

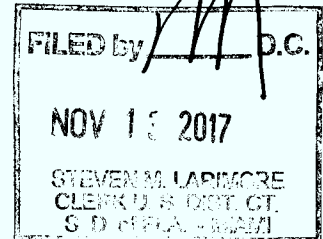
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:

JOEY GONZALEZ
Plaintiff,

vs.

U.S. DEPARTMENT OF AGRICULTURE
Defendant.



**COMPLAINT FOR DECLARATORY JUDGMENT,
MONETARY AND INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, as well as agency FOIA regulations, the Privacy Act of 1974, 5 U.S.C. §552a, et seq., and the Federal Declaratory Judgment Act. 28 U.S.C. §2201.

2. Plaintiff challenges the refusal of Defendant, the United States Department of Agriculture, Agricultural Research Service ("USDA ARS"), to release unredacted documents which are not covered by Defendant's claimed exemptions; 5 U.S.C. § 552(b)(5) and 552(b)(6), (hereinafter "exemptions 5" and "exemption 6" respectively) and that has been already made public in its entirety and without redaction.

3. Plaintiff seeks declaratory relief that Defendant, USDA ARS, is in violation of the FOIA for failing to fulfill plaintiff's requests for records in violation of the FOIA, and injunctive relief that defendant immediately and fully comply with plaintiff's requests under the FOIA.

4. Plaintiff prays that this Court declare Defendant in violation of the Privacy Act for disclosing Plaintiff's private information to the National Federation of Federal Employees ("NFFE").

I. JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(1), and 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(5), and 28 U.S.C. 1391.

II. PARTIES

6. Plaintiff has been an employee of Defendant for the past sixteen years. Plaintiff performs his duties at the Defendant's station in Miami, Florida (the "Miami Station"). Plaintiff is the former president of NFFE's Local 1752, ("Local 1752").

7. Defendant, is an agency of the Executive branch of the United States Government within the meaning of 5 U.S.C. §552(f). Defendant has control of the requested records and is responsible for fulfilling Plaintiff's FOIA requests.

8. Defendant's Administrator is Dr. Chavonda Jacobs-Young ("Jacobs-Young").

9. The Miami Station is part of the Defendant's Southeast Area. The South-East Area is directed by Dr. Deborah Brennan ("Brennan").

10. The Office of Personnel and Labor Solutions ("PALS") is a component of the USDA ARS. PALS is administered by Hillary Clark ("Clark").

11. Kathleen Hall ("Hall"), is an employee under the supervision and control of Clark, and Defendant's "Labor Relations Officer."

12. NFFE is a national labor organization. NFFE's President is Randy Erwin ("Erwin").

13. Elizabeth Pittaluga ("Pittaluga") is an employee of NFFE, under the control and supervision of Erwin. Pittaluga is NFFE's "business representative", and the person responsible for the Local 1752's matters.

14. Neither NFFE or Pittaluga fall under the definition of a Government controlled entity

pursuant to 5 U.S.C. §552(f).

III. FACTS GIVING RISE TO PLAINTIFF'S CLAIM FOR RELIEF

Emails between Pittaluga and Hall

15. By email, on April 15, 2017, Plaintiff requested all emails between Pittaluga and Defendant beginning on October 2016. The request was identified by Defendant's FOIA office as 2017-REE-03716-F (hereinafter the "April request").

16. Plaintiff received responsive documents to the April request on July 14, 2017. The response included 78 pages of emails, some redacted almost in their entirety. Defendant claimed the redacted documents were exempted under exemption 6.

17. Some of the unredacted or partly redacted emails demonstrate that from January to June 2017, Hall disclosed, and Pittaluga solicited Plaintiff's private information;

18. On February 16, 2017, by email, Hall disclosed to Pittaluga a copy of a Climate Assessment conducted at the Miami location on December 2016. *See* Exhibit A;

19. On March 2, 2017, Hall disclosed to Pittaluga a grievance filed by Plaintiff knowing that Plaintiff had not designated Pittaluga as his representative. Pittaluga accepted this grievance knowing that she was not asked by Plaintiff to represent him. Upon receiving Plaintiff's grievance, both, Hall and Pittaluga began planning how to dismiss Plaintiff's grievance. *See* Exhibit B.

20. On March 10, 2017, Pittaluga "blind copied" Hall in an email communication between her and Plaintiff, which Plaintiff believed it was private. *See* Exhibit C.

21. On April 4, 2017, Pittaluga solicited information from Hall regarding Plaintiff's payroll. According to Pittaluga, if Plaintiff was not paying union dues, he will be ineligible to serve as a union's officer. *See* Exhibit E.

