

Original

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

MARK A. MANN,
Plaintiff,

Case No.: 6:14-cv-01774-AA

v.

COMPLAINT
Freedom of Information Act (5 USC § 552)

THE UNITED STATES OF AMERICA
Defendant,

I. PARTIES

Plaintiff Mark A. Mann
1123 NW Canyon Drive
Redmond, Oregon 97756
(541)531-7391

Defendant The United States of America
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

II. JURISDICTION

1. This Court has jurisdiction pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, et seq. and 28 U.S.C. § 1331 (federal question).

III. STATEMENT OF CLAIMS

Claim I

2. On March 26, 2014, Mark A. Mann (Plaintiff) initiated a Freedom of Information Act (FOIA) request for design related information for the Tiller Trail Highway OR PFH 16(7)

project by letter delivered via electronic mail (email) to, Ms. Telina Thompson, FOIA Officer for Western Federal Lands Highway Division (WFL) of the U.S. Department of Transportation (defendant). Ms. Thompson promptly responded to plaintiff's request by phone and inquired as to the nature of the request, and to better understand the type of information requested. Plaintiff explained that he was engaged by a general contractor that had recently been awarded a contract with defendant and that the files were related to the design data for the project. Ms. Thompson indicated that this information should not require a FOIA process and that she would contact the project design/construction team to request the files. The following day Ms. Thompson again contacted plaintiff and explained that the request for this information would need to proceed through FOIA.

3. On March 28, 2014, plaintiff exchanged emails with Ms. Thompson to modify the list of files requested and to provide some technical information on the type of files requested. Ms. Thompson responded by email in order to clarify plaintiff's revised request and plaintiff responded with a letter via email, outlining the revised request. Ms. Thompson replied with an acknowledgment letter and assigned FOIA Case Number 2014-0234.
4. On April 21, 2014, Ms. Thompson contacted plaintiff via email to inform him that an impending legal review of the FOIA request was postponed until April 24, 2014 and to advise that the FOIA fees to date were \$150.00, and requested that a check be mailed to her attention. Plaintiff replied via email on April 22, 2014 and advised that he was working in the field and the check would be mailed by his wife. Plaintiff's wife mailed check #1789 that day and it cleared the bank on May 8, 2014.
5. On May 1, 2014, plaintiff contacted Ms. Thompson via email and requested the status of

the FOIA request. Ms. Thompson responded by letter via email and identified three requested file types that would be placed on the WFL's public ftp site; and listed Request #4, #5 and #6 as "No Responsive LandXML documents". The letter stated that Ms. Thompson was the person responsible for this decision and advised of plaintiff's administrative appeal rights. On May 2, 2014, plaintiff responded via email and asked for a more detailed explanation, as the response listed no reasoning for the determination not to provide the records in the format as requested, nor did it identify the names and titles or positions of each person responsible for the initial determination not to comply with such request, as required by statute. Ms. Thompson replied by email and essentially copied the text of the original letter into the body of the email.

6. On May 2, 2014, plaintiff downloaded all 21 files posted on the WFL's public ftp site under the directory [ftp://199.79.179.52/pub/!FOIA/Tiller Trail Highway OR PFH 16\(7\)](ftp://199.79.179.52/pub/!FOIA/Tiller Trail Highway OR PFH 16(7)). Although the responsive letter issued May 1, 2014, identified "Request#2-Responsive XSR cross section files are posted on the public ftp site", these files were not included in the 21 files posted on the WFL public ftp site on May 2, 2014.

CLAIM II

7. On May 31, 2014, plaintiff filed an appeal of the FOIA Officer's decision, to the attention of Ms. Patricia A. Prosperi (E64-312), Associate Administrator for Administration for the Federal Highway Administration in Washington, D.C.. The letter was delivered via USPS Express Mail and delivery was confirmed on June 2, 2014. On June 11, 2014, Ms. Manizheh Boehm, FOIA Specialist issued a letter stating the appeal had been received in the Federal Highway Administration office on June 11, 2014. The letter also indicated

the request required consultation with other components of the Agency and a response would be forwarded as soon as possible. The appeal was assigned FOIA Control No. 2014-0334A.

8. On August 17, 2014, plaintiff sent a letter via USPS Priority Mail to Ms. Prosperi, notifying the Agency of their failure to respond to the appeal, and demanding a response by August 31, 2014. On August 28, 2014, plaintiff received a phone message from Ms. Boehm, requesting verification of the mailing address in order to send an acknowledgment letter. On August 30, 2014, plaintiff responded in a letter via email and explained that the acknowledgment letter dated June 11, 2014, had already been received and that it did in fact, have the correct mailing address. On September 3, 2014, Ms. Boehm replied via email and indicated that the estimated time for a response to the appeal was September 15, 2014.
9. On September 23, 2014, plaintiff received the Agency's decision on FOIA appeal 2014-0334A, signed by Ms. Sarah J. Shores, Associate Administrator for Administration and delivered via email by Mr. Aaron R. Perry, Office of the Chief Counsel, Federal Highway Administration. The Analysis of the decision stated in pertinent part:

You are seeking to have the Agency take a smaller amount of two-dimensional data from a larger data source and, through another software program, manipulate or process that data in order to create a particular arrangement of that data, giving it new characteristics as a three-dimensional model.

The Conclusion of the decision stated in pertinent part:

As fulfilling your request would constitute creating a new record, the Agency properly determined that there were no records responsive to your request.

