIA request to DOE, defendants have denied plaintiff's right to this information provided by
27 law under the Freedom of Information Act.

1 83. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
2 rights to access the records requested in plaintiff's October 11, 2007 FOIA request to DOE.

3 84. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
4 provide all non-exempt and non-excluded records (or portions thereof) responsive to its October
5 11, 2007 FOIA request to DOE.

6 85. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
7 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
8 records (or portions thereof) responsive to its October 11, 2007 FOIA request to DOE.

9 86. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant
10 to FOIA. 5 U.S.C. § 552(a)(4)(E).

11 **Count IV: Violation of the Administrative Procedure Act: FOIA-07-273-P**

12 87. The allegations made in all preceding paragraphs are realleged and incorporated by
13 reference herein.

14 88. Defendants' failure to disclose records responsive to plaintiff's October 11, 2007
15 FOIA request to DOE constitutes agency action unlawfully withheld and unreasonably delayed,
16 in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants' failure in
17 this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and
18 without observance of procedure required by law; all in violation of the APA.

19 89. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply with
20 the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
21 records (or portions thereof) responsive to plaintiff's October 11, 2007 FOIA request to DOE
22 has injured plaintiff's interests in public oversight of governmental operations and constitutes a
23 violation of defendants' statutory duties under the APA.

24 90. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
25 U.S.C. §§ 702, 706.

26 91. Plaintiff is entitled to costs of disbursements and costs of litigation, including
27 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
28 2412.

1 **Count V: Violation of the Freedom of Information Act: FOIA-10-00003-K**

2 92. The allegations made in all preceding paragraphs are realleged and incorporated by
3 reference herein.

4 93. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
5 non-exempt and non-excluded records (or portions thereof), requested by plaintiff in its October
6 5, 2009 FOIA request to NNSA.

7 94. By failing to provide plaintiff with all records responsive to its October 5, 2009
8 FOIA request to DOE, defendants have denied plaintiff's right to this information provided by
9 law under the Freedom of Information Act.

10 95. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
11 rights to access the records requested in plaintiff's October 5, 2009 FOIA request to NNSA.

12 96. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
13 provide all non-exempt and non-excluded records (or portions thereof) responsive to its October
14 5, 2009 FOIA request to NNSA.

15 97. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
16 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
17 records (or portions thereof) responsive to its October 5, 2009 FOIA request to NNSA.

18 98. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant
19 to FOIA. 5 U.S.C. § 552(a)(4)(E).

20 **Count VI: Violation of the Administrative Procedure Act: FOIA-10-00003-K**

21 99. The allegations made in all preceding paragraphs are realleged and incorporated by
22 reference herein.

23 100. Defendants' failure to disclose records responsive to plaintiff's October 5, 2009
24 FOIA request to DOE constitutes agency action unlawfully withheld and unreasonably delayed,
25 in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants' failure in
26 this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and
27 without observance of procedure required by law; all in violation of the APA.
28

1 101. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply
2 with the mandates of FOIA. Defendants' failure to disclose all non-exempt, and non-excluded
3 records (or portions thereof) responsive to plaintiff's October 5, 2009 FOIA request to NNSA
4 has injured plaintiff's interests in public oversight of governmental operations and constitutes a
5 violation of defendants' statutory duties under the APA.

6 102. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
7 U.S.C. §§ 702, 706.

8 103. Plaintiff is entitled to costs of disbursements and costs of litigation, including
9 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
10 2412.

11 **Count VII: Violation of the Freedom of Information Act: FOIA-10-00125-H**

12 104. The allegations made in all preceding paragraphs are realleged and incorporated by
13 reference herein.

14 105. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
15 non-exempt records, and non-excluded records (or portions thereof), requested by plaintiff in its
16 March 1, 2010 FOIA request to NNSA.

17 106. By failing to provide plaintiff with all records responsive to its March 1, 2010
18 FOIA request to DOE, defendants have denied plaintiff's right to this information provided by
19 law under the Freedom of Information Act.

20 107. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
21 rights to access the records requested in plaintiff's March 1, 2010 FOIA request to NNSA.

22 108. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
23 provide all non-exempt, and non-excluded records (or portions thereof) responsive to its March
24 1, 2010 FOIA request to NNSA.

25 109. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
26 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
27 records (or portions thereof) responsive to its March 1, 2010 FOIA request to NNSA.

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1 110. Plaintiff is entitled to reasonable costs of litigation, including attorney fees
2 pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

3 **Count VIII: Violation of the Administrative Procedure Act: FOIA-10-00125-H**

4 111. The allegations made in all preceding paragraphs are realleged and incorporated by
5 reference herein.

6 112. Defendants' failure to disclose records responsive to plaintiff's March 1, 2010
7 FOIA request to NNSA constitutes agency action unlawfully withheld and unreasonably
8 delayed, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants'
9 failure in this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the
10 law, and without observance of procedure required by law; all in violation of the APA.

