

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

NAVIGATE AFFORDABLE)
HOUSING PARTNERS, INC.;)

Plaintiff,)

v.)

UNITED STATES DEPARTMENT)
OF HOUSING AND URBAN)
DEVELOPMENT;)

Defendant.)

Case No.: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Navigate Affordable Housing Partners, Inc. (“Navigate”) brings this suit against the United States Department of Housing and Urban Development (“HUD”) and alleges as set forth below.

INTRODUCTION

1. Navigate brings this action pursuant to the Freedom of Information Act, as amended by the OPEN Government Act of 2007 (“FOIA”), for the principal purpose of compelling HUD’s immediate production of certain records made the subject of two August 2014 FOIA requests. Navigate also seeks declaratory, injunctive, and other appropriate relief under FOIA and other applicable law.

2. Navigate's principal business is project-based contract administration for HUD. Periodically, HUD enters into a Performance Based Annual Contributions Contract (a "**PBACC**") with a third-party contract administrator such as Navigate to assist in the management of project-based Section 8 housing contracts within a state. HUD will enter into a PBACC with one entity to serve as project-based contract administrator for an entire state. Between 2003 and 2005, Navigate was awarded the PBACCs for Alabama, Mississippi, Virginia, and Connecticut, and thereby became HUD's project-based contract administrator for those states. Navigate has continued to serve in that role without interruption.

3. As described in further detail below, in 2011 and 2012, HUD sought to re-award the PBACCs and, accordingly, issued solicitations of applications from Navigate and others interested in becoming contract administrators. These solicitations do not appear to have been reasonably calculated to efficiently carry out the duties of HUD or to do so at the lowest available cost. Accordingly, these solicitations were contrary to the public interest.

4. As also described in further detail below, in August 2014, Navigate submitted two FOIA requests to HUD seeking the disclosure of documents relating to the circumstances surrounding, and the justification for, the 2011 and 2012 solicitations. HUD has improperly withheld all documents responsive to these requests, failing to produce even one document.

5. As a result of HUD's unlawful denial of Navigate's FOIA requests, Navigate seeks (a) a declaration that the records sought are subject to disclosure under FOIA, (b) affirmative injunctive relief requiring HUD to produce all responsive records, and (c) an award of reasonable attorneys' fees and other litigation costs.

PARTIES AND JURISDICTION

6. Navigate is a nonprofit corporation organized under the laws of the State of Alabama. Navigate's office is located at 500 Office Park Drive, Mountain Brook, Alabama 35223.

7. HUD is an "agency" within the meaning assigned to that term in 5 U.S.C. § 552(f)(1). HUD has possession and control of the records requested by Navigate.

8. The Court has subject matter jurisdiction over this action and personal jurisdiction over HUD pursuant to 5 U.S.C. § 552(a)(4)(B). The Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

9. Venue is proper under 5 U.S.C. § 552(a)(4)(B) because Navigate has its principal place of business within the Northern District of Alabama. Venue in this district is also proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions premising Navigate's claims occurred within the Northern District of Alabama.

FACTUAL ALLEGATIONS

10. In February 2011, HUD issued an “invitation to bid,” pursuant to which HUD solicited applications from entities seeking to be awarded one or more PBACCs and thereby become contract administrator for one or more states. In July 2011, HUD announced that 42 of the PBACCs had been awarded, and that Navigate was the successful bidder in six states. However, in August 2011, HUD cancelled many of the July 2011 contract awards, including all six of those awarded to Navigate.

11. In March 2012, HUD again sought to award the PBACCs. This time, however, HUD imposed severe limits to eligibility to bid on these contracts. Specifically, the 2012 solicitation provided that HUD would only consider an application from an out-of-state entity if there was no qualified in-state applicant. This limitation was imposed despite HUD’s express statement in the 2012 solicitation that the limitation was not required under the Housing Act of 1937 and despite the fact that the limitation was not imposed in the 2011 solicitation or any previous solicitation—if it had been imposed, this limitation would have automatically eliminated the vast majority of successful applicants from contention.

12. Put simply, the March 2012 solicitation was calculated to eliminate competition, and it appears to have been against the public interest because it did

not ensure that the PBACCs would be awarded to the entity best suited to efficiently administer HUD's project-based housing assistance program or perform contract administration duties at the lowest cost.

13. Navigate and other applicants successfully challenged the March 2012 solicitation. *See CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency*, 745 F.3d 1379 (Fed. Cir. 2014), *cert. denied sub nom., U.S. v. CMS Contract Mgmt. Servs.*, 135 S. Ct. 1842 (2015). HUD vacated the March 2012 solicitation and, to date, has not issued another solicitation.

14. In August 2014, in order to discover information relating to the 2011 and 2012 solicitations, Navigate made two FOIA requests (the "**FOIA Requests**") to HUD. True and correct copies of the FOIA Requests are attached hereto as **Exhibit A and B**, respectively.

15. The information sought in the FOIA Requests would have been useful in publicly revealing HUD's reasons for and justification behind cancelling the July 2011 contract awards and eliminating competition in the March 2012 solicitation despite the fact that this would lead to a much less effective and more costly means of contract administration. If HUD had responded to the FOIA Requests as required under applicable law, the responsive information and documents could have been used to help ensure that the PBACCs would be awarded to the best qualified, most cost-efficient contract administrators in the

future, thus promoting the public's interest in the efficient use of public funds and in providing safe and affordable public housing.