22. On April 20, 2017, based on the information disclosed by Hall regarding Plaintiff's payroll, Pittaluga informed Plaintiff's supervisor that NFFE does not recognize Plaintiff as the union's president because "Mr. Gonzales (sic) is not a dues paying member of this local." Pittaluga blind copied Hall on this email. *See* Exhibit F.

23. On April 24, 2017, Pittaluga informed Hall that she was concerned that employees called Plaintiff for assistance and that she "REALLY, don't want to stir that nest again." *See* Exhibit G.

The Climate Assessment

24. On December 6, 2016, Brennan announced that ADR Advantage, Inc., ("ADR"), will be conducting a Climate Assessment at the Miami Station from December 13-15, 2016.

25. According to Brennan; "In the spirit of providing an environment where employees feel comfortable participating in the survey, Bargaining Unit Employees (BUEs) may elect to have their union representative present during the survey interview."

26. At no time prior or after the announcement, Brennan discussed with Plaintiff, at the time the Local 1752's President, anything related to the assessment, its logistics or the availability of union representation.

27. On December 8, 2016, Plaintiff emailed Brennan asking her for evidence that she had secured the participation of the Union in the assessment. Brennan did not respond.

28. On December 13, 2016, Brennan's continued refusal to address the union's questions regarding the assessment, resulted in an Unfair Labor Practice in which Local 1752 alleged that Brennan dealt directly with bargaining unit employees in conditions of employment.

29. The Climate assessment was conducted as announced and without the union's participation. Employees and non-employees of the Agency participated. Also, employees such

Hall which is not part Miami location and personnel from the Agency's Office of General Counsel ("OGC"), were allowed to participate. The cost of the assessment was approximately \$30,000.

30. Approximately On October 2017, and before the assessment the Agency's Office of Inspector General ("OIG"), had initiated an investigation into administrative and criminal matters at the Miami location, and the possible involvement of PALS in these matters. Plaintiff was a witness in this investigation. PALS was aware of this investigation and Plaintiff's participation since November 2016.

31. At the end of January 2017, Hall visited the Miami location. There she met with Jake Dang, the OIG agent conducting the investigation. Following Hall's visit, OIG's investigation was unexpectedly suspended. Dang refused to tell Plaintiff the reason for his decision.

32. On May 18, 2017, and during a mandatory meeting, Brennan, accompanied by Timothy Schranck, from OGC, discussed the Climate Assessment Miami Location's staff. According to Brennan the assessment was designed with the collaboration of OGC, and was conducted because of her dissatisfaction with the low score numbers she obtained in the 2015 and 2016 Office of Personnel Management, Employee's Viewpoint Survey.

33. During the meeting, and using the assessment as reference, Brennan discussed and made negative comments regarding Plaintiff's employment performance before the majority of employees at the Miami Location in attendance. Brennan also stated that the Climate Assessment may be obtained through FOIA. At no time, she stated that the content of the assessment was confidential.

34. By email, on June 28, 2017, Plaintiff requested copies of the Climate Assessment.

The request was identified by Defendant's FOIA office as 2017-REE-05254-F (hereinafter the "June request").

35. Plaintiff received a response to the June request on August 16, 2017.

36. In response, Defendant USDA ARS produced a redacted version of the Climate Assessment. Defendant claimed its response was exempted under FOIA exemptions 5 and 6.

37. The assessment referred to Plaintiff as the "IT specialist" and the "NFFE union local president" interchangeably.

38. The assessment contained defamatory and unverified comments from participants about Plaintiff's in his capacity as union president and in his capacity as an employee of the Agency.

39. In the assessment ADR purported to cite a series of negative comments about the Plaintiff allegedly made by participants. However, the assessment does not identify the persons who according to ADR made these comments.

40. The assessment claims among other matters, that Plaintiff is the source of harassment and hostile working environment at the Miami location.

41. The assessment attempted to justify the usage of some personnel under Brennan, Clark and Jacob-Young's supervision of personal email accounts to conduct official government business by blaming Plaintiff for these actions.

42. An email dated January 16, 2017, and included in Defendant's response to the April request revealed that Hall had willfully disclosed an unredacted version of the Climate Assessment to Pittaluga. The January 16 email states in relevant part:

Hall: "In advance of your visit I have attached the final report of the climate assessment that had been conducted at the location in December. The report has not been distributed to anyone at the location at this point so I am requesting you keep it confidential."

Pittaluga: “Thank you, Kathleen. I appreciate the Agency's effort. The climate survey was very helpful. I will not discuss/disclose the information in the report.”

See Exhibit A.

