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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

COLUMBIA RIVERKEEPER, a non-profit
Washington corporation,
Plaintiff,

Civil No.:

v.

U.S. ARMY CORPS OF ENGINEERS, a
United States agency, and **LIEUTENANT
GENERAL THOMAS P. BOSTICK**, in his
official capacity as Commanding General and
Chief of Engineers, U.S. Army Corps of
Engineers,
Defendants.

COMPLAINT
Freedom of Information Act (5 U.S.C. §
552); Administrative Procedure Act (5
U.S.C. § 706)

INTRODUCTION

1. This civil action seeks judicial relief compelling the defendants U.S. Army Corps of Engineers and Lieutenant General Thomas P. Bostick (hereafter collectively “Corps”) to comply with the requirements of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, with respect to the production of documents requested by plaintiff Columbia Riverkeeper (“Riverkeeper”) under FOIA.

2. FOIA requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure. 5 U.S.C. § 552 *et seq.*

3. Riverkeeper requested documents relating to the Corps’ review of a controversial coal export project, known as the Morrow Pacific Project. As of the date this complaint was filed, the Corps had not disclosed all of the requested information or responded to Riverkeeper’s latest administrative appeal.

4. The Corps’ failure to produce the requested documents, or respond to Riverkeeper’s administrative appeal, causes a concrete and on-going injury to Riverkeeper’s ability to obtain and use public information.

5. Riverkeeper seeks injunctive relief requiring the disclosure of the requested documents and a judicial declaration that the Corps violated the Freedom of Information Act.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as well as under 28 U.S.C. § 1331, because this action arises under FOIA, 5 U.S.C. § 552 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

7. Venue is proper in this Court under 28 U.S.C. § 1391 and 5 U.S.C. § 552(a)(4)(B) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, some or all of the agency records in question may be located in this district, and Riverkeeper's principal place of business is in this district.

PARTIES

8. Plaintiff COLUMBIA RIVERKEEPER is a non-profit public interest organization incorporated in Washington State with approximately 3,000 members. Riverkeeper's principal place of business is in Hood River, Oregon. Riverkeeper's mission is to restore and protect the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Riverkeeper participates in the Corps' regulatory activities concerning the protection of the Columbia River. Riverkeeper regularly uses FOIA to obtain records from many federal agencies, including the Corps. Riverkeeper brings this action on its own behalf and on behalf of its members and staff, who use and benefit from information obtained through FOIA. These interests of Riverkeeper have been harmed by the Corps' failure to disclose the documents requested under FOIA and by the Corps' failure to respond in a timely manner to Riverkeeper's administrative appeal. These harms are traceable to the Corps' conduct and would be remedied by the relief sought in this action.

9. Defendant U.S. ARMY CORPS OF ENGINEERS is a federal agency within the Department of Defense, and has possession or control of the records Riverkeeper seeks. The Corps has responsibility for deciding administrative appeals of its FOIA determinations.

10. Defendant LIEUTENANT GENERAL THIOMAS P. BOSTICK is sued solely in his official capacity as the Commanding General and Chief of Engineers of the U.S. Army Corps

of Engineers. The Commanding General and Chief of Engineers is the official ultimately responsible for the Corps' compliance with FOIA and determination of FOIA appeals.

LEGAL FRAMEWORK

11. FOIA's basic purpose is "to open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

12. To achieve these important goals, FOIA requires federal agencies to make records in their possession or control available to the public upon the request, unless one of FOIA's nine specific exemptions applies. 5 U.S.C. § 552(a), (b).

13. Within twenty working days of receiving a FOIA request, an agency must make all the requested records available, or tell the requestor that part of the request was denied pursuant to one of the FOIA exemptions. 5 U.S.C. § 552(a)(6)(A)(i).