11 113. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply
12 with the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
13 records (or portions thereof) responsive to plaintiff's March 1, 2010 FOIA request to NNSA has
14 injured plaintiff's interests in public oversight of governmental operations and constitutes a
15 violation of defendants' statutory duties under the APA.

16 114. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
17 U.S.C. §§ 702, 706.

18 115. Plaintiff is entitled to costs of disbursements and costs of litigation, including
19 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
20 2412.

21 **Count IX: Violation of the Freedom of Information Act: FOIA-10-169-J**

22 116. The allegations made in all preceding paragraphs are realleged and incorporated by
23 reference herein.

24 117. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
25 non-exempt records and non-excluded records (or portions thereof), requested by plaintiff in its
26 March 31, 2010 FOIA request to NNSA.

1 118. By failing to provide plaintiff with all records responsive to its March 31, 2010
2 FOIA request to NNSA, defendants have denied plaintiff's right to this information provided by
3 law under the Freedom of Information Act.

4 119. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
5 rights to access the records requested in plaintiff's March 31, 2010 FOIA request to NNSA.

6 120. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
7 provide all non-exempt and non-excluded records (or portions thereof) responsive to its March
8 31, 2010 FOIA request to NNSA.

9 121. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
10 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
11 records (or portions thereof) responsive to its March 31, 2010 FOIA request to NNSA.

12 122. Plaintiff is entitled to reasonable costs of litigation, including attorney fees
13 pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

14 **Count X: Violation of the Administrative Procedure Act: FOIA-10-169-J**

15 123. The allegations made in all preceding paragraphs are realleged and incorporated by
16 reference herein.

17 124. Defendants' failure to disclose records responsive to plaintiff's March 31, 2010
18 FOIA request to NNSA constitutes agency action unlawfully withheld and unreasonably
19 delayed, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants'
20 failure in this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the
21 law, and without observance of procedure required by law; all in violation of the APA.

22 125. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply
23 with the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
24 records (or portions thereof) responsive to plaintiff's March 31, 2010 FOIA request to NNSA
25 has injured plaintiff's interests in public oversight of governmental operations and constitutes a
26 violation of defendants' statutory duties under the APA.

27 126. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
28 U.S.C. §§ 702, 706.

1 127. Plaintiff is entitled to costs of disbursements and costs of litigation, including
2 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
3 2412.

4 **Count XI: Violation of the Freedom of Information Act: FOIA-10-00173-H**

5 128. The allegations made in all preceding paragraphs are realleged and incorporated by
6 reference herein.

7 129. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
8 non-exempt records, and non-excluded records (or portions thereof), requested by plaintiff in its
9 April 12, 2010 FOIA request to NNSA.

10 130. By failing to provide plaintiff with all records responsive to its April 12, 2010
11 FOIA request to NNSA, defendants have denied plaintiff's right to this information provided by
12 law under the Freedom of Information Act.

13 131. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
14 rights to access the records requested in plaintiff's April 12, 2010 FOIA request to NNSA.

15 132. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
16 provide all non-exempt and non-excluded records (or portions thereof) responsive to its April
17 12, 2010 FOIA request to NNSA.

18 133. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
19 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
20 records (or portions thereof) responsive to its April 12, 2010 FOIA request to NNSA.

21 134. Plaintiff is entitled to reasonable costs of litigation, including attorney fees
22 pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

23 **Count XII: Violation of the Administrative Procedure Act: FOIA-10-00173-H**

24 135. The allegations made in all preceding paragraphs are realleged and incorporated by
25 reference herein.

26 136. Defendants' failure to disclose records responsive to plaintiff's April 12, 2010
27 FOIA request to NNSA constitutes agency action unlawfully withheld and unreasonably
28 delayed, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants'

1 failure in this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the
2 law, and without observance of procedure required by law; all in violation of the APA.

3 137. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply
4 with the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
5 records (or portions thereof) responsive to plaintiff's April 12, 2010 FOIA request to NNSA has
6 injured plaintiff's interests in public oversight of governmental operations and constitutes a
7 violation of Defendants' statutory duties under the APA.

8 138. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
9 U.S.C. §§ 702, 706.

10 139. Plaintiff is entitled to costs of disbursements and costs of litigation, including
11 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
12 2412.

13 **Count XIII: Violation of the Freedom of Information Act: FOIA-10-00196-J**

14 140. The allegations made in all preceding paragraphs are realleged and incorporated by
15 reference herein.

16 141. Defendants have violated FOIA by failing to provide plaintiff with all responsive,
17 non-exempt records, and non-excluded records (or portions thereof), requested by plaintiff in its
18 May 11, 2010 FOIA request to NNSA.

19 142. By failing to provide plaintiff with all records responsive to its May 11, 2010
20 FOIA request to NNSA, defendants have denied plaintiff's right to this information provided by
21 law under the Freedom of Information Act.

