

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-B -1254 (OES)

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

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**RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and  
PETITION FOR *IN CAMERA* INSPECTION**

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On April 1, 2005, Defendant Department of Labor (DOL) filed a request under Fed.R.Civ.P. 56 for dismissal of this action. In support of its motion, the DOL relies upon a declaration by Miriam McD. Miller, Co-counsel for Administrative Law, Office of the Solicitor, United States Department of Labor.

For the following reasons, Defendant's motion should be continued until the Court conducts an *in camera* review. Months after this lawsuit was filed, Plaintiff Mary M. Hull (HULL) substantially prevailed in her FOIA demand by obtaining 4,275 of 6,587 of the documents requested. However, there are remaining disputed questions of fact concerning the applicability of FOIA Exemption 7 with respect to the remaining 2,300 withheld documents.

**Plaintiff's Statement of Her Claim.** HULL asserts one claim for relief arising under the Freedom of Information Act, 29 U.S.C. § 552 (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 Qwest Pension Plan to which she is a participant. By letter dated March 4, 2004, Defendant refused to comply and withheld everything referring to FOIA exemption 7(A). By letter dated March 16, 2004, HULL timely appealed to the Solicitor of Labor which office did not provide a timely response within twenty days. On June 18, 2004, almost 90 days after HULL had appealed to the Solicitor of Labor, she filed her Complaint.

After this Complaint was filed and served, the Solicitor's response was delivered in the mail to Plaintiff's counsel. The Solicitor's response was to uphold the Kansas City DOL's decision not to make any disclosures, again relying upon FOIA Exemption 7(A). Again, every piece of requested paper was withheld. It is undisputed that the full text of the parties correspondence is included within the Complaint.

FOIA Exemption 7(A) prohibits disclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such. . . information. . . could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A).

HULL fully exhausted all administrative remedies made available to her. For about 90 days, the Department of Labor, Office of the Solicitor, did not respond to HULL's administrative appeal. This action under FOIA was timely filed.

In summary, HULL contends in her Complaint that the DOL could not in good faith justify non disclosure of everything that had been withheld from HULL, and the FOIA Exemption relied upon by the DOL did not fully apply to everything the DOL had been withholding from HULL. The DOL's *blanket* denial of HULL's request did not comply with the letter and spirit of FOIA. In the pending motion for summary judgment, the DOL gives no explanation for why the federal agency fully denied HULL's claim and waited until months after

this litigation was commence to finally comply with FOIA. Thus far, HULL has substantially prevailed, since her litigation caused the DOL to give her over 4,200 pages of documents, none of which should have ever been withheld from HULL.

HULL contends the DOL stalled, acted in bad faith, and abused Exemption 7(A) of the FOIA. Furthermore, HULL contends there was no legitimate basis for the DOL to not provide HULL any of the requested information together with an index of all withheld or redacted documents. **A citizen should not have to commence federal court litigation in order to motivate a federal agency to comply with FOIA.** But, that is what happened here.

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(F), in her Complaint, HULL seeks an order finding that the circumstances surrounding the withholding of documents responsive to HULL's FOIA request raises questions whether DOL agency personnel acted arbitrarily or capriciously with respect to the withholding. Furthermore, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), HULL seeks an order enjoining the DOL from withholding documents responsive to HULL's FOIA request and order the DOL to produce to the Court the DOL's file so that the Court can conduct an *in camera* review of any withheld and/or redacted documents to determine whether said documents are properly within the scope of Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A).

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), HULL seeks such other appropriate temporary, preliminary and permanent injunctive relief against DOL, including an order directing future timely compliance with FOIA requests. Finally, pursuant to 5 U.S.C. § 552(a)(4)(E), HULL seeks an order requiring Defendant DOL to pay the reasonable value of Plaintiff's attorney's fees for services performed, necessary expenses of litigation, and costs of this action.

## I. ARGUMENT

### A. **Dismissal is Premature, as HULL Requests an *In Camera* Review of Remaining Withheld Documents For a Determination of Whether The Documents Are Being *Improperly Withheld*.**

FOIA is to be broadly construed in favor of disclosure, and the government bears the burden of justifying nondisclosure under a particular FOIA exemption. See *Audobon Soc’y v. United States Forest Serv.*, 104 F.3d 1201, 1203 (10<sup>th</sup> Cir. 1997). FOIA requires federal agencies to make records within its possession promptly available to citizens who request them. See 5 U.S.C. § 552(a)(3). Unless the requested information falls within one of the nine specified exemptions, the agency must make disclosure. See 5 U.S.C. § 552(b)(1)-(9). Before this Complaint was filed, only one exemption was at issue in this FOIA request: the so-called “7(A) exemption.” This exemption allows a federal agency to withhold "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).

FOIA provides federal courts with jurisdiction to enjoin an agency from withholding agency records and to order the production of such records only if they are being “*improperly withheld* from the complainant.” 5 U.S.C. § 552(a)(4)(B) (emphasis added). In enacting Exemption 7(A), "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). However, Congress did not intend to preclude disclosure of any

investigatory records; rather, Congress sought to protect against interference with investigatory files prior to the completion of an actual or contemplated enforcement proceeding. Id. at 232.

