

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 13-cv- 3403

SAN JUAN CITIZENS ALLIANCE, INC., a Colorado non-profit corporation;

Plaintiff,

v.

Bureau of Land Management, a federal agency;

Defendant.

COMPLAINT

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1. This suit seeks to remedy violations of the statutory rights of San Juan Citizens Alliance (“SJCA” or “Plaintiff”) caused by the Defendant Bureau of Land Management (“BLM”) and Department of the Interior’s Southwest Regional Office of the Solicitor (“Solicitor”) in withholding an unspecified number of agency records responsive to written requests SJCA filed pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*

I. STATEMENT OF FACTS AND SUMMARY OF LAW

2. SJCA submitted a written FOIA request to BLM on May 1, 2013.

3. As of the date of the present filing, BLM has not produced a single document responsive to the May 1, 2013 FOIA request.

4. SJCA brings this action to establish a judicially enforceable deadline that compels release of all responsive documents not subject to an extant FOIA exemption and that enjoins BLM from an arbitrary and capricious pattern and practice of denying SJCA's FOIA rights.

5. On May 17, 2013, BLM requested that SJCA narrow the scope of the written FOIA. By letter dated May 17, 2013 BLM estimated that it would take until September 13, 2013 to fulfill in the request. By letter dated May 17, 2013, BLM requested that SJCA narrow the scope of the request to aid BLM respond before the BLM-anticipated response date of September 13, 2013.

6. On June 11, 2013 SJCA responded to the BLM request and agreed to narrow the request by amending the May 1, 2013 request. BLM failed to provide any responsive documents ahead of the anticipated September 13, 2013 response date.

7. BLM failed to respond to the FOIA Request on or before the statutory 20 working day deadline. The statutory deadline for making the statutory determination on the May 1, 2013 FOIA request was on or before May 30, 2013.

8. In the alternative, and while not conceding that the June 11, 2013 amendment allowed additional time, the statutory deadline for responding to the June 11, 2013 amendment to the May 11, 2013 FOIA Request was on or before July 9, 2013.

9. BLM's May 17, 2013 letter promised a response to the FOIA request on or before September 13, 2013, and perhaps sooner in the event that SJCA narrowed its request.

10. As of the date of this filing, BLM still has not provided the promised response.

11. On information and belief, Defendant continues to withhold agency records responsive to the FOIA Request.

12. SJCA can no longer rely on Defendant's anticipated timelines to remedy statutory deadlines imposed by FOIA. Judicial review and remedy is the means chosen by Congress to ensure federal agencies comply with FOIA's legislative purpose and intent.

13. SJCA's statutory FOIA rights have been denied by unlawful delay and arbitrary and capricious agency actions that are ripe for judicial remedy and judicial remedy.

14. The FIOA request sought information concerning ongoing activities of the Bureau of Land Management (BLM)/Farmington Field Office (FFO) involving the Glade Run Recreation Area Recreation (GRRRA) Resource Management Plan Amendment/Environmental Assessment and Travel Management Plan (R&TMP) (NEPA No.DOI-BLM-NM-FO-2013-0197-EA).

15. BLM has not updated the GRRRA R&TMP document to address refined Alternatives and resource issues.

16. BLM's May 17, 2013 response was given the number NM 2013-032 by BLM. NM 2013-32 categorized the FOIA as "Exceptional." BLM provided no information to support its categorization of the request as "Exceptional."

17. On June 10, 2013, a SJCA representative spoke with Dave Evans, District Manager at BLM/FFO. Mr. Evans reiterated BLM's written request for SJCA to narrow the FOIA request to meet a different tracking category that would accelerate the FOIA response. The stated purpose of the BLM request to narrow the focus of the request was to reduce the workload of his staff associated with the FOIA Request.

18. On June 11, 2013 SJCA submitted a revised (amended) FOIA request. The amended request narrowed the focus of the request by eliminating four categories of agency records from the request. SJCA's amended request was obtained by BLM offering the inducement of a more rapid agency response.

19. On July 18, 2013 BLM responded with FOIA Response NM 2013 -032a.

20. NM 2013-032 stated that, "your amended FOIA request has not significantly reduced the amount of work we anticipate such that the BLM will be capable of producing the requested documents prior to September 13, 2013. You are welcome to narrow still further the scope of your request to a particular subject or area of concern and we may be able to reduce the amount of response time." BLM did not explain why BLM could not produce the requested documents before the originally promised September 13, 2013 deadline, even where SJCA had agreed to narrow the request to reduce the response time.

