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AMERICAN SMALL BUSINESS LEAGUE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN SMALL BUSINESS
LEAGUE,

Plaintiff,

vs.

UNITED STATES SMALL BUSINESS
ADMINISTRATION,

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF UNDER THE
FREEDOM OF INFORMATION ACT (5
U.S.C. § 552(a)(3)(A))**

INTRODUCTION

1 This is an action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §
2 552, for declaratory, injunctive, and other appropriate relief. Plaintiff American Small Business
3 League ("plaintiff" or "ASBL") seeks disclosure, under FOIA, of records of defendant United
4 States Small Business Administration ("SBA") showing how the hundreds of billions of dollars
5 appropriated by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") have
6 been spent, including, but not limited to, the names of all loan recipients under the Paycheck
7 Protection Program ("PPP") and the amount of each borrower's PPP loan. In light of the
8 unprecedented taxpayer investment in the CARES Act and the PPP, the gravity of the COVID-
9 19-related economic issues that the PPP is meant to address, and the revelation that numerous
10 large businesses have obtained (and in some cases returned, under public pressure) PPP loans
11 despite government representations that the PPP was supposed to help small businesses, it is of
12 paramount public importance that the requested records be disclosed.

JURISDICTION

13 This Court has subject matter and personal jurisdiction over this action pursuant to
14 5 U.S.C. section 552(a)(4)(B) and 28 U.S.C. section 1331.

15 Venue is proper in this Court pursuant to 5 U.S.C. section 552(a)(4)(B) because
16 plaintiff has its principal place of business in Petaluma (Sonoma County), California, which is
17 located in the Northern District of California.

18 Defendant has constructively denied ASBL's FOIA Request No. SBA-2020-
19 000566, as amended in Exhibit B hereto, by failing to provide ASBL a FOIA-compliant
20 determination on the request by the statutory deadline. Plaintiff is deemed to have exhausted its
21 administrative remedies with respect to this FOIA request pursuant to 5 U.S.C. section
22 552(a)(6)(C).

INTRADISTRICT ASSIGNMENT

23 Assignment to the San Francisco Division is proper pursuant to Civil L.R. 3-2(c)
24 and (d) because a substantial portion of the events giving rise to the action occurred in Sonoma
25 County and the City and County of San Francisco.

PARTIES

6. ASBL is an organization located in California, with its principal place of business in Petaluma (Sonoma County), California. ASBL's core mission is to promote and advocate for the interests of small business concerns through public policy change. A significant part of ASBL's advocacy seeks to focus the public's attention on government programs intended to help small businesses, and on instances in which these programs are failing to help small businesses as intended. To accomplish this, ASBL reviews government policies and procedures and investigates the effectiveness of government programs intended to help small businesses to see whether the programs are operating appropriately and achieving their purposes. ASBL regularly makes and analyzes responses to FOIA requests in its advocacy and oversight work. On multiple occasions, ASBL has sued federal agencies to enforce its and the public's rights of access under FOIA and won.

7. The SBA is an "agency" within the meaning of 5 U.S.C. section 552(f).

FACTUAL BACKGROUND

8. In early 2020, the World Health Organization ("WHO") declared a pandemic based on the novel coronavirus ("SARS-CoV-2") and the disease it caused ("COVID-19"). *See* World Health Organization, *WHO Timeline – COVID-19*, <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (last updated Apr. 27, 2020).

9. COVID-19 arrived in the United States a few months later, and the federal government declared the outbreak a national emergency, issued travel restrictions, and discouraged large gatherings. Grace Hauck, et al., *Five months in: A timeline of how COVID-19 has unfolded in the US*, USA Today (Jun. 23, 2020, 3:21 AM), <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/>. State and local governments also issued orders requiring residents to avoid large gatherings and strictly limit their activities outside of the home. *See* Sarah Mervosh, et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last updated Apr. 20, 2020). COVID-19, the federal government's declaration and guidance, and these state

1 and local orders caused a decline in economic activity that severely harmed, and in some
2 instances existentially threatened, many small businesses.

