

UNITED STATES DISTRICT COURT OF MAINE

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| <p>NULANKEYUTMONEN NKIHTAQMIKON, Plaintiff,</p> <p>vs.</p> <p>BUREAU OF INDIAN AFFAIRS, Eastern Regional Office,</p> <p>and</p> <p>DEPARTMENT OF THE INTERIOR, Office of the Solicitor</p> <p>Defendants.</p> | <p>Civil Action</p> <p>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p> |
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking the release of agency records unlawfully withheld by the Bureau of Indian Affairs and the U.S. Department of the Interior.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).
3. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) because Plaintiff resides here.
4. Relief is authorized by 28 U.S.C. §§ 2201 and 2202.

PARTIES

5. Plaintiff Nulankeyutmonen Nkihtaqmikon is a group of private citizens who are members of the Passamaquoddy Tribe and residents of the Pleasant Point Passamaquoddy Reservation in Maine. It seeks the release of agency records within the control of the Bureau of Indian Affairs (BIA) that relate to the BIA's approval of a lease to Quoddy Bay, LLC, for the purposes of constructing and operating a liquefied natural gas (LNG) terminal on tribal lands that abut Passamaquoddy Bay. Nulankeyutmonen Nkihtaqmikon seeks this information to educate members of the Pleasant Point Reservation, as well as the general public, about the impacts of the lease and LNG project on tribal lands and waters, and the Passamaquoddy Bay ecosystem.

6. Defendant Bureau of Indian Affairs is an agency within the meaning of 5 U.S.C. § 552(f).

7. Defendant Department of the Interior (DOI) is a Department of the Executive Branch of the United States Government and an agency within the meaning of 5 U.S.C. § 552(f).

PROCEDURAL BACKGROUND

Plaintiff's FOIA Request

8. By letter to Defendant BIA dated July 11, 2005, Plaintiff requested under the FOIA the disclosure of:

- 1. The environmental review documents, prepared either by BIA or the Sipayik Environmental Department, and any other environmental documents relied upon.**
- 2. The Solicitor's Opinion regarding the decision to approve the lease.**
- 3. Information regarding any appeal process that may be available for this decision through the BIA or the Department of Interior.**

4. All documents in your possession and control concerning the decision of BIA to approve the ground lease between Passamaquoddy Reservation and Quoddy, LLC.

9. Plaintiff's request was in conformance with the requirements for such requests set forth in Defendant BIA's regulations, 43 C.F.R. § 2.28. In support of its request, Plaintiff noted that the information sought is of significant public concern and directly affects members of Nulankeyutmonen Nkihtaqmikon and Passamaquoddy tribal members.

Defendant BIA's Response and Denial of Request

10. By letter dated August 5, 2005, Defendant BIA granted Plaintiff's request for environmental review documents in Item 1, but withheld the Regional Solicitor's opinion regarding the decision to approve the lease pursuant to 5 U.S.C. § 552(b), which permits an agency to withhold "interagency or intra-agency memorandums or letters that would not be publicly available by law," because the Solicitor's opinion "reflects the recommendations and advice of staff members, and was used to arrive at a final agency decision." Defendant BIA's Response to Request, August 5, 2005.

Plaintiff's Appeal of Defendant BIA's Denial of Request

11. Pursuant to 5 U.S.C. § 552(a)(6) and Defendant BIA's regulations, 43 C.F.R. § 2.28(a)(2), Plaintiff filed a timely appeal challenging Defendant BIA's withholding of the Regional Solicitor's opinion because the BIA improperly invoked the "deliberative process" privilege of 5 U.S.C. § 552(b)(5).

12. By letter to Plaintiff dated October 6, 2005, Defendant Office of Solicitor of the DOI declined to make a determination with regard to Plaintiff's appeal challenging Defendant BIA's withholding of the Regional Solicitor's opinion because of the "extraordinarily large number of pending appeals," "the need to fully review the issues"

presented in the appeal, and “other unforeseen circumstances.” Defendant DOI’s Response to Appeal, October 6, 2005 (FOIA Appeal No. 2005-173).

13. By letter to Plaintiff dated October 25, 2005, Robert K. Impson, acting regional director of the Eastern Region of the BIA, noted that the Regional Solicitor’s opinion regarding the decision to approve the lease is three pages in length; however the letter did not provide any further explanation of what was in the Regional Solicitor’s opinion or why it was exempt from disclosure.

14. Plaintiff has exhausted the applicable administrative remedies under 43 C.F.R. § 2.28.

15. To date, Defendants have not released the requested Regional Solicitor’s opinion or provided any explanation for why they believe its entire contents are exempt from disclosure despite the fact that it was relied upon in making the decision to approve the Quoddy Bay, LLC lease.