Utilizing this framework, the Court should conclude that the DOL has failed to demonstrate that Exemption 7(A) shields all of the requested data from disclosure. The DOL has not demonstrated with "concrete examples" the way in which the premature public release of the requested documents could interfere with enforcement proceedings. Instead, the DOL submits an affidavit by someone not even remotely connected with the so-called "investigation" giving only speculative and not the "actual, contemplated enforcement proceeding" that Congress had in mind when drafting Exemption 7(A). See Id. at 232.

Courts grappling with FOIA Exemption 7(A) have held that interference with open or prospective cases means hindering an agency's ability to control its investigation, enabling suspects to elude detection and intimidate witnesses, or prematurely revealing evidence or strategy. See, e.g., *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998). The DOL has not affirmatively established any potential interference of this nature.

The DOL's bad faith approach taken during the two-step FOIA administrative proceedings and for months after this lawsuit was commenced that all of its investigative records are within the scope of Exemption 7(A) makes the limitation that the records be reasonably "expected to interfere with law enforcement proceedings" meaningless. The DOL's stance contradicts the congressional intent in fashioning FOIA and its exemptions. Exemption 7(A) is not intended to "endlessly protect material simply because it was in an investigatory file." *Robbins Tire*, 437 U.S. at 230. The exemption requires a government agency to show by more than conclusory statements how the particular kinds of investigatory records would interfere with

a pending enforcement proceeding. *Campbell v. Dept. of Health and Human Serv.*, 682 F.2d 256, 265-66 (D.C. Cir. 1982). To date, the DOL has failed to do so.

In this FOIA case, HULL cannot compel production of the very documents that are being withheld under a FOIA exemption. Formal discovery is not a means for a party to circumvent an agency's assertion of FOIA's exemptions and obtain the contents of withheld documents – the issue that lies at the very heart of a FOIA case. *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983) (affirming denial of discovery when directed to substance of withheld documents at issue).

As shown by HULL's Affidavit submitted herewith under Fed.R.Civ.Proc. Rule 56(f), since she cannot conduct formal discovery of the requested documents, she cannot establish facts essential to justify her opposition to the DOL's motion for summary judgment. The most expeditious and fair resolution of this case is for the Court to conduct an *in camera* inspection.

In her Complaint, HULL asks this Court to exercise its discretion to conduct an *in camera* review of any withheld and redacted documents not produced to determine whether said documents are within exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A). HULL does not abandon this request. Since the DOL needlessly categorized *everything* as exempt from FOIA disclosure, only to change course months after the lawsuit, there is an issue about the DOL's good faith, and HULL has good reason to continue with her request for an *in camera* inspection. The DOL's so-called "investigation" is now over 4 years old and nothing has happened.

Pursuant to Rule 56(f), the court should order a continuance of the DOL's motion for summary judgment and make such "other order as is just." Therefore, HULL requests and the Court should conduct an *in camera* inspection of the remaining 2,300 documents and make a

determination whether disclosure “could reasonably be expected to interfere with enforcement proceedings.”

**B. The *In Camera* Review Will Prove HULL Has Substantially Prevailed and Due to the DOL’s Needless Delay and Actions In this Case, She Should Be Awarded Attorney’s Fees and Costs.**

Months after a the DOL filed a general denial Answer to the Complaint and a scheduling conference was held, the DOL finally saw fit to give HULL over 4,200 pages of documents requested long ago. There is no dispute about the fact that HULL’s lawsuit was a catalyst for obtaining the DOL’s compliance with FOIA. And the DOL gives no facts to show any reasonableness for the government’s asserted legal basis for withholding the 4,200 pages of documents all that time. The DOL is simply silent about how it conducted itself and that matter is not discussed in the either motion for summary judgment or the accompanying affidavits.

The DOL relies upon pure *speculation* to support its contention that release of any of the remaining 2,300 documents will interfere with the 4 year old stalled investigation. The DOL relies upon the Miller Declaration which contains conclusory and vague statements that public disclosure of any of the remaining documents would or could: 1) “permit Qwest to take pre-emptive measures to avoid liability in any future enforcement proceeding arising from the investigation” (¶ 15); 2) “enable it [Qwest] to gain an unfair advantage in any future enforcement proceedings” (¶ 16); “trigger public interference with the investigation, and therefore hamper its progress” (¶ 17); “undermine the evidence EBSA has compiled in anticipation of an enforcement proceeding” (¶ 18); and “jeopardize any enforcement proceeding against Qwest by divulging the details underlying EBSA’s enforcement strategy” (¶ 19). There has been no reasonable showing of articulable harm that will result from public

release of any of the remaining information. In her Declaration, Ms. Miller admits that 1,000 of the withheld documents contain “data” concerning the Qwest Pension Plan. There is a serious question concerning good faith on the part of the DOL.<sup>1</sup>

*In camera* inspection is particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims or there is evidence of bad faith on the part of the agency. *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996); *Carter v. United States Dep’t of Commerce*, 830 F.2d 388, 392-93 (D.C. Cir. 1987).