14. If an agency denies part of a FOIA request, the requestor may appeal to the head of that agency. 5 U.S.C. § 552(a)(6)(A)(i). The agency must "make a determination with respect to [the] appeal within twenty [working] days" after receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

15. A requestor has "exhausted his administrative remedies," 5 U.S.C. § 552(a)(6)(C)(i), and may sue in federal district court to compel the agency to disclose any improperly withheld records, 5 U.S.C. § 552(a)(4)(B), when the agency does not make a determination with respect to an appeal within twenty working days of receiving the appeal. 5

U.S.C. § 552(a)(6)(A)(ii). *See also* 32 C.F.R. § 518.17(d) (Corps’ regulations governing FOIA appeals).

16. FOIA Exemption 5 (hereinafter “Exemption 5”), 5 U.S.C. § 552(b)(5), allows, but does not require, federal agencies to withhold records that are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 allows an agency to withhold documents that it would not have to disclose in discovery, including documents covered by the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Maricopa Audubon Soc’y v. United States Forest Serv.*, 108 F.3d 1082, 1084 n.1 (9th Cir. 1997).

17. As part of Exemption 5, the deliberative process privilege protects agency records with three characteristics. First, the record must document a communication between or among agency employees. 5 U.S.C. § 552(b)(5). Second, that communication must be deliberative; “a direct part of the deliberative process . . . that makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975). Third, the record must be pre-decisional; it must have been created while the agency was deliberating its decision. *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

18. Even if a part of a record is exempt from FOIA, the agency must make available any non-exempt parts of that record—such as factual materials—that are “reasonably segregable.” 5 U.S.C. § 552(b).

STATEMENT OF FACTS

19. On November 2, 2012, Riverkeeper submitted a FOIA request to the Corps’ Portland District Office, requesting information related to the Corps’ environmental review of a

controversial coal export project proposed along the Columbia River, known as the Morrow Pacific Project.

20. Coyote Island Terminals LLC, a subsidiary of Ambre Energy (hereafter collectively “Ambre”), proposes the Morrow Pacific Project to export coal mined in Wyoming and Montana to overseas markets. The Morrow Pacific Project would ship 8.8 million tons of coal per year in open rail cars from the Powder River Basin in Wyoming and Montana to the Port of Morrow in northeastern Oregon. At the Port of Morrow, Ambre would load the coal onto barges, which would be pushed 272 miles down the Columbia River to Port Westward, near Clatskanie, Oregon. At Port Westward, Ambre would transfer coal from the barges into ocean-going vessels that would transport the coal overseas.

21. Under Section 10 of the Rivers and Harbors Act of 1899, the Corps has permitting authority over aspects of the Morrow Pacific Project that would impact navigation on the waters of the United States. *See* 33 U.S.C. § 403 *et seq.* In 2012, Ambre applied to the Corps for a Rivers and Harbors Act Section 10 permit to build in- and over-water structures to facilitate coal trans-loading and export.

22. Because issuing a Rivers and Harbors Act Section 10 permit for the Morrow Pacific Project would be a “major Federal action[],” 42 U.S.C. § 4332(C), the Corps began an environmental review of the Morrow Pacific Project pursuant to the National Environmental Policy Act. 42 U.S.C. § 4321 *et seq.*

23. Though the Morrow Pacific Project would have severe environmental impacts and use un-tested technology for handling coal, the Corps decided to first prepare an Environmental Assessment instead of a more rigorous Environmental Impact Statement to examine and explain the Project’s impacts. *Compare* 40 C.F.R. § 1508.9 (describing Environmental Assessments)

with 40 C.F.R. §§ 1502.1–1502.25 (describing requirements for Environmental Impact Statements). To date, the Corps has not issued an Environmental Assessment or a Finding of No Significant Impact.

24. On November 2, 2012, Riverkeeper submitted a FOIA request to the Corps for information related to the Corps' National Environmental Policy Act review of the Morrow Pacific Project.

25. On January 18, 2012, the Corps produced some records responsive to Riverkeeper's request. These responsive records were communications between Ambre and the Corps about the Morrow Pacific Project.

26. On March 18, 2013, Riverkeeper administratively appealed the Corps' failure to produce all records responsive to Riverkeeper's FOIA request within the statutory deadline.

