

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ROBERT BERMAN)	
1915 Grand Court)	
Vienna, VA 22182)	
)	
Plaintiff,)	
)	
v.)	Civil Action #
)	
U. S. DEPARTMENT OF THE INTERIOR,)	
MINERALS MANAGEMENT SERVICE)	
1849 C Street, N.W.)	
Washington, D.C. 20240)	<u>COMPLAINT</u>
)	
Defendant.)	

PRELIMINARY STATEMENT

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the Department of the Interior, Minerals Management Service ("MMS") to disclose records wrongfully withheld after a FOIA request and subsequent appeal from Plaintiff. FOIA requires that federal agencies respond to public requests for documents, including files maintained electronically, in order to increase public understanding of the workings of government and access to government information.

2. Plaintiff's FOIA request sought records that reflect on issues pertaining to MMS taking Royalty-In-Kind offerings for off-shore crude oil. MMS is a sub-agency of the

Department of Interior. Specifically, Plaintiff sought “winning offer sheets and the second highest offer sheet” for all off-shore crude oil offerings since 2005.

3. The records are a matter of public concern because they contain not only facts and data about the Royalty-In-Kind program, but also shed light upon the MMS’s policy of taking royalty in kind. In particular, disclosure of the records will help reveal whether the Royalty-In-Kind program is being implemented in a way that protects the interests of the American taxpayers or benefits oil companies by selling them oil below the market price.
4. Plaintiff Robert Berman (“Plaintiff”) is a citizen of the United States. Plaintiff served as a senior economist in the Department of Interior’s Office of Policy Analysis (OPA) and is an expert in crude oil market and industry analysis. Plaintiff requested the subject records in order to personally learn about and improve the public’s understanding of the operation of the Royalty-In-Kind program.
5. On February 4, 2009, Plaintiff submitted a FOIA request (# 2009-013) to the MMS. On February 27, 2009, MMS denied Plaintiff’s fee waiver under the February 2009 request, and additionally cited Exemptions 3 and 4 of FOIA as reasons for not disclosing the requested documents. Plaintiff appealed the fee waiver denial on March 6, 2009 (Appeal # 2009-056). By email March 9, 2009, MMS granted Plaintiff’s fee waiver based on a letter submitted by Public Employees for Environmental Responsibility (“PEER”), stating how it intended to publicly disseminate the disclosed records. On May 12, 2009, Defendant dismissed the appeal of the denial of the fee waiver as moot.

6. However, on March 20, 2009, MMS formally denied the FOIA request based on FOIA Exemptions 2 and 4. On April 10, 2009, Plaintiff appealed the March 20th denial of the FOIA request (Appeal #2009-075), arguing that Exemptions 2 and 4 were not applicable to the requested information. MMS acknowledged receipt the same day. On May 12, 2009, DOI wrote to Plaintiff acknowledging that it had failed to make a determination on his appeal within 20 days as required by 5 U.S.C. § 552(a)(6)(A)(ii), and that therefore Plaintiff could seek judicial review under 5 U.S.C. § 552(a)(4)(B).
7. MMS's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. Exemptions 2 and 4 are not applicable to the requested records and, as such, MMS is required by law to release them. MMS's conduct frustrates Plaintiff's efforts to educate the public regarding mismanagement and potentially fraudulent activities with the Royalty-In-Kind program and is a violation of the FOIA and the APA.
8. Plaintiff seeks a court order requiring MMS to produce immediately the documents sought in his February 4, 2009, FOIA request, under the fee waiver granted on March 9, as well as other appropriate relief, including attorney's fees and costs.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

10. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
11. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).
12. Venue is properly vested in this Court pursuant to 5 U.S.C. § 552(a)(4)(B). Venue is also proper under 28 U.S.C. § 1391(e), because a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

13. Plaintiff Robert Berman is a citizen of the United States, residing in Virginia.
14. Defendant DOI, MMS is an agency of the United States as defined by 5 U.S.C. § 552(f)(1), and is charged with the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

15. The Interior Department's Minerals Management Service is vested with the power of overseeing the nation's mineral resources, including natural gas and oil. As part of this power, the MMS is responsible for managing offshore and onshore mineral leases. In 1998, MMS began development of the Royalty-In-Kind program, which allows companies to pay royalties to the federal government in oil or natural gas rather than cash, and the federal government in turn sells this oil or natural gas on the market at its own

expense. Currently, the Royalty-In-Kind program sells over 150,000 barrels of crude oil per day.

