

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL,)
)
Plaintiff,)
)
v.) 01-2545 (GK)
)
DEPARTMENT OF ENERGY,)
)

Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S EXPEDITED MOTION
FOR RELEASE OF RESPONSIVE RECORDS AND FOR A VAUGHN INDEX**

Introduction

In April 2001, plaintiff Natural Resources Defense Council ("NRDC") submitted a straightforward Freedom of Information Act ("FOIA") request to the Department of Energy ("DOE") seeking records related to the Vice-President's National Energy Policy Development Group ("Energy Task Force"). See Declaration of Sharon Buccino ("Buccino Decl."), Attachment ("Att.") 1. However, more than nine months later, NRDC has yet to receive the records it has requested. Id., ¶ 13. Moreover, even in response to this lawsuit, DOE has not offered to disclose these documents, to justify the basis for withholding documents, or even to justify the basis for the agency's delay in responding. Instead, DOE has filed an "Answer" which, on the one hand, concedes that DOE is in patent violation of the FOIA, while at the same time asking the Court to dismiss this action. Compare Answer, ¶ 17 (admitting failure to provide responsive records) with id. at 5 (requesting that "this action be dismissed with prejudice . . .").

In the meantime, as recent press accounts have made clear, there is enormous public interest in the Energy Task Force and the manner in which the Task Force's recommendations were developed. See, e.g., Dana Milbank, Cheney Refuses Records' Release: Energy Showdown

With GAO Looms, Washington Post, Jan. 28, 2002, at A1; see also Don Van Natta, Jr., White House Could Be Sued on List Access, New York Times, Jan. 26, 2002, at B1. Especially in light of the Task Force's controversial recommendations -- e.g., increased extraction of coal, oil and other resources from public lands, including the Arctic National Wildlife Refuge; construction of new power plants; and increased reliance on nuclear power, see Recommendations of the National Energy Policy Development Group ("Task Force Report") (May 2001) (available at www.whitehouse.gov/energy/) -- plaintiff NRDC and others have serious concerns whether industry officials who stand to benefit from these recommendations played an extensive role in the process. See Buccino Decl., ¶¶ 2-3; see also White House Could Be Sued on List Access at B1 (discussing revelations that Vice-President Cheney met with Kenneth Lay of Enron during the development of the Energy Task Force recommendations). However, the Administration has repeatedly rebuffed Congress' and others' efforts to obtain this information. Id.

Evidently, continuing the pattern of delay, DOE hopes that by simply dragging this litigation out as long as possible, it can continue to avoid letting the public learn how the nation's energy policies are being developed. This evident disdain for the government's clear obligations under the FOIA cries out for judicial relief. Thus, given (a) DOE's admission that the agency may have thousands of responsive records that have not yet been produced, see Declaration of Howard M. Crystal ("Crystal Decl."), ¶ 2; (b) the many months which NRDC has already waited for these materials; and (c) the lack of any justification for this delay, the Court should order DOE to provide NRDC with all responsive, non-exempt records, together with an adequate Vaughn index to justify any withholdings of the records for which an exemption is claimed.

Moreover, given the fact that the Senate will begin debating energy legislation before

mid-February, DOE should not be permitted to delay any further in taking these steps. See, e.g., Buccino Decl., ¶ 10; see also Jan. 24, 2002 Letter from Congressmen Henry Waxman and John Dingell to the General Accounting Office ("GAO") (indicating that "consideration in the Senate of comprehensive energy legislation is likely in the near future . . .") (Crystal Decl., Att. 1). Instead, the Court should order DOE to comply with the FOIA within ten days of the Court's Order.¹

Background

A. The Energy Task Force

In his second week in office, President Bush announced the formation of the Energy Task Force, to be chaired by Vice-President Dick Cheney. See Task Force Report at viii. In addition to the Vice-President, the Task Force's formal membership included the Secretaries of the Departments of Energy, Interior, Agriculture, Transportation, and Commerce, as well as the Administrator of the Environmental Protection Agency and the Director of the Office of Management and Budget. See id. at v.

During the next several months, the Task Force met with various individuals and groups to collect information, and to develop their recommendations for legislative and administrative action. See, e.g., White House Could Be Sued on List Access, at B1. In May 2001, the Task Force issued its Report, entitled "National Energy Policy: Report of the National Energy Policy Development Group." See Task Force Report. Among other recommendations, the Report

¹ NRDC expected that, in response to the Complaint, DOE would provide responsive records, as often occurs in FOIA actions. However, having received DOE's Answer last week, and having discussed the matter with DOE's Counsel, it is apparent that, absent immediate Court intervention, DOE will not provide the records NRDC seeks for months. See Crystal Decl., ¶ 2.

recommends that the Administration "expedite permits and other federal actions necessary for energy-related projects," id., Summary of Recommendations at 3; remove "impediments to federal oil and gas leasing," id. at 7; promote "offshore oil and gas development," id.; and "support the expansion of nuclear energy." Id. at 8.