Appeals and Defendant's Response

43. Plaintiff appealed Defendant's responses on September 13, 2017 and September 15, 2017. The appeals were assigned reference numbers 2017-REE-00338-A and 2017-REE-00342-A.

44. The response to the appeals provided on October 20, 2017, are irrelevant and does not justify Defendant's refusal to release the responsive documents unredacted.

45. Defendant's responses to Plaintiff's appeals does not address its violations of the Privacy Act.

COUNT I BLANKET INVOCATIONS OF EXEMPTION 5

1. Plaintiff realleges and incorporate by reference all preceding paragraphs
2. Defendant is in violation of FOIA, 5 U.S.C. §552, by failing to fully and lawfully disclose documents responsive to Plaintiff's requests.
3. Without providing any explanation or justification Defendant improperly claims the Climate Assessment falls under the category of 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.
4. The Climate Assessment is not entitled to exemption 5 because neither Pittaluga or NFFE are part of the Agency, and there is no pending litigation between NFFE and the USDA ARS.
5. The Climate Assessment is not entitled to exemption 5 because it was not intended or

is being used as part of a deliberative or predecisional process.

6. Defendant's response to Plaintiff's appeal failed to address any reason for claiming exemption 5. There is not a single line in the Defendant's responses to Plaintiff's appeal that refers to which litigation, deliberative or predecisional process Defendant is engaged and exempts the Climate Assessment.

7. Since the Climate Assessment is not predecisional¹ or deliberative, and there is no pending litigation involving these documents, the responsive documents do not qualify for exemption 5. *See Am. Mgmt. Servs., LLC v. Dep't of the Army*, 842 F. Supp. 2d 859, 871-72 (E.D. Va. 2012) (“[A] document withheld pursuant to Exemption 5 must satisfy two requirements: (i) it must be inter-agency or intra-agency, and (ii) it must fall within a discovery privilege”).

8. Even if Defendant is correct, any claim of privilege has been waived by Defendant for the mere act of disclosing the Climate Assessment to the public.

COUNT II **BLANKET INVOCATIONS OF EXEMPTION 6**

1. Plaintiff realleges and incorporate all allegations in paragraphs 1-45.
2. Defendant is in violation of FOIA, 5 U.S.C. §552a, by failing to fully and lawfully release documents responsive to Plaintiff's requests.
3. Defendant improperly claims the redacted information in the Climate Assessment is protected by exemption 6.
4. Defendant waived its privacy claim (if there was any), when it shared the

¹ See *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C.Cir.1991) (“[T]he word ‘deliberative’ as used in the law of Exemption 5 is considerably narrower than the colloquial meaning; as a consequence, the ‘deliberative’ and ‘predecisional’ requirements tend to merge. Both terms have come to apply only to documents that contribute to an ongoing deliberative process **within an agency.**”) (bold emphasis added).

unredacted version of the Climate Assessment with NFFE through Pittaluga.

5. Defendant also waived any claim of privacy because Brennan discussed the Climate Assessment and Plaintiff's performance before the majority of the staff of the ARS Miami location in May 2017.

6. Plaintiff is therefore entitled to relief in the form of a declaratory order that Defendant is in violation of its statutory responsibilities under FOIA, and an order enjoining Defendant pursuant to the statute from invoking exemption 6 to withhold information responsive to Plaintiff's FOIA request.

COUNT III
FAILURE TO FOLLOW FOIA PROCEDURES

1. Plaintiff realleges and incorporate all allegations in paragraphs 1-39.

2. Defendant did not follow proper FOIA procedures because it failed to provide sufficient specificity to permit understanding of its rationale for withholding the responsive records in both FOIA requests. Not only Defendant must identify the particular privilege invoked, it must also identify the particular issue or policy to which the redacted information contributed.

3. Defendant failed to provide a "description and explanation reveal[ing] as much detail as possible as to the nature of the document without actually disclosing information that deserves protection." Oglesby v. U.S. Department of Army, 79 F.3d 1176 (D.C.Cir.1996). This explanation may include a detailed description of each document being withheld and take the form of a Vaughn index. Students Against Genocide v. Dep't of State, 257 F.3d 828, 832 (D.C.Cir.2001).

4. Defendant failed to provide sufficient specificity "to permit a reasoned

judgment as to whether the material is actually exempt under FOIA” Founding Church of Scientology v. Bell, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” King v. Department of Justice, 830 F.2d (1987) at 223-24.

5. Given the foregoing facts, Plaintiff believes that Defendant, USDA ARS refuses to follow FOIA proper procedures because the redacted information will reveal more violations of FOIA and the Privacy Act committed by Defendants.