3 10. The decline in economic activity led to a national unemployment rate of 13.3
4 percent as of May 2020. U.S. Department of Labor, Bureau of Labor Statistics, *The Employment*
5 *Situation*, BLS.gov, 1 (2020), <https://www.bls.gov/news.release/pdf/empstat.pdf>. In response to
6 the looming economic crisis, Congress passed and the President signed the Coronavirus Aid,
7 Relief, and Economic Security (“CARES”) Act. *See* Pub. L. 116-136. Under the CARES Act, the
8 SBA was tasked with administering a new loan program, the PPP, which offers often forgivable
9 loans to qualifying small businesses to help them weather the COVID-19 storm and cover their
10 operating expenses, including payroll. U.S. Department of the Treasury, *The CARES Act Provides*
11 *Assistance to Small Businesses*, [https://home.treasury.gov/policy-issues/cares/assistance-for-](https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses)
12 [small-businesses](https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses) (last visited Jun. 28, 2020). According to the SBA, the PPP is “a loan designed
13 to provide a direct incentive for small businesses to keep their workers on the payroll.” U.S.
14 Small Business Administration, *Paycheck Protection Program*, [https://www.sba.gov/funding-](https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program)
15 [programs/loans/coronavirus-relief-options/paycheck-protection-program](https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program) (last visited July 9,
16 2020). While the PPP was intended to benefit small businesses, even businesses with more than
17 500 employees can also receive PPP loans if they meet certain criteria. *Id.* Many loans in excess
18 of \$5 million have been made under the PPP.

19 11. The SBA began accepting PPP loan applications on April 3, 2020. Robin Saks
20 Frankel, *The Paycheck Protection Program Ran Out of Funding. What’s Next for Small Business*
21 *Owners?*, *Forbes* (Apr. 16, 2020, 5:44 PM),
22 [https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#3e3a17274405)
23 [funding-whats-next-for-small-business-owners/#3e3a17274405](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#3e3a17274405). Within two weeks, the SBA and
24 the Treasury Department reported that “The SBA has processed more than 14 years’ worth of
25 loans in less than 14 days,” with a combined value of more than \$300 billion. *Id.* To date, the
26 SBA reports that it had approved more than 4.8 million loan applications, and has approved loans
27 that are collectively worth a total of more than \$521 billion. *See Paycheck Protection Program*,
28 *supra*, <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck->

[protection-program](#) (last visited July 9, 2020).

12. The SBA's PPP borrower application form explicitly states to prospective borrowers that several categories of submitted information "will be automatically released" under FOIA, including "the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity":

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

A copy of the SBA's PPP borrower application form is attached hereto as **Exhibit A**.

This language appears on page 4.

13. The categories of information that the SBA states "will be automatically released" in its borrower application form are consistent with the information that it has released annually on loans that it has approved under two other small business loan programs it administers: 7(a) loans and 504 loans. With respect to both of these categories of loans, the SBA has disclosed, and on information and belief regularly discloses and has a practice of regularly disclosing, the name and address of each recipient and the amount of each loan, among other information, at least through the end of 2019. The SBA made this information publicly available in Excel spreadsheets – and is continuing to make this information publicly available as of July 8, 2020 – on its website, <https://www.sba.gov/about-sba/open-government/foia>, at the following hyperlinks:
http://imedia.sba.gov/vd/general/foia/7a_504_FOIA%20Data%20Dictionary.xlsx;
[http://imedia.sba.gov/vd/general/foia/FOIA%20-%207\(a\)\(FY1991-FY1999\).xlsx](http://imedia.sba.gov/vd/general/foia/FOIA%20-%207(a)(FY1991-FY1999).xlsx);
[http://imedia.sba.gov/vd/general/foia/FOIA%20-%207\(a\)\(FY2000-FY2009\).xlsx](http://imedia.sba.gov/vd/general/foia/FOIA%20-%207(a)(FY2000-FY2009).xlsx);
[http://imedia.sba.gov/vd/general/foia/FOIA%20-%207\(a\)\(FY2010-Present\).xlsx](http://imedia.sba.gov/vd/general/foia/FOIA%20-%207(a)(FY2010-Present).xlsx); and
[http://imedia.sba.gov/vd/general/foia/FOIA%20-%20504%20\(FY1991-Present\).xlsx](http://imedia.sba.gov/vd/general/foia/FOIA%20-%20504%20(FY1991-Present).xlsx).

