

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

Civil Action No. 04-cv-01264-LTB-OES

MARY M. HULL,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

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**DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT**

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Defendant, the United States Department of Labor (hereafter “defendant” or “DOL”) responds in opposition to plaintiff Mary M. Hull’s Motion for Summary Judgment in this Freedom of Information Act (“FOIA”) case. The short answer to plaintiff’s motion is that it is moot. She asks that DOL be ordered to produce Qwest pension plan service contracts which had been withheld under FOIA Exemption 4. But those service contracts have been produced to her. She also contends that DOL “asserts no FOIA Exemption and gives no explanation for not releasing” 11 computer discs and 17 documents. With respect to the 11 computer discs, they contain only copies of electronic documents which defendant fully addresses in defendant’s *Vaughn* indices. With respect to the 17 documents, only eight are responsive to plaintiff’s FOIA request.

Defendant has produced some of those eight documents to plaintiff, and has asserted FOIA exemptions as to others. Defendant is filing on January 11, 2006 a motion for summary judgment in which defendant asserts that portions of the eight documents are not releasable under various FOIA exemptions.

Because plaintiffs' motion for summary judgment is moot, the motion should be denied.

### **I. STATEMENT OF FACTS**

This case involves plaintiff's FOIA request for a copy of approximately 6,000 pages of records compiled by DOL's Employee Benefits Security Administration ("EBSA"), during its investigation of the Qwest Pension Plan under the Employee Retirement Income Security Act of 1974 ("ERISA").

On March 3, 2004, plaintiff submitted a FOIA request to DOL, seeking a copy of EBSA's file in its open investigation of Qwest. *See* Docket No. 1 (Complaint) at 3-4. EBSA withheld the records under FOIA Exemption 7(A), which authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

**A. DOL's Initial Release of Documents and April 1, 2005 Motion for Summary Judgment**

On December 15, 2004, in response to plaintiff's FOIA request, DOL released over 4,000 pages of redacted records to her. The remaining information was withheld from plaintiff under FOIA Exemptions 2, 3, 4, 5, 7(A), 7(C) and 7(E). On April 1, 2005, defendant filed a motion for summary judgment, with an accompanying *Vaughn* declaration, asserting that the documentation should be withheld under these FOIA exemptions. *See* Docket No. 13.

**B. DOL's Subsequent Release of Documents Following the Processing of Former Exemption 7(A) Documents, and Defendant's July 11, 2005 Motion for Summary Judgment**

EBSA closed its investigation of Qwest on April 7, 2005. Accordingly, EBSA reprocessed the documents that were being withheld under Exemption 7(A). On June 27, 2005, approximately 1,400 redacted pages of documents formerly covered by Exemption 7(A) were released to plaintiff. *See* Docket No. 23 (Defendant's Motion for Summary Judgment, filed July 11, 2005), Supplemental Declaration of Miriam McD. Miller, at ¶¶ 2-3. Defendant then filed on July 11, 2005 its summary judgment motion with respect to the documents initially withheld under FOIA Exemption 7(A). *See* Docket No. 23.

Among the arguments asserted in plaintiff's response in opposition to defendant's July 11, 2005 summary judgment motion, plaintiff contended that defendant had not produced 11 computer discs. *See* Docket No. 24 at 11 (citing to Hull Affidavit at ¶ 17).

In defendant's reply to plaintiff's response brief, defendant addressed this argument. Defendant included with its reply brief the declaration of EBSA's Senior Investigator John Mayers, who had been assigned to conduct the Qwest Pension Plan investigation. *See* Docket No. 27 (Defendant's Reply In Support of Defendant's July 11, 2005 Motion for Summary Judgment), at Exhibit A-12 (Declaration of John Mayers) at ¶ 4. Mr. Mayers noted in his declaration that he had created electronic documents during the course of the Qwest investigation, and had maintained those electronic documents on his computer hard drive. *Id.* at ¶ 5. He acknowledged that 11 floppy discs were created which contained copies of all the electronic documents on his computer hard drive. *Id.* at ¶ 7. Those 11 floppy discs were created specifically in response to plaintiff's March 3, 2004 FOIA request. *Id.*

But the 11 floppy discs are not themselves independent records. Rather, they are simply copies of electronic documents contained on Mr. Mayers' computer hard drive. *Id.* at ¶¶ 5-7.