Furthermore, an *in camera* inspection is appropriate because the DOL does not explain why it cannot reveal any segregable portions of the remaining 2,300 pages of withheld documents. Although a document may fall within one of FOIA's exemptions, non-exempt material contained therein which is "segregable" from the exempt information must be disclosed. 5 U.S.C. Section 552(b). (Agencies "shall" disclose "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt under this subsection."). For instance, in *Mead Data Central v. Department of Air Force*, 566 F. 2d 242, 260 (D.C. Cir. 1977), the Court stated: "It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." See also, *Center for Auto Safety v. E.P.A.*, 731 F. 2d 16, 21 (D.C. Cir. 1984).

Because of this "segregability" requirement, an agency's FOIA affidavit must explain why all individual passages in a withheld document are not subject to public disclosure. Here,

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<sup>1</sup> For instance, the DOL seriously undermines its own arguments. While taking up the Court’s time arguing that “public disclosure of the identity of EBSA’s investigator and EBSA’s case number before the investigation is completed could compromise the integrity of the investigation” (See Deft’s Motion at p. 10), the DOL and Ms. Miller proceed to waive that argument by disclosing the identity of the investigator. See page 1 and page 5 of Exhibit A-10 to Miller Declaration - identifying the EBSA investigator.

Ms. Miller's Declaration is deficient because she does not adequately address the segregability requirement. The DOL cannot merely assert that each document itself (contained within the 2,300 withheld pages) is exempt from disclosure since it contains exempt information. The DOL should not be allowed to withhold every *entire* document simply by arguing that they may contain some exempt material. After *in camera* inspection, the Court should order the DOL's compliance with FOIA's segregability requirement and make production to HULL.

FOIA provides that the court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case ... in which the complainant has substantially prevailed." 5 U.S.C. §552(a)(4)(E). Assessment of attorney's fees in an FOIA case is discretionary with the district court. *Aviation Data Serv. v. FAA*, 687 F.2d 1319, 1321 (10th Cir. 1982) (holding that the district court should be guided by the following four factors: "(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought and (4) whether the government's withholding of the records had a reasonable basis in the law.").

Admittedly, HULL has not yet obtained either a judgment or consent decree which would label her the party that has "substantially prevailed." <sup>2</sup> However, after an *in camera* inspection of the remaining withheld documents, HULL expects the Court will order the DOL to release additional documents to HULL.

## II. CONCLUSION

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<sup>2</sup> Plaintiff is aware of the recent line of cases including *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002), applying the Supreme Court's rule in *Buckhannon Board & Care Home, Inc.*, 532 U.S. 598 (2001) and ruling that attorney fees are not authorized to a plaintiff under a fee-shifting statute, such as FOIA, without a judgment on the merits or a court-ordered consent decree and rejecting a "catalyst theory."

For the aforesaid reasons, Plaintiff MARY M. HULL opposes Defendant's motion for summary judgment and requests, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), an order requiring the DOL to produce to the Court the DOL's remaining file so that the Court can conduct an *in camera* review of any withheld and/or redacted documents to determine whether said documents are properly within the scope of FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A).

DATED this 20<sup>th</sup> day of April, 2005.



**CURTIS L. KENNEDY**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of April, 2005, a true and correct copy of the above and foregoing **RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and PETITION FOR IN CAMERA INSPECTION** together with a copy of **RULE 56(f) AFFIDAVIT OF PLAINTIFF MARY M. HULL** was delivered to Defendant's counsel of record as follows:

Michael C. Johnson, Esq.  
Assistant United States Attorney  
UNITED STATES ATTORNEY'S OFFICE  
1225 17<sup>th</sup> Street, 7<sup>th</sup> Floor  
Denver, CO 80202  
Tele: 303-454-0134  
Fax: 303-454-0404

**(Via Fax and First Class Mail)**

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



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**RULE 56(f) AFFIDAVIT OF PLAINTIFF MARY M. HULL**

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Plaintiff MARY M. HULL, first being duly sworn, deposes and states of her own personal knowledge and submits the following, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in opposition to Defendant's Motion of Summary Judgment filed on April 1, 2005:

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 80218-2302.
2. Months after my lawsuit was commenced, in late December 2004, Defendant Department of Labor (DOL) finally produced about 4,500 pages of documents which the DOL had previously consistently refused to give me, claiming the documents were all subject to FOIA Exemption 7(A).
3. I have not seen any of the remaining approximately 2,200 pages of requested documents being withheld by the DOL and I cannot establish facts essential to justify opposition to the DOL's motion for summary judgment filed on April 1, 2005. Since I cannot conduct formal discovery of the requested documents, I cannot present evidence that the documents are