14. On or about April 16, 2020, the SBA stopped accepting applications for PPP loans due to what the SBA described as a lack of funding. However, on or about April 27, 2020, the SBA resumed accepting applications after receiving more funding. Also, on June 27, 2020, the President signed into law an extension of the PPP loan program authorizing PPP loan applications until August 8, 2020. Robin Saks Frankel, Congress Extends PPP Five More Weeks. Here's How To Apply, Forbes (July 2, 2020), <https://www.forbes.com/sites/advisor/2020/07/02/congress-extends-ppp-five-more-weeks-heres-how-to-apply/#6587c1833b20>.

15. News organizations soon reported on issues with the administration of the PPP, including inconsistent treatment of loan applicants and challenges and confusion among borrowers and lenders regarding the application process. Danielle Kurtzleben, et al., *Here's How the Small Business Loan Program Went Wrong in Just 4 Weeks*, NPR (May 4, 2020, 11:14 AM), <https://www.npr.org/2020/05/04/848389343/how-did-the-small-business-loan-program-have-so-many-problems-in-just-4-weeks>. They also reported that large businesses were receiving PPP loans, including national restaurant chains Shake Shack and Ruth's Chris Steak House and the Los Angeles Lakers. *Id.* Some large businesses then returned loans that they had received under the program, and congressional leaders called for the disclosure of information about PPP loan recipients to allow for better oversight of the PPP. Aaron Gregg, et al., *In big reversal, Treasury and SBA agree to disclose details about many small business loan recipients*, Washington Post (Jun. 19, 2020), <https://www.washingtonpost.com/business/2020/06/19/treasury-sba-ppp-disclosure/>.

16. On July 6, 2020, the SBA reversed course and disclosed some limited information about PPP loan recipients. U.S. Department of the Treasury, *SBA and Treasury Announce Release of Paycheck Protection Program Loan Data* (July 6, 2020), <https://home.treasury.gov/news/press-releases/sm1052>. However, it did not release the actual amounts that borrowers had been loaned or the identities of borrowers who had received less than \$150,000. *Id.* For all PPP loans of \$150,000 or more, the SBA released "business names, addresses, NAICS codes, zip codes, business type, demographic data, non-profit information, name of lender, jobs supported, and loan amount ranges," stating whether each loan was for "\$150,000-\$350,000," "\$350,000-\$1 million,"

1 “\$1-2 million,” “\$2-5 million,” or “\$5-10 million.” *Id.* For all PPP loans of less than \$150,000,”
2 the SBA released this same limited information “except” – critically – borrower names and
3 addresses. *Id.*

4 17. The SBA’s limited public disclosure of information about PPP loan recipients does
5 not fully answer any of ASBL’s FOIA requests, and is not sufficient to comply with FOIA or
6 allow ASBL and the public to fully understand and evaluate how the PPP, one of the largest
7 expenditures of United States taxpayer funds ever, was crafted and administered. For example,
8 the identities of *all* PPP loan recipients should be disclosed. As the SBA itself has stated, “The
9 average loan size is approximately \$100,000,” *id.*, which means that a large majority of loan
10 recipients have not yet been identified. Also, the amount of each PPP loan should be stated with
11 precision, as the SBA’s PPP loan application form said it would be, and as the SBA has done with
12 respect to loans under its 7(a) and 504 loan programs. There is a huge difference between a \$5
13 million loan and a \$10 million loan, and the public is entitled to know how much each business
14 sought and obtained, especially since the government has assured the public that the PPP is
15 supposed to be helping small businesses. A business getting a loan of over \$5 million, or up to
16 \$10 million, is not a small business under any normal definition of that term. The public has a
17 right to know how much businesses like the large Kasowitz law firm, which grossed more than
18 \$215 million last year and which has represented President Trump in high-profile litigation,
19 received from this expensive government program, not just that the firm got a loan in the \$5
20 million-\$10 million range.