The Administration has already begun implementing some of the Task Force's recommendations. For example, the Bureau of Land Management ("BLM") has taken steps to expedite the process to approve drilling permits on BLM lands, as recommended by the Task Force. Buccino Decl., ¶ 6. Other recommendations call for legislative action, such as legislation to allow oil drilling in the Arctic National Wildlife Refuge, support expansion of nuclear energy, and subsidize some of the dirtiest forms of power generation. Buccino Decl., ¶ 9. The House of Representatives has already passed a bill adopting many of these recommendations, and the Senate Majority Leader has announced that the Senate will begin considering energy legislation by mid-February. See id., ¶¶ 8-10; see also Crystal Decl., Att. 1.

From the beginning, plaintiff NRDC and others have been extremely concerned with the manner in which the Task Force's recommendations were being developed. See Buccino Decl., ¶¶ 2-3. That concern has only been heightened by the secrecy which has surrounded the Task Force, and the participation of various non-governmental officials who were consulted in developing the Task Force's recommendations. Id.²

² One of NRDC's concerns is whether the Task Force, or subcommittee's reporting to the Task Force, should have complied with the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, as amended. See, e.g., Association of Am. Surgeons and Physicians v. Clinton ("Clinton"), 997 F.2d 898, 914 (D.C. Cir. 1993) (discussing FACA's application to President Clinton's Health Care Task Force). Thus, one of the areas covered by the FOIA request is the

B. NRDC's FOIA Request and DOE's Response

As the Supreme Court has emphasized, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (other citations omitted). Thus, FOIA was enacted to "permit access to official information long shielded unnecessarily from public view" by creating a "right to secure such information from possibly unwilling official hands," Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973), thereby "open[ing] agency action to the light of public scrutiny." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (other citations omitted). "[D]isclosure, not secrecy, is the dominant objective of the Act." Id.

The FOIA, 5 U.S.C. § 552, as amended, requires agencies of the federal government, upon request, to release records to the public, unless one of nine specific statutory exemptions applies. Although, in "unusual circumstances," an agency may grant itself an extension of ten additional days to respond, upon receiving an FOIA request an agency must respond within twenty working days. 5 U.S.C. § 552(a)(6); see also 10 C.F.R. § 1004.5(d) (DOE FOIA regulation requiring notice "in writing" of any unusual circumstances requiring a delayed response).

In order to learn more about the manner in which the Energy Task Force was developing its recommendations, on April 26, 2001, plaintiff NRDC submitted an FOIA Request to the Department of Energy for records related to the Task Force. In particular, the Request asked for:

participation of non-governmental individuals and groups in the Task Force. See Buccino Decl., ¶ 4.

- (a) Records identifying the members of the Task Force and any and all working groups, subcommittees or other groups reporting to the Task Force;
- (b) Records relating to the purpose or work plan of the Task Force and any and all working groups, subcommittees or other groups formed to assist the Task Force;
- (c) The calendars dating from January 21, 2001 to the present of the agency head and any agency staff performing work related to the Task Force;
- (d) Minutes, notes or other records of meetings attended by the agency head or any agency staff relating to the work of the Task Force;
- (e) Records relating to any contractors or temporary full-time employees hired by the agency regarding the work of the Task Force, including, but not limited to the contracts with these individuals, their resumes, and their SF-171 forms;
- (f) Records relating to communications between agency personnel and members of the Presidential transition team regarding the Task Force;
- (g) Records regarding any efforts by agency personnel or the Task Force to screen for conflicts of interest or bias among the individuals or groups providing advice relating to the work of the Task Force;
- (h) Records prepared by agency personnel relating to the work of the Task Force;
- (i) Records received from non-agency individuals or groups, contractors or temporary full-time agency employees relating to the work of the Task Force; and
- (j) Records relating to solicitation of advice from individuals or groups regarding the work of the Task Force that have not already been included in response to any of the categories above.

See Buccino Decl., Att. 1.³

³ NRDC also requested a waiver of fees, which applies where the information is not sought for commercial purposes and "is likely to contribute significantly to public understanding of the operations or activities of the government" See 5 U.S.C. § 552(a)(4)(A)(iii). Although DOE initially denied the fee waiver, the agency quickly reversed course and granted the waiver. See Buccino Decl., Atts. 2 and 3. The agency initially denied the fee waiver based on the unsupportable rationale that the records would not contribute to public understanding of government activities, even though DOE had not even collected, let alone evaluated, the relevant documents. See Buccino Decl., Att. 2.