On August 13, 2005, Mr. Mayers reviewed all the electronic documents on his hard drive to ascertain whether or not those documents had been printed out for inclusion in the Qwest investigative file. *Id.* at ¶ 8. He determined that 17 documents had not been printed out for inclusion in the investigative file. *Id.* at ¶ 9. Nine of these documents were created after March 3, 2004, the date of plaintiff's FOIA request to DOL. Thus,

these nine documents were not responsive to plaintiff's FOIA request. In short, a total of eight documents responsive to the FOIA request had not been printed out for inclusion in the investigative file.

**C. DOL's Release of Exemption 4 Documents, and Defendant's January 11, 2006 Motion for Summary Judgment Regarding the Remaining Eight Documents**

DOL provided to plaintiff on December 27, 2005, via Federal Express delivery, a copy of the four service contracts previously withheld under FOIA Exemption 4. *See* Exhibit A-1, attached hereto (December 27, 2005 letter to plaintiff's counsel). As set forth in the letter accompanying the documents, defendants provided to plaintiff pages that have been Bates-numbered 860-935 and 951-999. *Id.* Prior to releasing these documents to plaintiff, defendant was required to obtain permission from all of the contracting parties named in the service contracts, and obtaining such permission took some time.

Defendant has, however, withheld certain information on the service contracts under Exemption 7(C). In particular, some information on pages 860 and 867 was withheld under this exemption on the grounds that release of the information would invade an individual's personal privacy.<sup>1</sup>

With respect to the eight remaining responsive documents Mr Mayers identified as

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<sup>1</sup> Defendant demonstrates in its summary judgment motion, to be filed on January 11, 2006, that the redactions on pages 860 and 867 are proper under Exemption 7(C).

documents from his computer hard drive which were not included in the investigative file, those eight documents are addressed in defendant's motion for summary judgment which is being filed January 11, 2006. In this summary judgment motion, defendant demonstrates that the eight documents have been printed-out, the pages of the documents have been numbered S-1 through S-78, and the pages have been processed under the FOIA. On December 27, 2005, defendant provided to plaintiff, by overnight mail, a copy of the following pages of material which were deemed releasable under the FOIA in whole or in part: S-1 to S-3, S-42 to S-47, S-60 to S-76. *See* Exhibit A-2 (letter dated December 27, 2005). Defendant further demonstrates in its summary judgment motion that, to the extent some of the pages of material have been withheld in whole or in part, they have properly been withheld under FOIA Exemption 5 and FOIA Exemption 7(C).

Defendant has now addressed all of the electronic documents contained on Mr. Mayers' 11 floppy discs. The vast majority of the electronic documents on the discs have been addressed in defendant's previous summary judgment motions, and the eight remaining documents are addressed in defendant's January 11, 2006 summary judgment motion.

## **II. ARGUMENT**

The Supreme Court has held, under the "case or controversy" requirement in Article III of the Constitution, that "federal courts are without power to decide questions

that cannot affect the rights of litigants in the case before them.” *City Of Albuquerque v. U.S. Dept. Of Interior*, 379 F.3d 901, 918 -19 (10th Cir. 2004)(quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). “A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quotation marks and citations omitted); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1256 (10th Cir. 2004). “[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). The crucial question is whether “granting a present determination of the issues offered . . . will have some effect in the real world.” *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999) (quotation marks and citations omitted).

Plaintiff’s motion for summary judgment is moot, because the issues presented in the motion are no longer “live.” No controversy exists as to the issues presented in the motion.

**A. Plaintiff’s Request that Defendant Produce Qwest Pension Plan Service Contracts is Moot**

Plaintiff first asserts that she is entitled to 125 pages of Qwest’s “service contracts” which defendant is withholding under Exemption 4, 5 U.S.C. § 552(b)(4). *See* Plaintiff’s Motion at 2-3. In particular, plaintiff asks for copies of documents that have been Bates-numbered 860-935 and 951-999. *Id.* at 3.

Defendant has provided this information to plaintiff. On December 27, 2005, defendant provided to plaintiff a copy of the four service contracts previously withheld under FOIA Exemption 4. *See* Exhibit A-1, attached hereto. As set forth in the letter to plaintiff accompanying the December 27, 2005 submission, defendant provided to plaintiff documents that have been Bates-numbered pages 860-935 and 951-999. *Id.* Plaintiff's request for an order requiring defendant to produce those particular Bates-numbered pages is therefore moot. *City of Erie*, 529 U.S. at 287.