16. On February 4, 2009, Plaintiff filed a FOIA request with the MMS FOIA Coordinator (Request # 2009-013), seeking MMS's records regarding its Royalty-In-Kind program. Specifically, Plaintiff sought "copies of the winning offer sheets and the second highest offer sheet" for all Royalty-In-Kind offerings of off-shore crude oil since 2005. Plaintiff clearly stated that the identities of the winners were of lesser interest so there was no objection to their redaction if necessary. Plaintiff also sought "revenues to the Government from the sale, and the actual volumes if different from the offer." In the alternative, Plaintiff sought "a volume of weighted average, aggregated by crude type, gravity and FMP, separately for Argus and Platts, of all offer specifications including 'PLA and High Gravity Pass Back Percentage', 'NYMEX + Daily Roll basis 6 mo.', 'NYMEX + Daily Roll basis 12 mo.', total volumes and total revenues paid to the Government." Plaintiff stated that aggregations to pipeline levels would be acceptable, and also requested that MMS "provide high and low value, the total number of offers in the aggregation, and the total number of unsuccessful offers."
17. MMS acknowledged receipt of Plaintiff's FOIA request in an email dated February 20, 2009. In the email, MMS asked for additional information for determining which fee category Plaintiff fell in.
18. On the same day, Plaintiff spoke with MMS FOIA Officer Gregory K. Kann, who indicated that although the winning bid forms could be disclosed, the second highest bid forms could not because it would be considered proprietary information.

19. On February 22, 2009, Plaintiff sent additional information regarding his FOIA request to Mr. Kann at MMS in response to his February 20 email. In the correspondence, Plaintiff answered four questions in support of his request for a fee waiver. In addition, in response to Mr. Kann's assertion over the phone that the second highest bid forms could not be released, Plaintiff indicated redacting the names of the second highest bidders would resolve the issue of releasing proprietary information, and therefore the second highest offer sheets should be released along with the winning bids.
20. MMS denied Plaintiff's request for a fee waiver in an email dated February 27, 2009. FOIA Officer Kann's email stated "your request did not contain sufficient evidence to support [the criteria in 43 CFR § 2.19] because you have not adequately demonstrated that you have the ability to disseminate the information to the general public or a reasonably broad audience of persons interested in the subject." The email also cited FOIA Exemptions 3 and 4 as grounds for withholding the requested documents. FOIA exemption 3 allows the withholding of information prohibited from disclosure by another statute. 5 U.S.C. § 552(b)(3). MMS claimed that "proposals submitted by a contractor in response to the requirements of a solicitation for a competitive proposal" fell under the prohibited disclosures codified at 41 U.S.C. § 253b(m). Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).
21. In a letter dated March 3, 2009, Public Employees for Environmental Responsibility ("PEER") agreed to publicize and disseminate any information obtained from MMS as a result of Plaintiff's FOIA request. Among other public interest projects, PEER engages

in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government. PEER proposed to distribute the results of Plaintiff's analysis of the materials he seeks under FOIA through a news release, its website and its newsletter.

22. Based on the letter by PEER, Plaintiff appealed MMS's denial of the fee waiver in a letter dated March 6, 2009, stating PEER could reach a broad audience of people interested in the information (Appeal # 2009-056).
23. On March 9, 2009, MMS sent Plaintiff an e-mail message granting the request for a fee waiver based on the additional information provided in the March 6, 2009 appeal.
24. On March 20, 2009, MMS formally denied Plaintiff's request for the information requested in the February 4, 2009, FOIA request. MMS based its denial on FOIA Exemptions 2 and 4. Exemption 2 protects from disclosure information "related solely to the internal personnel rules and practices of the agency." 5 U.S.C. § 552(b)(2). Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).
25. On April 10, 2009, Plaintiff filed an administrative appeal with the Department of the Interior, Office of the Solicitor ("Solicitor"), concerning MMS's March 20 denial of the FOIA request on Exemption 2 and 4 grounds (Appeal # 2009-075). The appeal challenged MMS's claim that the requested documents were exempt from disclosure

because they would reveal trade secrets and could compromise the effectiveness of the Royalty-In-Kind program. Plaintiff claimed that Defendant's withholding of documents on these grounds was arbitrary and capricious and suffered from a complete lack of empirical support.