On May 11, 2001, DOE, purporting to respond to NRDC's request, produced copies of form letters sent by DOE to individuals inquiring about the work of the Task Force. See, e.g., Buccino Decl., Atts. 4 and 5 (examples of these letters). Although DOE indicated that the request had been forwarded to various offices to collect responsive records, DOE did not provide any additional records. See Buccino Decl., ¶ 13 and Att. 3.

On May 16, 2001, NRDC wrote to DOE, explaining that NRDC was still waiting for documents responsive to the FOIA request. See Buccino Decl., Att. 6. During the following week, NRDC agreed to narrow the scope of its request, by limiting part (c) of its request to the calendars of senior DOE personnel, and limiting part (h) of its request to the last draft of any chapter of the Task Force's Report provided by DOE to the Task Force, the version prior to that draft, and records prepared by agency personnel which relate to information received from non-federal employees concerning the Task Force. See Buccino Decl., Att. 7. Despite this accommodation, DOE continued to refuse to provide any additional responsive records.

Given this failure, in July 2001, NRDC filed a constructive denial appeal of their FOIA request with DOE's Office of Hearings and Appeals. See Buccino Decl., Att. 8. Incredibly, a few weeks later, DOE's Appeals Office dismissed the appeal, on the grounds that it lacks jurisdiction to rule on the agency's violations of the FOIA by failing to respond to an FOIA request. See Buccino Decl., Att. 9.

C. The Present Litigation

In light of DOE's stonewalling, NRDC filed this suit on December 11, 2001, asking the Court to order the release of all the records responsive to NRDC's April 2001 FOIA Request.

See Complaint. After obtaining an extension to respond to the Complaint, see Order of Jan. 14, 2002, last week DOE filed an Answer.

In its Answer, DOE flatly admits that the agency has failed to provide responsive records to NRDC within the timeframe required by the statute. See Answer, ¶ 17. Yet, remarkably, DOE denies that it has violated the FOIA, id., ¶ 19, and instead asserts that "plaintiff is not entitled to the relief requested, or to any relief whatsoever." Id. at 5. DOE then asks the Court to order that "this action be dismissed with prejudice" Id.

Shortly after filing this Answer, DOE's counsel conferred with plaintiff's counsel concerning the Request. Rather than asserting that plaintiff is not entitled to any relief, as DOE had stated in its Answer, DOE's counsel indicated that DOE may have thousands of responsive records in its possession. See Crystal Decl., ¶ 2. However, rather than agreeing to provide these records now, more than nine months after the FOIA request was submitted, DOE's counsel explained that it may be several more months before DOE provides all the responsive records. Id., ¶ 2. Moreover, even at that time, DOE apparently only plans to summarize the basis for any withholdings of records, rather than providing a Vaughn index concerning these records, id., ¶ 3. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).⁴

Given DOE's intransigence on a matter of enormous public interest, plaintiff has no alternative but to file the present motion.

Argument

A. The Court Should Order DOE to Release All Non-Exempt Responsive Records To NRDC Within Ten Days.

⁴ In light of these representations, DOE's counsel asked that plaintiff simply await a further response from DOE. See Crystal Decl., ¶ 2.

As noted above, the plain language of the FOIA requires agencies to respond to FOIA requests within twenty working days, and permits an additional twenty working days for the agency to resolve any administrative appeal. See 5 U.S.C. § 552(a)(6)(B). As Senator Ted Kennedy explained when the FOIA was initially enacted, "giv[ing] the agency 40 working days, or almost two calendar months [is] more than enough time for any agency to complete the process of finding and reviewing requested records." See Open America v. Watergate Special Prosecutor Force, 547 F.2d 605, 611, n.11 (D.C. Cir. 1976), quoting Joint Comm. Print, Freedom of Information Act and Amendments of 1974, 94th Cong., 1st Sess. 178 at 438-39 (1975).⁵

Nonetheless, recognizing that there may develop "unusual circumstances" which make responding even within twenty days difficult, Congress included a FOIA provision permitting agencies to invoke a ten day extension in the deadline. See 5 U.S.C. § 552(a)(6)(B). However, the FOIA requires that, at the very least, the agency must provide "written notice" concerning such an extension, both explaining the "unusual circumstances" requiring the delay, and informing the requestor when to expect a response. Id.

Here, although DOE never even provided the required written notice claiming "unusual circumstances," it has long since missed both the twenty day deadline, which was reached in May 2001, as well as the extended deadline, which expired on June 7, 2001. Now, more than seven months later, DOE has still not provided the responsive records, or any assurance as to when those records will be provided.

⁵ As originally enacted, the FOIA required a response within ten working days, but the Statute was amended in 1996 to provide agencies more time to respond. See Pub Law 104-231. However, despite this amendment, DOE's FOIA regulations still require the agency to respond to an FOIA request within ten working days. See 10 C.F.R. § 1004.5(d).