27. On March 22, 2013, the Corps responded to Riverkeeper's first appeal by sending Riverkeeper the remaining records that were, in the Corps' view, responsive to Riverkeeper's FOIA request. At that time, however, the Corps also expressly withheld or redacted ninety-one responsive records pursuant to FOIA Exemption 5. The Corps indiscriminately claimed that all ninety-one responsive records or portions of records were subject to the deliberative process privilege and/or the attorney work product privilege and/or the attorney-client privilege. This constituted a partial denial of Riverkeeper's FOIA request.

28. Because the ninety-one responsive records or portions of records that the Corps withheld are not actually subject to FOIA Exemption 5, on May 16, 2013, Riverkeeper administratively appealed the Corps' partial denial of Riverkeeper's FOIA request. *See* Exhibit 1 (Riverkeeper's second administrative appeal).

29. As of the date this complaint was filed, more than twenty working days had passed since the Corps received Riverkeeper's second administrative appeal and the Corps had made no determination regarding Riverkeeper's second administrative appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii); *see also* 32 C.F.R. § 518.17(d). Accordingly, the Corps constructively denied Riverkeeper's second administrative appeal.

FIRST CLAIM FOR RELIEF
FOIA—Wrongful Withholding of Records

30. Riverkeeper realleges and incorporates by reference all preceding paragraphs.

31. The ninety-one responsive records or portions of records that the Corps withheld are agency records of the Corps within the meaning of 5 U.S.C. § 552. Riverkeeper requested the release of these withheld records under FOIA, but the Corps refused to produce those records or to redact and disclose all reasonably segregable non-exempt portions of those records. Riverkeeper has exhausted its administrative remedies by filing a timely appeal, which the Corps did not rule upon within the twenty working days allowed by statute.

32. The ninety-one records or portions of records that the Corps withheld are not exempt from release under FOIA Exemption 5 because the Corps has not demonstrated that those records are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with agency." 5 U.S.C. § 552(b)(5).

33. Riverkeeper has a statutory right under FOIA to the ninety-one responsive records or portions of records that the Corps withheld, and Riverkeeper is entitled to judicial review of the Corps' failure to promptly release those records. 5 U.S.C. § 552(a)(4)(B).

34. The Corps' failure to release the requested records, or all reasonably segregable portions of those records, violates FOIA. 5 U.S.C. § 552(a)(6). The Court should order the

Corps to produce the records that it improperly withheld from Riverkeeper. 5 U.S.C. § 552(a)(4)(B).

SECOND CLAIM FOR RELIEF
Violations of the Administrative Procedure Act

35. Riverkeeper re-alleges and incorporates all preceding paragraphs by reference.

36. The Corps unlawfully withheld agency action by refusing to: (1) provide records responsive to Riverkeeper's information request that are not within the scope of any FOIA disclosure exemptions, and (2) issue a timely determination on Riverkeeper's administrative appeal. *See* 5 U.S.C. § 706(1).

37. The Corps acted arbitrarily, capriciously, and not in accordance with law, and abused its discretion, by withholding records responsive to Riverkeeper's request. *See* 5 U.S.C. § 706(2)(A).

38. The Corps constructively denied Riverkeeper's administrative appeal of the Corps' decision to withhold requested records pursuant to FOIA's Exemption 5. 5 U.S.C. § 552(a)(6)(C)(i); 32 C.F.R. § 518.17(d).

39. Riverkeeper is entitled to judicial review under the Administrative Procedure Act. 5 U.S.C. §§ 702, 706.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

A. Order defendants to immediately disclose to plaintiff all of the records sought in this action.

B. Declare that defendants' failure to disclose the requested documents is unlawful under FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), as well as agency action unlawfully withheld, 5 U.S.C.

§ 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2).

C. Declare that defendants' failure to timely make a determination on plaintiff's administrative appeal is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2).

D. Award plaintiff its reasonable costs, litigation expenses, and attorneys' fees pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E), and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and all other applicable authorities; and

E. Grant such other further relief as the Court deems just and proper.

Respectfully submitted, this 26th day of August, 2013.

s/ Miles B. Johnson
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