16. Plaintiff is entitled to the Regional Solicitor’s opinion under the standards contained in the FOIA and Defendant BIA’s regulations.

17. Defendants have wrongfully withheld the requested records from Plaintiff.

CAUSES OF ACTION

First Claim: Failure to Disclose the Regional Solicitor’s Opinion Used by BIA in Approving the Quoddy Bay, LLC Lease

18. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 17 above.

19. Under section 552(a)(2)(A-C) of the FOIA, Defendants must make available “final opinions,” “statements of policy and interpretation which have been adopted by the agency,” and “instructions to staff that affect a member of the public.”

20. Under section 552(a)(3)(A) of the FOIA, Defendants must make available all records upon any request which “reasonably describes such records and is made in accordance with published rules . . . and procedures to be followed.”
21. These obligations under the FOIA do not apply, however, to any matters listed in the exemptions promulgated under section 552(b), including “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).
22. Courts have interpreted this provision to apply only to matters of a “deliberative process” which do not contain factual material, do not affect the rights of members of the public, and which are not used to arrive at a final agency decision. *See e.g., Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854 (1980).
23. Further, if an agency claims a privilege under section 552(b) of the FOIA, it must make reasonable efforts to segregate any nonexempt material from the exempt material pursuant to 5 U.S.C. § 552(b) and Defendant BIA’s own regulation, 43 C.F.R. §§ 2.1(c).
24. Defendants have a duty under 5 U.S.C. § 552(a) and Defendant BIA’s own regulations, 43 C.F.R. §§ 2.1, 2.2, to make available to Plaintiff the Regional Solicitor’s opinion.
25. Defendants’ failure to grant Plaintiff’s requests for the Regional Solicitor’s opinion violates the FOIA, 5 U.S.C. § 552(a)(2)(A-C), and Defendant BIA’s own regulations, 43 C.F.R. §§ 2.1, 2.2, because Defendants adopted the Regional Solicitor’s opinion to arrive at a final agency decision and the advice given affects Plaintiff, a group of members of the public, and thus is subject to disclosure under 5 U.S.C. § 552(a)(2).

26. Further, Defendants cannot invoke the “intra-agency memorandum” exemption of 5 U.S.C. § 552(b)(5) because the Regional Solicitor’s opinion is not privileged by the deliberative process doctrine since it was used to arrive at a final agency decision which directly affected the rights of Plaintiff and all other Passamaquoddy tribal members. Defendants’ failure to make any efforts to segregate any nonexempt material from the claimed exempt material violates 5 U.S.C. § 552(b) and Defendant BIA’s own regulation promulgated thereunder, 43 C.F.R. §§ 2.1(c).

**Second Claim: Failure to Make a Determination on Plaintiff’s Appeal Within
FOIA’s Statutory Timeframe**

27. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 26 above.

28. Under section 552(a)(6)(A)(ii) of the FOIA and 43 C.F.R. § 2.32 of Defendant BIA’s regulations, Defendants must “make a determination with respect to any appeal within twenty [working] days after the receipt of such appeal.”

29. Additionally, if an “agency fails to comply with the applicable time limit provisions . . . a court may retain jurisdiction and allow the agency additional time to complete its review of the records” if the agency can show “exceptional circumstances.” 5 U.S.C. § 552(a)(6)(C)(i).

30. “[E]xceptional circumstances do not include a delay that results from a predictable agency workload of requests.” 5 U.S.C. § 552(a)(6)(C)(ii).

31. Defendants’ failure to make a determination with respect to Plaintiff’s appeal violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), and Defendant BIA’s own regulation promulgated thereunder, 43 C.F.R. § 2.32.

32. Defendants do not have justification to extend the time limits to make a determination with respect to Plaintiff's appeal under 5 U.S.C. § 552(a)(6)(C)(i) because a "large number of pending appeals" and "the need to fully review the issues" are the predictable agency workload results of Plaintiff's requests within the meaning of 5 U.S.C. § 552(a)(6)(C)(ii), and thus are not subject to the "exceptional circumstances" extension.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

33. Order Defendants immediately to process Plaintiff's appeal and make a determination regarding Plaintiff's challenge to Defendant BIA's withholding of the Regional Solicitor's opinion;

34. Order Defendants, upon completion of such determination, to disclose the requested record(s) in their entireties and make copies available to Plaintiff;

35. Award Plaintiff its costs and reasonable attorneys fees incurred in this action; and

36. Grant such other relief as the Court may deem just and proper.

Dated this 6th day
of December, 2005

Respectfully submitted,

/s/ David K. Mears

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