21 **FOIA Request No. SBA-2020-000566**

22 18. On April 9, 2020, ASBL made an initial FOIA request to the SBA regarding
23 advisory committees. On April 16, 2020, ASBL amended that FOIA request to state that it was
24 seeking the following:

- 25 - Records relating to any committee, advisory group or panel the SBA has established to
26 administer the \$350 billion CARES Act response to the coronavirus pandemic, especially
27 the members of that committee and any regulations which they have drafted and
28 correspondence among the members of that committee.
- A list of names and bios of members who serve on any of the active SBA advisory
committees.

- Data showing how the appropriated funds from the CARES Act were distributed through PPP program.
- Any communication between the White House, SBA, and Congress regarding requests for additional funding for the CARES Act and PPP Program.

An e-mail exchange between ASBL's counsel and SBA FOIA Chief Oreoluwa Fashola that memorializes this amendment is attached hereto as **Exhibit B**.

19. On May 19, 2020, Mr. Fashola sent a letter to ASBL acknowledging the amendment to ASBL's FOIA request and purporting to respond to ASBL's FOIA request, as amended. Mr. Fashola stated that the SBA had no records responsive to category 1, and that the SBA would respond as to the remaining three categories separately, with one exception: As to the third category, the SBA also provided the following hyperlink:

<https://content.sba.gov/sites/default/files/2020-04/PPP%20Report%20SBA%204.14.20%20%20-%20%20Read-Only.pdf>. That led to a public summary document which stated, in very broad terms, the total approved PPP loans and amounts distributed nationally, by state, and by industry. A copy of Mr. Fashola's May 19, 2020 letter and the linked document are attached hereto as **Exhibit C**. Mr. Fashola stated that the SBA would continue its search for responsive documents as to categories 2-4.

20. On May 22, 2020, ASBL sent a further letter to the SBA in response to the SBA's May 19, 2020 letter. ASBL explained in its May 22, 2020 letter that the SBA's May 19, 2020 letter did not constitute a lawful determination on ASBL's FOIA request. ASBL demanded that the SBA provide a complete and lawful determination on its FOIA request as to each category of requested records, and that SBA disclose the names of and loan amounts received by all PPP loan recipients, by May 29, 2020. A copy of ASBL's letter of May 22, 2020 is attached hereto as **Exhibit D**.

21. To date, neither the SBA nor any other federal government agency or representative has responded further to ASBL's FOIA request or ASBL's May 22, 2020 letter.

22. To date, the SBA has not produced any records to ASBL in response to ASBL's FOIA request, except for the summary document to which it provided a hyperlink in its May 19,

2020 letter and information the SBA made public on July 6, 2020 which did not disclose names of those who received PPP loans of less than \$150,000 and did not disclose any loan amounts except in broad ranges.

23. To date, the SBA has not fully informed ASBL of the extent to which it has records that are responsive to ASBL's FOIA request.

24. To date, the SBA has not informed ASBL of whether and the extent to which it intends to disclose records and information in response to ASBL's FOIA request.

25. To date, the SBA has not stated whether or the extent to which it intends to withhold records or information based on FOIA exemptions, or, if so, what exemptions it believes might apply.