COUNT IV
IMPROPER DISCLOSURE OF INFORMATION
PROTECTED BY THE PRIVACY ACT

1. Plaintiff realleges and incorporate all allegations in paragraphs 1-39.

2. Subsection (b) of the Privacy Act limits a government agency's ability to disclose information placed in a system of records. The agency may only disclose such information if (1) it has consent from the individual or; (2) if it can meet one of twelve conditions².

3. Defendant claims that the redacted information in the emails between Hall and Pittaluga, and the redacted information in the Climate Assessment is protected by exemption

² These 12 conditions are:

1. The disclosure is to an agency employee who normally maintains the record and need it in the performance of duty;
2. The disclosure is made under the Freedom of Information Act;
3. The disclosure is for a "routine use;"
4. The disclosure is to the Census Bureau for the purposes of a census survey;
5. The disclosure is to someone who has adequately notified the agency in advance that the record is to be used for statistical research or reporting, and the record is transferred without individually identifying data;
6. The disclosure is to the National Archives and Records Administration as a record of historical value;
7. The disclosure is to an agency "of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity," and if the record is provided in response to a written request by the head of the agency;
8. The disclosure is made where there are "compelling circumstances" affecting someone's health or safety, and the person whose health or safety is affected is sent a notification of the disclosure;
9. The disclosure is made to Congress, or any committee or subcommittee within Congress;
10. The disclosure is made to the Comptroller General in the course of the duties of the General Accounting Office;
11. The disclosure is made pursuant to a court order;
12. The disclosure is made to a consumer reporting agency in accordance with 31 U.S.C. 3711(e).

6. In other words, Defendant claims that this information constitutes personnel, medical or similar files, and that its disclosure constitutes a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6).

4. On January 16, 2017, Hall provided a unredacted copy of the Climate Assessment to Pittaluga. *See* Exhibit A.

5. During the months of January to July 2017, Hall disclosed via email Plaintiff's private information to Pittaluga.

6. Hall released private information about the Plaintiff contained in emails and the Climate assessment, including Plaintiff's payroll and grievances to Pittaluga for no legitimate reasons.

7. The Climate Assessment discussed Plaintiff's performance and alleged that Plaintiff was the cause of harassment and hostile working environment at the Miami location.

8. Hall did not inform Plaintiff that it was disclosing his private information to Pittaluga.

9. Plaintiff did not consent that Hall disclosed his private information to Pittaluga.

10. Defendant's actions are not justified by any of the 12 exceptions outlined in subsection (b) of the Privacy Act.

11. Defendant USDA ARS violated the Privacy Act.

12. Plaintiff is therefore entitled to relief in the form of a declaratory judgment that Defendant is in violation of its statutory responsibilities under the Privacy Act and an order enjoining Defendants from further disclosing Plaintiff's private information.

13. Plaintiff is entitled to relief declaring that Hall willfully disclosed Plaintiff's identifiable information to Pittaluga, and an order referring Hall for criminal prosecution.

14. Plaintiff is entitled to relief declaring that Brennan willfully disclosed Plaintiff's identifiable information to employees of the Miami location on May 18, 2017, and an order referring Brennan for criminal prosecution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request that the Court:

(1) Declare that Defendant has violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff's FOIA requests;

(2) Declare Defendant in violation of the Privacy Act;

(3) Order Defendant to release immediately all records responsive to Plaintiff's FOIA request in its entirety and unredacted;

(4) Enjoin Defendant from further disclosing Plaintiff's information, and enjoin NFFE from further soliciting Plaintiff's information;

(5) Award Plaintiff any actual damages under § 552a(g)(4)(A), the exact amount of which is to be determined at trial but is not less than \$1,000;

(6) Invoke its equitable powers to expunge all records or information maintained by Defendant USDA ARS that is inaccurate, defamatory and/or derogatory to Plaintiff;

(7) Refer Brennan, Hall and any other of Defendants' responsible official for criminal prosecution under 5 U.S.C. § 552a(i) for improperly disclosing, maintaining or soliciting Plaintiff's information in violation of the Privacy Act;

(8) Award Plaintiff's reasonable attorney's fees and litigation costs pursuant to 5 U.S.C. §§ 552a(g)(3)(B) and/or (4)(B), 552 (a)(4)(E) and/or 28 U.S.C. § 2412(d);

(9) Expedite this action in every way possible pursuant to 28 U.S.C. § 1657(a) and; Grant such other and further relief this Court deems just and proper.

Respectfully submitted on 2017-11-10 by

~~/s/ Joey D. Gonzalez~~
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