

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

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY,)
2000 P Street, NW, Suite 240)
Washington, D.C. 20036)
)
Plaintiff,)
)
V)
)
U.S. INTERNATIONAL BOUNDARY)
AND WATER COMMISSION,)
4171 North Mesa, Suite C-100)
El Paso, TX 79902-1441)
)

Defendant.)

February 9, 2010

Civil Action # 1:10-cv-00019

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Public Employees for Environmental Responsibility (“PEER” or “Plaintiff”), hereby move for summary judgment pursuant to Federal Rule of Civil Procedure (“Rule”) 56(b).

PRELIMINARY STATEMENT

Plaintiff brings this action under the Freedom of Information Act (“FOIA”) seeking the production of certain Agency records requested by Plaintiff in its October 7, 2009 FOIA request. Defendant withheld responsive documents in its denial of the FOIA request on November 9, 2009, and subsequently in its denial of the FOIA appeal on December 22, 2009. Defendant did not attempt to provide any reasonably segregable materials, nor did it provide a legitimate justification for the withholding of responsive documents. Despite Plaintiff’s attempts to follow-up with Defendant about the status of the FOIA request, as well as explaining why the requested materials were not covered by Exemption (b)(4), Defendant informed Plaintiff that it that it

would continue to withhold the responsive documents. In that Defendant has not released any documents responsive to Plaintiff's FOIA request, which are not covered by a FOIA exemption, this Court should grant summary judgment in Plaintiff's favor.

BACKGROUND

I. PLAINTIFF'S FOIA REQUEST

On October 7, 2009, Plaintiff requested records pursuant to 5 U.S.C. § 552, *et seq.*, the Freedom of Information Act ("FOIA"), "concerning the retainer of counsel by the United States Section of the International Boundary and Water Commission (USIBWC)." Plaintiff specifically asked for "(1) A copy of the retainer agreement between IBWC and the law firm of Jackson Lewis in the matter concerning McCarthy v. IBWC, Docket # DA-1221-09-0725-S-1 and (2) All documents that evidence the source of the funds used to pay for representation by Jackson Lewis in the matter concerning McCarthy v. USIBWC." *See* Attachment A. Defendant failed to acknowledge or respond to Plaintiff's FOIA request within 20 working days as required by law. Complaint at ¶5. On November 9, 2009, in response to an inquiry by Plaintiff's counsel, Defendant denied the FOIA request. *See* Attachment B. On December 1, 2009, Plaintiff filed an administrative appeal of Defendant's denial of the FOIA request. *See* Attachment C. By letter dated December 22, 2009, IBWC denied the administrative appeal. *See* Attachment D.

II. PLAINTIFF'S COMPLAINT

On January 5, 2010, Plaintiff filed the instant Complaint in this matter. Plaintiff alleges that Defendant wrongfully withheld responsive documents in response to the FOIA request and that Defendant's conduct was arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. *See* Complaint at ¶ 6.

III. DOCUMENTS WITHHELD

All of the documents Plaintiff sought, including the retainer agreement between the Agency and the Jackson Lewis Law Firm and information concerning the funds used to pay the law firm, were withheld in their entirety. In that these documents contained information that is subject to public disclosure through the mandate of FOIA, Defendant improperly withheld them under Exemptions (b)(4) and (b)(5).

IV. DEFENDANT'S FAILURE TO ANSWER THE COMPLAINT

Defendant was served and received a copy of the summons and complaint in the instant matter on January 6, 2010. To date, Defendant has not filed a response or answer to the complaint as required by law.

ARGUMENT

I. APPLICABLE LEGAL STANDARD FOR SUMMARY JUDGMENT.

“Summary judgment is appropriate when the pleadings and the evidence demonstrate that ‘there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Kilby-Robb v. Spellings*, 522 F. Supp. 2d 148, 154 (D.D.C. 2007) (Bates, J.), *quoting* Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial responsibility of showing an absence of a genuine issue of material facts. *Id.* In deciding whether a genuine issue of material facts exists, the court must “accept all evidence and make all inferences in the non-movant’s favor.” *Id.*, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “A non-moving party, however, must establish more than the mere existence of a scintilla of evidence in support of its position.” *Id.* (citations and internal quotation marks omitted). That is, “[i]f the evidence is merely colorable, or is not significantly probative,

summary judgment may be granted.” *Id.*, quoting *Anderson*, 477 U.S. at 249-50. Applying this standard it is clear that the Court should enter summary judgment in Plaintiff’s favor.

II. **DEFENDANT IMPROPERLY INVOKED FOIA EXEMPTIONS.**

Defendant improperly applied FOIA exemptions (b)(4) and (b)(5) in withholding responsive documents for which there is a very compelling public interest. In that Plaintiff has shown that the requested materials are not covered by a FOIA exemption it is entitled to summary judgment in the instant matter.

