

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

**PLAINTIFF'S RESPONSE IN OPPOSITION re [31]
DEFENDANT'S January 11, 2006 MOTION FOR SUMMARY JUDGMENT and
PETITION FOR *IN CAMERA* REVIEW with Rule 56(f) Affidavit by PLAINTIFF HULL**

Plaintiff MARY M. HULL (HULL), through her counsel, hereby responds to [Docket No. 31] Defendant's January 11, 2006 Motion for Summary Judgment and submits her Rule 56(f) Affidavit. This is an action under the Freedom of Information Act, 29 U.S.C. § 552 (FOIA).

Plaintiff's Statement of Her Claim. Plaintiff MARY M. HULL asserts one claim for relief arising under FOIA. By letter dated March 3, 2004, HULL requested the Kansas City office of the Department of Labor (DOL) to provide her information regarding the investigation of the Qwest Pension Plan by the Employee Benefits Security Administration. HULL is a participant retiree in the pension plan. This Court has appropriately characterized this protracted interaction between HULL and the DOL as an "ongoing tug of war" (Docket No. 28, Order of December 2, 2005, p.1). The DOL interjects a new twist to this proceeding. Only a few weeks ago, the DOL first revealed that it has some more documents not yet produced to HULL. In its January 11, 2006 filing, the DOL states: "*Nine of these electronic documents were created after the March 4, 2004 cut-off date for the production of documents in this case. These nine documents therefore are not responsive to Plaintiff's FOIA request, and copies are not*

being produced to the Plaintiff.” (Second Supplemental Declaration of Miriam McD. Miller, ¶ 4). The DOL does not assert any FOIA Exemption. Instead, in its latest and *third* summary judgment brief, the DOL cites a Federal Regulation, to-wit: “In determining records responsive to a request, a component [i.e., each separate bureau, office, board, division, commission, service or administration of the Department of Labor] will include only those records existing as of the date of its receipt of the request as that date is determined in accordance with paragraph (c).” 29 C.F.R. § 70.20(f). The DOL witness does not explain why the federal agency has chosen to selectively withhold some post-March 4, 2004 documents while releasing to HULL many other post-March 4, 2004 documents. For example, see Exhibit 1 filed herewith, a copy of the May 11, 2004 “tolling agreement” executed by Qwest and the DOL. There are numerous other post-March 4, 2004 documents the DOL has begrudgingly released to HULL. (Exhibit 2, HULL Affidavit, ¶ 5). Indeed, this Court has already taken note of several post-March 4, 2004 papers. (See Docket No. 28, Order of December 2, 2005, p. 19). HULL’s FOIA request was for the entire investigation file. It is undisputed that the DOL’s investigation has ended.

Effectively, the DOL wants HULL to repeat her FOIA request efforts. While the DOL contends it must comply with the cited regulation, the DOL has not complied with a plethora of other federal regulations, such as the time limitations set forth in 29 C.F.R. § 70.25 (f). The Court should not allow the DOL to act inconsistent and arbitrary.

In this case, there has been no revelation of when the DOL began and ended its search for records and documents responsive to HULL’s original March 4, 2004 FOIA request. In all likelihood, the process did not begin until long after this litigation was commenced. The DOL did not even begin to produce records until late December 2004. Since then, the DOL has continued to spoon feed HULL, trying to keep ahead of any judicial involvement. At no time during the administrative proceedings did the DOL inform HULL that it would apply a “cut-off”

date of March 4, 2004 for responsive documents. (See HULL Affidavit, ¶ 4).

When faced with the issue of a "cut-off" date for providing responses to FOIA requests, the courts apply a more flexible approach. See *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring a "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on the date of the request); *Van Strum v. EPA*, No. 91-35404, 1992 WL 197660, at *2 (9th Cir. Aug. 17, 1992) (agreeing that a date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); *Judicial Watch, Inc. v. United States Dep't of Energy*, No. 01-0981, 2004 WL 635180, at *21 (D.D.C. Mar. 31, 2004) ("Because the [agency] imposed the . . . cut-off date without informing [the requester] of its intention to do so, the court must conclude that [the agency's] search was inadequate.").

For the same reasons previously argued by Plaintiff and accepted by this Court, there should be an *in camera* review of the papers discussed in the DOL's latest motion.

WHEREFORE, for the aforesaid reasons and as set forth in the Rule 56(f) Affidavit submitted and attached hereto, Plaintiff MARY M. HULL opposes Defendant's January 11, 2006 motion for summary judgment and requests this Court order the DOL to produce to HULL those undisclosed post-March 4, 2004 documents that are part of the Qwest Pension Plan investigation file. Plaintiff requests the Court subject the withheld documents to an *in camera* review.

Dated: February 3, 2006.

s/ Curtis L. Kennedy
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RULE 56(f) AFFIDAVIT OF PLAINTIFF MARY M. HULL

I, Plaintiff MARY M. HULL, first being duly sworn, declare under penalty of perjury and state of my own personal knowledge and submit the following, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in opposition to Defendant's January 11, 2006 Motion for Summary Judgment:

1. I am the Plaintiff in this civil action, a United States citizen over the age of 21 years, and I reside at 678 Clarkson St., Denver, CO 80218-3202.
2. I serve as the elected President of the Association of U S WEST Retirees (AUSWR), a non-profit organization dedicated to promoting the interests of over 20,000 U S WEST and Qwest retirees. AUSWR's mission includes taking appropriate and necessary action to investigate, protect and preserve the interests of retirees, their spouses and beneficiaries in the Qwest Pension Plan and other employee benefit plans.
3. For the benefit of myself and thousands of AUSWR retirees, I directed Attorney Curtis L. Kennedy to pursue this action under the Freedom of Information Act (FOIA). There is great public interest in the outcome of this matter and the information sought under FOIA is being shared with thousands of retiree pension participants who requested my efforts to help

police questionable activities concerning the Qwest Pension Plan.

4. Presently, the DOL contends that some recently discovered documents are not going to be produced to me because the documents were created after March 4, 2004, the date of my original FOIA request. The DOL never informed me of a “cut-off” date to be applied to my FOIA request.

5. In response to my FOIA request, the DOL has produced numerous other documents created after March 4, 2004, including a “tolling agreement” executed by both the DOL and Qwest which agreement has been submitted herein as Exhibit 1.

6. To date, the DOL has never provided me any paperwork reflecting the final decision for not going through with the legal action outlined in the tolling agreement. In other words, the DOL has never revealed any paperwork reflecting a final decision concerning the subject matter of the tolling agreement.

7. Since I cannot conduct formal discovery, I cannot present evidence that the remaining documents are being improperly withheld. I renew my request for an *in camera* review.

Further Affiant sayeth not. I declare the foregoing Affidavit consisting of two (2) pages to be true and correct under penalty of perjury.

EXECUTED this 3rd day of February, 2006, at Denver, Colorado.

/s/ Mary M. Hull
Mary M. Hull, Plaintiff

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

The foregoing Affidavit of Mary M. Hull was acknowledged, subscribed, and sworn to before me this 3rd day of February, 2006 by Mary M. Hull.

Witness my hand and official seal. My commission expires on 02/08/2009.

/s/ Curtis L. Kennedy

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2006, a true and correct copy of the above and foregoing document was filed with the Clerk of the Court using the CM/ECF system which system will send notice of such filing to all counsel of record and a courtesy copy was emailed to Defendant's counsel of record as follows:

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Also, copy of the same was delivered via email to Plaintiff Mary M. Hull.

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