10. Plaintiff interpreted the decision as a determination by the Agency that the information

requested did not exist at the time of the request. The defendant's determination was arbitrary and capricious because it failed to address the data as specified by plaintiff's FOIA request. Plaintiff specifically requested the horizontal and vertical alignment data used in the final design to be provided in LandXML format. These alignments were identified in the project plans prior to the FOIA request and again in reports provided by defendant in text format. This data is two dimensional and the format requested would have provided two dimensional data. Plaintiff had also requested the "original ground surface" and "final design surface" to be provided in LandXML format. This information is considered three dimensional data and is fundamental to the delivery of the road project design by the Agency. The existence of this data was evidenced in the project plans, cross section drawings and survey staking notes. Plaintiff had received this data from defendant on previous projects, and in the LandXML format requested. Plaintiff was also aware that exporting the data using the defendant's software did not require another software program as it is a routine function of defendant's software.

CLAIM III

11. Plaintiff concluded that the Agency's determination was so arbitrary that it did not accurately identify the information plaintiff intended to request. Plaintiff had also amended his FOIA request on March 28, 2014 to exclude the original request for XSR files and add the request for the horizontal and vertical alignments in LandXML. Defendant's initial determination was to provide the XSR files, however these files were not in fact posted to the WFL public ftp site as defendant indicated. Since these files were excluded from plaintiff's amended FOIA request, they were not identified in the

appeal. Accordingly, plaintiff decided to submit a new FOIA request to clarify the specific data requested and to again add the XSR files.

12. On September 29, 2014, plaintiff submitted another FOIA request via email to the WFL FOIA Officer, Ms. Telina Thompson. This request included XSR file, which was excluded from the previous FOIA request dated March 28, 2014. On October 14, 2014, Ms. Thompson issued a responsive letter via email. The letter indicated that it appeared plaintiff was seeking the information that was subject of the original FOIA request, 2014-0234 and was subject to the appeal determination 2014-0334A. The letter concluded that request could not be processed under FOIA and was considered closed. The letter assigned FOIA Control No. 2014-0457 and advised of the administrative appeal rights.
13. On October 16, 2014, plaintiff filed and appeal of the FOIA Officer's determination, to the attention of Ms. Patricia A. Prosperi (E64-312), Associate Administrator for Administration for the Federal Highway Administration in Washington, D.C.. This appeal also specifically addressed the issue of the XSR file, which was not subject of the original FOIA request 2014-0234, nor the subsequent FOIA appeal 2014-0334A. On October 21, 2014, plaintiff received an email reply to his appeal from Mr. Adam Brill, Attorney Advisor, Office of Chief Counsel for the Federal Highway Administration. Mr. Brill's response stated in pertinent part:

Your request for information in FOIA Control No. 2014-0457 is a duplicate of your previous request for information (FOIA Control No. 2014-0234) and was fully resolved by final agency action (FOIA Control No. 2014-0334A). Because your latest request for information is a duplicate of your initial request and your initial request was denied in full on September 23, 2014, by the Assistant Administrator for Administration in FOIA Control No. 2014-0334A, there is no further right to appeal.

Mr. Brill's response did not address the XSR files, which defendant previously identified as posted to the WFL public ftp site on May 1, 2014; and, which plaintiff determined did not exist on the WFL public ftp site on May 2, 2014.

IV RELIEF

First Claim for Relief

14. Plaintiff realleges paragraphs 2 thru 6.
15. Plaintiff is entitled to payment of \$150 for fees improperly assessed by defendant.
16. Plaintiff respectfully requests the Court to order FOIA Officer, Ms. Telina Thompson, to provide the names and titles or positions of each person responsible for the initial determination not to comply with plaintiff's FOIA request.

Second Claim for Relief

17. Plaintiff realleges paragraphs 7 thru 10.
18. Plaintiff respectfully requests the Court order the production of the records improperly withheld by defendant under FOIA Control No. 2014-0234 in LandXML format.
19. Plaintiff requests an order enjoining the defendant from denying future FOIA requests for data in LandXML format when existing documentation demonstrates the data exists.

Third Claim for Relief

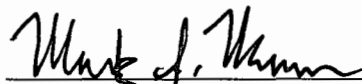
20. Plaintiff realleges paragraphs 11 thru 13.
21. Plaintiff respectfully requests the Court order the production of the records improperly withheld by defendant under FOIA Control No. 2014-0457 in LandXML format, and production of the records requested in XSR format.
22. Plaintiff requests an order enjoining the defendant from denying future FOIA requests for

data in LandXML format when existing documentation demonstrates the data exists, and to the extent that the data is readily reproducible in the format requested.

WHEREFORE, plaintiff prays for judgment on its complaint as follows:

- a. In the amount of \$150 for fees improperly assessed by defendant;
- b. an order directing defendant to provide the names and titles or positions of each person responsible for the initial determination not to comply with plaintiff's FOIA request;
- c. an order directing defendant to produce the records improperly withheld under FOIA Control No.s 2014-0234 and 2014-0457 in LandXML format;
- d. an order enjoining the defendant from denying future FOIA requests for data in LandXML format when existing documentation demonstrates the data exists;
- e. an order directing defendant to produce the records improperly withheld under FOIA Control No. 2014-0457 in XSR format;
- f. provide such other relief as the Court deems just and proper;
- g. and, for an award of plaintiff's attorney fees and costs incurred herein, pursuant to 5 U.S.C. § 552(a)(4)(E) and the Equal Access to Justice Act.

DATED this 6th day of November 2014.



Mark A. Mann, Plaintiff pro se

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