**B. Plaintiff's Contention that Defendant Has Failed to Assert a FOIA Exemption or Explanation for Not Releasing 11 Computer Discs is Moot**

Plaintiff argues in her summary judgment motion, as she did in her response brief filed July 29, 2005, that defendant has not justified its failure to produce 11 computer disks. *See* Plaintiff's Motion at 3. *See also* Docket No. 24 at 11, Part E. To the contrary, defendant has set forth a rational justification for declining to release the disks to plaintiff. The disks contain nothing more than copies of the electronic documents created by the EBSA investigator during the course of the Qwest investigation. *See* Docket No. 27 at Exhibit A-12 (Declaration of John Mayers) at ¶¶ 5-7. Defendant has produced or otherwise addressed all of the material on the 11 discs, and therefore plaintiff's request is moot.

The vast majority of the electronic documents on the 11 floppy discs have been addressed in defendant's previous summary judgment motions. As defendant has noted

above, Mr. Mayers determined that 17 electronic documents had not been printed out for inclusion in the investigative file. *Id.* at ¶ 9. Nine of these documents, however, post-date the receipt of plaintiff's FOIA request. *Id.* at ¶ 9. Accordingly, those documents are not responsive to plaintiff's FOIA request in this case. *See* 29 C.F.R. § 70.20(f) ("In determining records responsive to a request, a component will include only those records existing as of the date of its receipt of the request . . ."). Thus, only eight responsive documents which were not printed out for inclusion in the investigative file are at issue.

With respect to those eight responsive documents, the documents have been printed-out, numbered S-1 through S-78, and processed under the FOIA. On December 27, 2005, defendant provided to plaintiff, by overnight mail, a copy of the following documents which were deemed releasable under the FOIA in whole or in part: S-1 to S-3, S-42 to S-47, S-60 to S-76. *See* Exhibit A-2 (letter dated December 27, 2005). To the extent some of the documents numbered S-1 through S-78 have been withheld in whole or in part from plaintiff, those documents are now addressed in defendant's motion for summary judgment which is being filed January 11, 2006. In its summary judgment motion, defendant demonstrates that the documents are being properly withheld in whole or in part under FOIA Exemption 5 and FOIA Exemption 7(C).

Plaintiff's assertion that defendant has not provided an explanation for withholding the 11 floppy discs, *see* Plaintiff's Motion at 3, and has not asserted any applicable FOIA

exemption as to those floppy discs, *see id.*, is therefore moot.

**C. Plaintiff's Assertion that Defendant Has Not Addressed the 17 Documents is Moot**

As noted previously in this response brief, although Mr. Mayers determined that 17 electronic documents had not been printed out for inclusion in the investigative file, only eight of those electronic documents are responsive to plaintiff's FOIA request.

Those documents have been numbered S-1 through S-78, and defendant has provided a number of those documents to plaintiff. *See* Part B, *supra*. To the extent some of the documents numbered S-1 through S-78 have been withheld in whole or in part from plaintiff, those documents are addressed in defendant's motion for summary judgment which is being filed January 11, 2006.

Plaintiff's assertion that defendant has not tendered releasable documents to her, or otherwise asserted a basis for withholding any documents, *see* Plaintiff's Motion at 4, is therefore not correct. Defendant is addressing the documents.<sup>2</sup> Plaintiff's contention is thus moot. *Utah Animal Rights Coalition*, 371 F.3d at 1256.<sup>3</sup>

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<sup>2</sup> *See also* Exhibit A-3, Declaration of Michael C. Johnson.

<sup>3</sup> Plaintiff also requests that this Court establish a deadline by which DOL is required to deliver to the Court those documents which are to be reviewed *in camera*. *See* Plaintiff's Motion at 4-5. But defendant has already delivered the documents to the Court for *in camera* review. On December 21, 2005, defendant delivered the documents to chambers for such review.

### III. CONCLUSION

For the foregoing reasons, and any that may be presented at a hearing on this matter, plaintiff's motion for summary judgment should be denied.

Dated: This 10<sup>th</sup> day of January, 2006.