A. **Exemption (b)(4)**

In its initial denial of Plaintiff’s FOIA request, Defendant invoked FOIA Exemption (b)(4) to withhold the retainer agreement between the Jackson Lewis Law Firm and the Agency in the matter *McCarthy v. IBWC*. Exemption (b)(4) protects from disclosure records that fall under either of two distinct categories of information:“(1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.” 5 U.S.C. § 522(b)(4).

Defendant claims that the retainer agreement falls under the second category covered by Exemption 4, namely “commercial or financial information.” In support of this assertion, Defendant claims that the information contained in the retainer is confidential because disclosure could cause “harm to the competitive position of the commercial entity from whom the agency has obtained services.” *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Defendant further claims that the retainer is confidential because, “such information is not the type of information that would customarily be disclosed to the public.” *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (C.A.D.C. 1992).

Defendant failed to meet several of the criteria in showing that a document qualifies for protection under Exemption (b)(4). First, Defendant failed to show that the information was obtained from a person. Defendant also failed to show how release of the retainer agreement would result in a competitive disadvantage or harm to the Jackson Lewis Law Firm. Finally, Defendant failed to show that the retainer agreement is the type of information that would not customarily be disclosed to the public.

Exemption (b)(4) requires that the information be "obtained from a person." That requirement is not met where the information is generated by the federal government. *See Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (finding that the scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government"); *See also AllnetCommc'nServs. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992) (stating that "person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994). Here, Defendant has not shown that its retainer agreement with Jackson Lewis was not generated, at least partially, by the Agency. Therefore, Defendant has not shown that the information was "obtained from a person", as required by 5 U.S.C. § 522(b)(4).

Exemption (b)(4) also requires that the information submitted by the individual be "privileged or confidential." The D.C. Circuit declared in *National Parks* that information is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. 498 F.2d at 770. Under the "competitive harm

prong”, which Defendant invoked in withhold the responsive document, it is insufficient to allege that disclosure would allow the entity’s competitors to undercut future contracts or bids.¹ Moreover, protection under the competitive harm prong has been denied when the prospect of injury is remote-- for example, when a government contract is not awarded competitively -- or when the requested information is too general in nature.² Finally, courts have held that the harms flowing from "embarrassing disclosure[s]," or disclosures which could cause "customer or employee disgruntlement," are not cognizable under the competitive harm prong of Exemption 4.³ Here, Defendant has made no showing that disclosure of the retainer agreement would cause substantial harm to the competitive position of the Jackson Lewis Law Firm.

Finally, Defendant failed to show that the retainer agreement constitutes information of the type that would not ordinarily be disclosed to the public. The test laid out in *Critical Mass* for protecting information that would “not customarily be disclosed to the public” only applies to information that is voluntarily provided to the government. 975 F.2d at 879. In this case, the Jackson Lewis Law Firm’s voluntary participation in representing the Agency does not govern whether the retainer agreement made in connection with that activity is likewise voluntary. Rather, the agency must look to whether submission of the retainer agreement was required in order for the law firm to voluntarily participate in representing the agency.⁴ Here, although the

¹ See *GC Micro*, 33 F.3d at 1115; See also *Berlin Steel Constr. Co. v. VA*, No. 95-752, slip op. at 1, 5-6 (D. Conn. Sept. 30, 1996).

² See, e.g., *Hodes v. HUD*, 532 F. Supp. 2d 108, 118-19 (D.D.C. 2008); See also *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988).

³ See *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1402 (7th Cir. 1984). See also *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999), 704 F.2d at 1291 n.30 (declaring that competitive harm should "be limited to harm flowing from the affirmative use of proprietary information by competitors" and "should not be taken to mean" harms such as "customer or employee disgruntlement" or "embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials").

⁴ See, e.g., *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (declaring that "when the government requires a private party to submit information as a condition of doing business with the government" the submission is deemed "required").

Jackson Lewis Law Firm voluntarily chose to represent the Agency, the associated retainer agreement is considered required information and is therefore not analyzed under the test laid out in *Critical Mass* for information not customarily disclosed to the public.

Furthermore, pursuant to the Code of Federal Regulations, all federal agencies are *mandated* to annually publish a report documenting any payment of funds made to outside private attorneys or law firms. 1 C.F.R. s 305.87-3. The recommendation states:

Each agency that hires outside counsel should prepare and maintain in the office of its chief legal officer an annual *public* report, listing for each occasion on which outside counsel has been retained: (a) The attorney or firm and the type of work involved, (b) the reasons for engaging outside counsel, (c) the competitive procedures used, if any, (d) the fee range or other basis for compensation, and (e) the actual fee paid. For cases involving small amounts, aggregate figures would be acceptable.