22 143. Unless enjoined by this Court, defendants will continue to violate plaintiff's legal
23 rights to access the records requested in plaintiff's May 11, 2010 FOIA request to NNSA.

24 144. Plaintiff is directly and adversely affected and aggrieved by defendants' failure to
25 provide all non-exempt and non-excluded records (or portions thereof) responsive to its May 11,
26 2010 FOIA request to NNSA.

1 145. Plaintiff has fully exhausted all administrative remedies required by FOIA prior to
2 seeking judicial review of defendants' failure to provide all non-exempt and non-excluded
3 records (or portions thereof) responsive to its May 11, 2010 FOIA request to NNSA.

4 146. Plaintiff is entitled to reasonable costs of litigation, including attorney fees
5 pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

6 **Count XIV: Violation of the Administrative Procedure Act: FOIA-10-00196-J**

7 147. The allegations made in all preceding paragraphs are realleged and incorporated by
8 reference herein.

9 148. Defendants' failure to disclose records responsive to plaintiff's May 11, 2010
10 FOIA request to NNSA constitutes agency action unlawfully withheld and unreasonably
11 delayed, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Defendants'
12 failure in this manner is arbitrary, capricious, an abuse of discretion, not in accordance with the
13 law, and without observance of procedure required by law; all in violation of the APA.

14 149. Plaintiff has suffered a legal wrong as a result of defendants' failure to comply
15 with the mandates of FOIA. Defendants' failure to disclose all non-exempt and non-excluded
16 records (or portions thereof) responsive to plaintiff's May 11, 2010 FOIA request to NNSA has
17 injured plaintiff's interests in public oversight of governmental operations and constitutes a
18 violation of defendants' statutory duties under the APA.

19 150. Plaintiff is entitled to judicial review under the Administrative Procedure Act. 5
20 U.S.C. §§ 702, 706.

21 151. Plaintiff is entitled to costs of disbursements and costs of litigation, including
22 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
23 2412.

24 **Count XV: Violation of FOIA and the APA**

25 152. The allegations made in all preceding paragraphs are realleged and incorporated by
26 reference herein.

27 153. Plaintiff is injured by defendants' pattern and practice of disregarding the statutory
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1 timeframe set out in FOIA for the production of requested records. This pattern and practice is
2 arbitrary, capricious, an abuse of discretion, not in accordance with the law, and without
3 observance of procedure required by law, all in violation of FOIA and the APA.

4 **VII. REQUEST FOR RELIEF**

5 WHEREFORE, plaintiff respectfully requests that this Court enter Judgment for plaintiff
6 providing the following relief:

7 1. Expedite this case in accordance with 28 U.S.C. §1657(a) so as to resolve this case in
8 time for plaintiff to use the requested information in furtherance of its legitimate objectives.
9 Good cause is shown since “a right under...a Federal Statute would be maintained”. 28 U.S.C.
10 §1657(a).

11 2. Declare that defendants have violated FOIA by failing to respond in any substantive
12 fashion to the seven FOIA requests that are the subject of this complaint (FOIA-07-153-P,
13 FOIA-07-273-P, FOIA-10-00003-K, FOIA-10-00125-H, FOIA-10-169-J, FOIA-10-00173-H
14 and FOIA-10-00196-J).

15 3. Direct by injunction that defendants immediately provide plaintiff with all non-
16 exempt and non-excluded records (or portions thereof), responsive to the seven FOIA requests
17 that are the subject of this complaint (FOIA-07-153-P, FOIA-07-273-P, FOIA-10-00003-K,
18 FOIA-10-00125-H, FOIA-10-169-J, FOIA-10-00173-H and FOIA-10-00196-J).

19 4. Issue a written finding that the circumstances surrounding defendants’ actions raise
20 questions whether defendants’ personnel acted arbitrarily or capriciously with respect to the
21 seven FOIA requests that are the subject of this complaint (FOIA-07-153-P, FOIA-07-273-P,
22 FOIA-10-00003-K, FOIA-10-00125-H, FOIA-10-169-J, FOIA-10-00173-H and FOIA-10-
23 00196-J).

24 5. Order the Special Counsel to commence an investigation to determine whether
25 disciplinary action is warranted against any federal employee for the defendants’ unlawful
26 pattern and practice of withholding information sought pursuant to FOIA. See 5 U.S.C. §
27 552(a)(4)(F).
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- 6. Direct by injunction that defendants comply with the time requirements of FOIA, as provided by both case law and statute, for the production of requested documents to plaintiff.
- 7. Direct by injunction that defendants are barred from any and all improper withholdings of agency records.
- 8. Maintain jurisdiction over this action until defendants are in compliance with FOIA, APA, and every order of this Court.
- 9. Grant plaintiff's costs of litigation, including reasonable attorney fees, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E), and the Equal Access to Justice Act, 28 U.S.C. § 2412.
- 10. Provide such other relief as the Court deems just and proper.

Respectfully submitted this 28th day of December, 2010

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