16. However, HUD failed to produce any records in response to the FOIA Requests or to advise Navigate that it had determined records should be withheld under any exemptions provided for in 5 U.S.C. § 552(b). HUD's failure to produce any records or otherwise substantively respond to the FOIA Requests constitutes an unjustified constructive denial of the FOIA Requests.

17. On July 13, 2015, Navigate appealed HUD's denial of the FOIA Requests. A true and correct copy of Navigate's administrative appeal is attached hereto as **Exhibit C**¹.

18. On August 17, 2015, the HUD Office of General Counsel granted Navigate's appeal, determining that HUD was "in violation of the [FOIA] statute" because of its failure to timely respond to the FOIA Requests. The HUD Office of General Counsel "remanded [the FOIA Requests] to the FOIA liaison officer to be processed" and that "responsive documents should be sent to [Navigate] as soon as possible." A true and correct copy of this letter is attached hereto as **Exhibit D**.

19. Shortly thereafter, in September 2015, Navigate's counsel received a telephone call from Steve Martin, Director of the Assisted Housing Oversight Division in the Office of Multifamily Asset Management and Portfolio Oversight

¹ The letter is incorrectly dated July 13, 2014.

under the Office of Housing at HUD, and Yvette Viviani, a Branch Chief in the Assisted Housing Oversight Division. During this call, Martin and Viviani stated that when they received Navigate's July 2015 appeal, they were unaware of the FOIA Requests. They admitted that HUD had been derelict in its duty to respond to the FOIA Requests and that the FOIA Requests had "fallen through the cracks." Martin and Viviani promised to have their team look through HUD's old files in order to find documents responsive to the FOIA Requests and agreed to have periodic telephonic conferences with Navigate's counsel to give them progress reports on the FOIA Requests until the responsive documents were produced. During this call, Martin and Viviani told Navigate to communicate with them regarding the FOIA Requests.

20. In the ensuing weeks, Martin and Viviani conducted bi-weekly telephonic conferences with Navigate's counsel to discuss HUD's responses to the FOIA Requests. During these calls, Martin and Viviani consistently reported to Navigate that HUD was making progress in its efforts to respond to the FOIA Requests and that documents would be produced soon. However, despite Martin and Viviani's repeated statements to this effect, no documents were produced.

21. For example, on November 19, 2015, Martin and Viviani assured Navigate's counsel that HUD would produce some of the documents responsive to the FOIA Requests during the week of November 30, 2015. On December 3,

2015, when no documents had been produced as promised, Martin and Viviani claimed the documents were still under review and that Navigate would be updated by December 10, 2015. Navigate received no such update.

22. On December 16, 2015, after more than three months of calls and emails, Viviani abruptly told Navigate's counsel via email that she and Martin were going to "discontinue [their] bi-weekly calls to [Navigate's counsel] relating to the [FOIA Requests]," effective immediately. A true and correct copy of this email is attached hereto as **Exhibit E**.

23. Despite the fact that HUD determined that its denial of the FOIA Requests was unwarranted and unlawful (*see* Ex. D), to this day HUD has not produced even one document responsive to the FOIA Requests.

COUNT I

Declaratory Judgment – Failure to Produce Records (5 U.S.C. § 552)

24. Navigate adopts and incorporates by reference here all of its foregoing allegations.

25. FOIA requires that, upon proper request for disclosure of records, an agency "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3).

26. The documents made the subject of Navigate's FOIA Requests are agency records within HUD's control.

27. Navigate properly requested the production of said documents.

28. Navigate is entitled by law to obtain copies of the documents made the subject of its FOIA Requests.

29. HUD improperly withheld the documents in violation of FOIA.

30. Navigate requests a declaratory judgment that HUD has violated FOIA and that Navigate is entitled to immediately receive the documents made the subject of the FOIA Requests.

COUNT II

Injunctive Relief – Failure to Produce Records (5 U.S.C. § 552)

31. Navigate adopts and incorporates by reference here all of its foregoing allegations.

32. Under FOIA, this Court has “jurisdiction to enjoin [HUD] from withholding agency records and to order the production of any agency records improperly withheld from [Navigate].” 5 U.S.C. § 552(a)(4)(B).

33. The documents made the subject of Navigate’s FOIA Requests are agency records within HUD’s control.

34. Navigate properly requested production of said documents.

35. HUD improperly withheld the documents in violation of FOIA.

36. Navigate requests that, pursuant to 5 U.S.C. § 552(a)(4)(B), the Court enter an Order enjoining HUD from withholding the documents made the subject of the FOIA Requests and requiring HUD to immediately produce said documents to Navigate.

REQUEST FOR RELIEF

In light of the foregoing, Navigate respectfully asks this Court take the following actions:

A. Declare that HUD's failure to provide responsive documents is unlawful under FOIA;

B. Enter an affirmative injunction directing HUD to produce all requested records to Navigate, as provided in 5 U.S.C. § 552(a)(4)(B), unredacted and without further delay;

C. Award Navigate its costs and reasonable attorneys' fees in this action as provided under 5 U.S.C. § 552(a)(4)(E), as amended by the OPEN Government Act;

D. Expedite this action in every way pursuant to 5 U.S.C. § 552 and 28 U.S.C. § 1657; and

E. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted on this 22nd day of April 2016.

/s/ Russell Rutherford

Giles G. Perkins

Russell J. Rutherford

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Partners, Inc.

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Plaintiff hereby requests that the Clerk of Court mail a copy of the Summons and Complaint by certified mail to:

Joyce White Vance
United States Attorney's Office
1801 4th Avenue North
Birmingham, Alabama 35203

Loretta E. Lynch
Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Julián Castro
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410