Nor has DOE proffered any explanation as to the grounds for this delay, in express violation of DOE's own FOIA regulations. See 10 C.F.R. § 1004.5(d)(4) (requiring that "[w]hen no determination can be made within the applicable time period," DOE will "inform the requestor of the reason for the delay [and] the date on which a determination may be expected to be made"). Instead, while recognizing that NRDC is plainly entitled to the relief it is seeking here, DOE has inexplicably asked the Court to dismiss this action. See Answer at 5.

Accordingly, there can be no legitimate dispute that plaintiff is entitled to an order requiring DOE to provide plaintiff with the records NRDC seeks. Indeed, given the plain language of the FOIA, which provides DOE with "20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request" to respond, 5 U.S.C. § 552(a)(6)(A)(i), plaintiff is plainly entitled to the immediate release of these records. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (explaining that unambiguous statutory language "is the law and must be given effect."); see also Harbor Gateway Comm. Property v. EPA, 167 F.3d 602, 606 (D.C. Cir. 1999) ("when a statute's meaning is clear, and the enactment is within the constitutional authority of Congress, the sole function of the courts is to enforce it according to its terms.") (other citations omitted).⁶

⁶ Under the FOIA, a requestor may not be entitled to immediate relief from an agency's FOIA violations where "the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request," 5 U.S.C. § 552(a)(6)(C)(i). See Open America, 547 F.2d 605. However, the FOIA was amended in 1996 to narrow the scope of this exception, providing that a "predictable agency workload of requests" does not constitute such an "exceptional circumstance" unless "the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. § 552(a)(6)(C)(ii). Here, DOE has not suggested that there are such exceptional circumstances, and the agency certainly cannot demonstrate due diligence in responding to NRDC's FOIA request.

Moreover, while DOE has been refusing to provide responsive records, the Administration has been implementing some Task Force's recommendations, and Congress has been moving forward to consider legislation implementing others, with the Senate poised to take up energy legislation in just a few weeks. See Buccino Decl., ¶¶ 6-10; see also H.R. 4 and S. 1766 (House and Senate energy bills). In light of these events, it is imperative that the Court quickly remedy DOE's patent violations of the FOIA, and fulfill the statute's goal of "open[ing] agency action to the light of public scrutiny," Rose, 425 U.S. at 361, by ordering DOE to provide plaintiff with all responsive records within ten days of the Court's Order.

B. The Court Should Order DOE to Provide Plaintiff With a Vaughn Index Concerning Any Withheld Records, Or Parts of Records, Within Ten Days.

Since DOE has not yet even informed NRDC, or the Court, whether it will seek to withhold any records, and if so, provided the basis for that withholding, plaintiff is not asking the Court to simply order the release of all responsive records at this time. Instead, should DOE seek to withhold any records on the basis of exemption claims, the agency should be ordered to provide plaintiff with a detailed Vaughn index which fully informs plaintiff of the basis for that withholding. See Vaughn, 484 F.2d 820; see also Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (detailing "indispensable elements" of a Vaughn index).⁷

⁷ In light of DOE's abject failure to comply with the FOIA, it would be well within the Court's discretion to simply order DOE to provide plaintiff with all of the responsive records, and not permit DOE an opportunity to further delay by invoking FOIA exemptions to withhold records, or parts or records, from NRDC. See, e.g., D.C. Jasper Carlton v. Department of the Interior ("Carlton"), No. 97-2105 (D.D.C. Sept. 3, 1998) (GK) (Crystal Decl., Att.2). Indeed, in Carlton, this Court ordered the defendant agency to release all responsive records, including records the agency sought to withhold on attorney-client privilege grounds, precisely because of the agency's "intransigence and an ongoing pattern of delay" Id. at 16.

Again, given the delays thus far, and the likelihood that DOE will seek to withhold responsive records, see Buccino Decl., Att. 2 (DOE Letter indicating that DOE plans to withhold responsive records on exemption grounds), it is imperative that the Vaughn index be provided in short order, for, should the index prove inadequate, plaintiff will then have to first seek additional relief from the Court before it can obtain these records. Accordingly, DOE should be ordered to produce a complete Vaughn index at the same time it produces responsive records, within ten days of the Court's Order.⁸

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court order defendant to provide all records responsive to plaintiff's FOIA request, and a Vaughn index for all records, and parts of records, withheld, within ten days. Plaintiff also requests that the Court expedite the resolution of this motion.

Respectfully submitted,

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⁸ DOE's own regulations require that "DOE will make records available which it is authorized to withhold . . . whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1 In addition, DOE must release all segregable portions of any documents it decides to withhold on exemption grounds. See, e.g., Mead Data Central v. Department of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977).

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