Id. (emphasis added). The recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established. Id. As such, Defendant cannot claim that the documents sought are of the type not customarily disclosed to the public, when in fact their disclosure to the public is required by law. Because there is no genuine issue of material fact and the Agency's claim of exemption does not comply with the statute, summary judgment should be granted in the Plaintiff's favor.

B. Exemption (b)(5)

In its final denial of the FOIA request on December 22, 2009, Defendant also improperly invoked Exemption 5 to withhold the retainer agreement. Exemption 5 of the FOIA protects from disclosure inter-agency or intra-agency memoranda 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. § 522(b)(5). The Agency claims the retainer agreement is protected by attorney-client privilege. Their application is clearly improper under applicable precedent.

Again, the Code of Federal Regulations directs and authorizes federal agencies to make public information concerning the hiring of outside private counsel for litigation, specifically the type of information contained in a retainer agreement. Thus, the Agency cannot claim that the information sought is protected from disclosure by the attorney-client privilege.

Furthermore, in *Mead Data Central, Inc. v. Department of the Air Force*, the court limited the scope of the attorney-client privilege in stating that it only "permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts." 566 F.2d 242, 254 n.28 (D.C. Cir. 1977). The court also stated that purpose of the attorney-client privilege encompassed in Exemption 5 was to protect from discovery in civil litigation those "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data*, 566 F.2d at 252.

Here, the retainer agreement between the Agency and the private law firm is not considered protected by the attorney-client privilege under Exemption 5 because the agreement was drafted for purposes of defining the scope of representation as well as attorney's fees and other related matters, and does not contain attorneys' opinions or advice concerning the underlying facts of the legal matter for which the client sought the professional advice.

Viewing the evidence in the light most favorable to the Agency, there is no evidence in support of the Agency's position that the retainer agreement is protected under the attorney-client privilege. The Code of Federal Regulations expressly directs federal Agencies to make this information public. As such, there is no genuine issue of material fact and summary judgment should be granted in the Plaintiff's favor.

III. DEFENDANT MADE NO ATTEMPT TO SEGREGATE THE MATERIALS IN ACCORDANCE WITH 5 U.S.C. §522(B).

Defendant did not make any apparent attempt to segregate any clearly non-exempt portions of the material from the portions they deemed exempt in response to PEER's request. 5 U.S.C. § 522 states that "any reasonable segregable portion of a record *shall* be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 522(b)(emphasis added). Moreover, "the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Schiller v. NLRB*, 964 F.2d 1205, 1029 (D.C. Cir. 1992)(quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). Thus, Exemptions (b)(4) and (b)(5) may not protect factual data or matters that may be reasonably segregated from material that is confidential or covered by attorney-client privilege. *See Id.*; *Train*, 491 F.2d at 68. Given that PEER's request was for documents related to a public federal agency's appropriation of funds and arrangement with outside legal counsel, segregation of any material from the potentially exempt material is reasonable, and required by FOIA.

IV. THE AGENCY PROVIDED NON-RESPONSIVE DOCUMENTS

In response to the second item that Plaintiff request, Defendant provided a hyperlink to the Omnibus Appropriations Act of 2009. *See* <http://thomas.loc.gov/home/approp/app09.html>.

In its denial of Plaintiff's FOIA appeal, Defendant stated that "because agencies are encouraged to provide responses to requests electronically when possible, the agency's provision of the funding link in response to this request is upheld." Plaintiff does not contest that electronic responses to FOIA requests are an adequate means of responding. However, Defendant failed to address the content Plaintiff FOIA request, which sought evidence of the source of funds used to pay for the Agency's outside counsel. Mere reference to the Agency's

appropriations language does not constitute an adequate disclosure of information regarding the source of funds used to pay the Jackson Lewis Law Firm in the referenced matter. For one, the Act does not outline how the Agency has actually spent any of the funds which it was appropriated. Moreover, the Act states: “For necessary expenses for the United States Section of the International Boundary and Water Commission, United States and Mexico, and to comply with laws applicable to the United States Section, *including not to exceed \$6,000 for representation.*” (emphasis added). The Agency hired once of the largest and most expensive law firms in the country to represent them in the matter *McCarthy v. IBWC*. It is clear that the Agency has spent will over the \$6,000 appropriated in the Bill on representation. The Agency provided no additional evidence of the funds used to pay the Jackson Lewis Law Firm and thus did not fully respond to Plaintiff’s FOIA request. As such, there is no genuine issue of material fact and summary judgment should be granted in the Plaintiff’s favor.

CONCLUSION

For the foregoing reasons, summary judgment is appropriate on Plaintiffs’ claims in Plaintiff’s favor.

Dated: February 9, 2010

Respectfully submitted,

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