26. To date, the SBA has not provided a complete response to or a lawful determination on ASBL's FOIA request.

CLAIMS FOR RELIEF

COUNT I

Declaratory and Injunctive Relief; Constructive Denial of Request for Agency Records in Violation of FOIA, 5 U.S.C. § 552 (FOIA Request No. SBA-2020-000566)

27. ASBL incorporates by reference paragraphs 1-26.

28. FOIA provides this Court with "jurisdiction to enjoin [the SBA] from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B).

29. FOIA requires that, within 20 working days of receiving a FOIA request, an agency must, *inter alia*, complete its search for responsive records, notify the requester of the scope of the documents that the agency will produce and the scope of the documents that the agency plans to withhold under any FOIA exemptions, and identify any FOIA exemptions that it claims justify non-disclosure. *See* 5 U.S.C. § 552(a)(6)(A)(ii); *Citizens for Responsibility & Ethics in Washington ("CREW") v. Fed. Election Comm'n*, 711 F.3d 180, 184, 188 (D.C. Cir. 2013).

30. The records sought by ASBL are agency records within the SBA's control. For

1 example, the SBA has records that set forth the names of all PPP loan recipients and the precise
2 amounts that each PPP loan recipient has received, just as it has such records for recipients of
3 loans in connection with other loan programs that it administers, yet, to date, the SBA has failed
4 to disclose records showing the names of all PPP loan recipients or the amount of the loans they
5 received.

6 31. Pursuant to FOIA, the SBA was required to make and communicate to ASBL a
7 “determination” on its FOIA request within 20 working days, by no later than May 14, 2020. *See*
8 5 U.S.C. § 552(a)(6)(B)(i); *CREW*, 711 F.3d at 184, 188.

9 32. To date, the SBA has not communicated to ASBL a “determination” on its FOIA
10 request within the meaning of 5 U.S.C. § 552(a)(6)(A)(i); *CREW*, 711 F.3d at 184, 188. The
11 SBA’s May 19, 2020 e-mail is not a “determination,” because the SBA did not complete a search
12 for responsive records before providing it, notify ASBL of the scope of the documents that it
13 would produce and the scope of the documents that it planned to withhold, or identify any FOIA
14 exemptions that it claims justify non-disclosure. *See* 5 U.S.C. § 552(a)(6)(A)(ii); *CREW*, 711 F.3d
15 at 184, 188.

16 33. The SBA has wrongfully withheld the records sought by ASBL in this FOIA
17 request in violation of FOIA. This includes, but is not limited to, records responsive to ASBL’s
18 request for “Data showing how the appropriated funds from the CARES Act were distributed
19 through the PPP program.”

20 34. ASBL has exhausted its administrative remedies with regard to FOIA Request No.
21 SBA-2020-000566.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, ASBL respectfully requests that this Court:

24 A. Declare unlawful the SBA’s failure to timely respond to ASBL’s FOIA Request
25 No. SBA-2020-000566, as amended in Exhibit B hereto;

26 B. Declare unlawful the SBA’s constructive denial of ASBL’s FOIA Request No.
27 SBA-2020-000566, as amended in Exhibit B hereto;

28 C. Enter an injunction ordering the SBA to fully respond to ASBL’s FOIA Request

No. SBA-2020-000566, as amended in Exhibit B hereto, and to disclose all responsive records requested therein, including, but not limited to, records stating the name of each and every PPP loan recipient and the precise amount received by each and every PPP loan recipient in each and every PPP loan;

D. Provide for expeditious proceedings in this action pursuant to 28 U.S.C § 1657;

E. Award ASBL its costs and attorneys' fees in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

F. Grant such other further relief as the Court may deem just and proper.

Respectfully submitted,

DATED: July 10, 2020

CANNATA O'TOOLE FICKES & OLSON LLP

By: /s/ Karl Olson
KARL OLSON

Karl Olson
Aaron R. Field

Attorneys for Plaintiff
AMERICAN SMALL BUSINESS LEAGUE