Respectfully submitted,

WILLIAM J. LEONE  
United States Attorney

s/ Michael C. Johnson  
Michael C. Johnson  
Assistant United States Attorney  
1225 Seventeenth Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 454-0134  
FAX: (303) 454-0408  
E-mail: [michael.johnson2@usdoj.gov](mailto:michael.johnson2@usdoj.gov)  
Counsel for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of January, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will forward the document to the following CM/ECF participant at the following e-mail address:

Curtis L. Kennedy  
[CurtisLKennedy@aol.com](mailto:CurtisLKennedy@aol.com)

s/ Michael C. Johnson  
Michael C. Johnson  
Attorney for Defendant  
United States Attorney's Office  
1225 Seventeenth Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 454-0134  
FAX: (303) 454-0408  
E-mail: [michael.johnson2@usdoj.gov](mailto:michael.johnson2@usdoj.gov)

U.S. Department of Labor



VIA FEDERAL EXPRESS

December 27, 2005

Curtis L. Kennedy  
8405 E. Princeton Avenue  
Denver, Colorado 80237-1741

Re: Hull v. U.S. Department of Labor, No.  
04-B-1264 (OES) (D. Colo.)

Dear Mr. Kennedy:

Enclosed are copies of the four service contracts previously withheld under FOIA Exemption 4 in the captioned case. These documents are (1) The Project Contracts between Qwest and Towers Perrin (pages 860-873); (2) Terms and Conditions of Engagement Between Watson Wyatt & Company and Qwest (pages 874-877); (3) Contract between US West and Bankers Trust (pages 878-935); and (4) Custom Agreement for services between US West and Towers Perrin (pages 951-999). Certain information that would invade an individual's personal privacy has been redacted on pages 860 and 867 pursuant to FOIA Exemption 7(C).

Please contact Jennifer Toth at 202-693-5513 if you have any questions about this matter.

Sincerely,

Miriam McD. Miller  
Counsel FOIA, FACA, and Privacy Act

Enc.

cc: Michael C. Johnson, AUSA (w/out enclosures)

EXHIBIT A-1



*William J. Leone*  
*United States Attorney*  
*District of Colorado*  
*Civil Division*

1225 Seventeenth Street, Suite 700  
Denver, Colorado 80202  
(303) 454-0100

December 27, 2005

BY OVERNIGHT MAIL

Curtis L. Kennedy, Esq.  
8405 E. Princeton Avenue  
Denver, Colorado 80237-1741

Re: Mary M. Hull v. United States Department of Labor,  
Civil Action No. 04-B-1264 (OES)

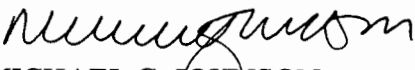
Dear Mr. Kennedy,

In "Defendant's Reply in Support of Defendant's July 11, 2005 Motion for Summary Judgment, and Response to Plaintiff's Petition for *in Camera* Review," at page 5, Defendant noted that John Mayers, the Department of Labor's Employee Benefits Security Administration ("EBSA") investigator on the Qwest investigation, determined that some documents had not been printed out for inclusion in the investigative file. The Department has processed those documents under the FOIA, and has determined that some documents are releasable in full, and some are releasable in part. The documents which are releasable in whole or in part are as follows: S-1 to S-3, S-42 to S-47, S-60 to S-76. A copy of those documents, which totals 26 pages in length, is enclosed.

Please contact me at (303) 454-0134 if you have any questions regarding this matter.

Very truly yours,

WILLIAM J. LEONE  
United States Attorney

  
MICHAEL C. JOHNSON  
Assistant United States Attorney

Enclosures

cc: Jennifer Toth, Esq.  
Office of the General Counsel  
U.S. Department of Labor

EXHIBIT A-2

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

Civil Action No. 04-cv-01264-LTB-OES

MARY M. HULL,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

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**DECLARATION OF MICHAEL C. JOHNSON**

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I, Michael C. Johnson, hereby declare as follows:

1. I am an Assistant United States Attorney and am employed at the U.S. Attorney's Office in Denver, Colorado.
2. I am one of the attorneys for defendant in the case *Hull v. United States Department of Labor*, Civil Action No. 04-cv-01264-LTB-OES.
3. I received from the Department of Labor in late August, 2005, a draft *Vaughn* declaration concerning the eight responsive documents which EBSA Senior Investigator John Mayers identified as documents from his computer hard drive which were not included in the investigative file.

4. Due to my caseload, and my own inadvertent administrative oversight, I did not complete at an earlier date defendant's motion for summary judgment regarding these documents.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

Dated: January 10, 2006

s/ Michael C. Johnson  
MICHAEL C. JOHNSON  
Assistant United States Attorney