26. By a letter dated May 4, 2009, the Solicitor acknowledged receipt of Plaintiff's April 10 appeal.
27. By a letter dated May 12, 2009, the Solicitor acknowledged that it had failed to meet the twenty (20) day limit for responding to Plaintiff's appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii). The Solicitor advised Plaintiff of the right to seek judicial review under 5 U.S.C. § 552(a)(4)(B), but also stated "we hope that you will delay filing a lawsuit so that the Department can thoroughly review the issues in your appeal and make a determination."
28. To date, Defendant has not responded to or provided the requested documents in response to Plaintiff's April 10, 2009, appeal. In so doing, Defendant has failed to meet the twenty (20) day limit imposed by FOIA for responding to an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii).
29. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.
30. On January 21, 2009 President Barack Obama issued an Executive Memo declaring the following policy: "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by

disclosure, because errors and failures might be revealed, or because of speculative or abstract fears....All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

31. On March 19, 2009 Attorney General Eric Holder issued new comprehensive FOIA guidelines directing all executive branch departments and agencies to apply a presumption of openness when administering the FOIA. The Attorney General stated that “by restoring the presumption of disclosure that is at the heart of the Freedom of Information Act, we are making a critical change that will restore the public’s ability to access information in a timely manner. The American people have the right to information about their government’s activities, and these new guidelines will ensure they are able to obtain that information under principles of openness and transparency.”

CAUSES OF ACTION

Count I: Violation of the Freedom of Information Act

32. Plaintiff repeats the allegations in paragraphs 1 through 30.
33. Defendant’s failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agency’s own regulations promulgated thereunder.
34. MMS wrongfully withheld the requested documents under FOIA Exemptions 2 and 4.

35. MMS's application of Exemption 2 is rooted in unsupported allegations that the release of such information could "cause circumvention of an agency regulation or statute or impede the effectiveness of an agency's activities." Exemption 2 does not in fact cover the release of information which could "impede the effectiveness of an agency's activities."
36. The data contained in the winning and runner up offers, or the aggregated offer data, is not related solely to the internal personnel rules and practices of MMS.
37. MMS identifies no regulation or statute that could be circumvented as a result of the release of the requested information.
38. MMS's claim that release of the information would result in lower bids and thereby compromise the effectiveness of the Royalty-In-Kind program is irrelevant to the applicability of Exemption 2. Furthermore, there is nothing to even support the contention that release of such data would have any influence on the effectiveness of the Royalty-In-Kind program.
39. The winning and runner-up offer sheets fall outside the coverage of Exemption 4. Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The information requested in Plaintiff's FOIA is not protected from disclosure under either category.
40. The Royalty-In-Kind bid sheets do not qualify as "trade secrets" because they have no direct relationship to a productive process by MMS. The bid sheets reflect offers given to the MMS for the sale of crude oil and are not "the end product of either an innovation or substantial effort" by the agency.

41. The requested documents are not protected as “information which is (a) commercial or financial, (b) obtained from a person and (c) privileged or confidential.” The information does not convey confidential or privileged information since the identity of the second highest bidder would not be revealed. Furthermore, MMS’s claim that disclosure would impair the government’s ability to obtain such information in the future and would result in substantial harm the competitive position of past bidders is mere speculation unsupported by any evidence or cogent rationale.

Count II: Violation of the Administrative Procedure Act

42. Plaintiff repeats the allegations in paragraphs 1 through 30.

43. Defendant’s failure to disclose documents responsive to Plaintiff’s request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Defendant’s failure in this matter is arbitrary, capricious, an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that Defendant has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld documents and ;

- iii. Maintain jurisdiction over this action until Defendant is in compliance with FOIA, APA and every order of this Court;
- iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: June 9, 2009

Respectfully submitted,

/s/

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