21. SJCA decided against further narrowing the scope of the May 1, 2013 FOIA request.

22. SJCA did not receive any documents on or before September 13, 2013.

23. On information and belief, Defendant's inducement of promising a rapid response in exchange for narrowing the scope of the request was arbitrary and capricious. On information and belief, BLM's stated intent of complying with FOIA prior to September 13, 2013 instead of the statutory 20 working-day deadline was arbitrary and capricious and contrary to law.

24. SJCA hereby withdraws its June 11, 2013 amendment that narrowed the scope of the May 1, 2013 FOIA request.

25. Defendant did not assign the necessary resources to meet FOIA's statutory deadlines. On information and belief, Defendant had access to the necessary resources to meet FOIA's

statutory deadline. On information and belief, BLM elected to allocate its resources to agency activities that did not involve statutory deadlines.

26. The agency persons responsible for the BLM processing of the FOIA request are Eileen Griego Vigil, FOIA Officer, and Jesse Juen, State Director, New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, in consultation with Michael Williams, Department of the Interior, Office of the Solicitor, Santa Fe Unit, Santa Fe, New Mexico.

27. On September 24, 2013 Mike Eisenfeld of SJCA spoke with Eileen Vigil of BLM. Ms. Vigil confirmed that BLM had missed the September 13, 2013 target date. Ms. Vigil said that a search had been conducted, agency records had been assembled, and records were undergoing Solicitor review. Ms. Vigil said that BLM hoped to have the FOIA response to SJCA by Friday, September 27, 2013.

28. On September 27, 2013, Ms. Vigil left a voicemail for SJCA at the Farmington office stating that BLM would not complete the FOIA request on September 27, 2013. As of the date of this filing, none of the records assembled by Ms. Vigil have been released to Plaintiff. BLM has provided no reason for withholding any requested record.

29. BLM has provided no further information regarding its processing of the FOIA request.

30. On information and belief, Defendant has knowingly allocated insufficient Solicitor resources to meet FOIA's statutory deadlines.

31. On information and belief, Defendant will continue to provide insufficient staff to process SJCA's FOIA request unless an enforceable judicial order imposes fixed deadlines for processing the FOIA request and a fixed deadline for release of all responsive documents.

32. Defendant's failure to properly and timely assert FOIA Exemptions waives the agency's ability to assert FOIA Exemptions in this matter.

33. FOIA was amended in 2007 to confirm that Congress, through FOIA, continues to seek to "ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the **fundamental 'right to know.'**" Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 2007)(emphasis supplied).

34. SJCA's rights are protected by the statutory charge that FOIA litigation receives expedited consideration by the federal courts. 5 U.S.C. 552 (a)(4)(C)("defendant shall serve an **answer** or otherwise plead [. . .] **within thirty days** [. . .] **unless** the court otherwise directs for **good cause shown.**")(emphasis supplied).

35. Without timely and full access to the requested records, Plaintiff and the general public are denied the fundamental right to timely knowledge of the Federal Government's ongoing activities that impact the Four Corner's region.

36. FOIA imposes a twenty (20) working day limit for the agency to make a determination on a FOIA request. 5 U.S.C. §552(a)(6)(A)(i). Under circumstances not present here, an agency may extend that deadline by 10 days for "unusual circumstances." 5 U.S.C. §552(a)(6)(B). BLM did not identify any "unusual circumstances."

37. Courts, not agencies, have discretion to allow extra time for FOIA compliance "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." 5 U.S.C. §552(a)(6)(C)(i). This Court has discretion to impose deadlines to vindicate SJCA's FOIA rights.

38. Even where extensions to the 20 working-day statutory deadline may apply, the legislative purpose and intent of FOIA contemplates that agencies must accomplish record

production within days or weeks, not months or years. BLM has an established pattern and practice of delaying production of records for months and even years.

39. Over 6 months have lapsed since the filing of Plaintiff's May 1, 2013 FOIA request.

40. At the time of this filing, Defendant has not released a single agency record that is responsive to the FOIA request.

41. On information and belief, BLM requests to narrow the scope of the FOIA Request are part of a pattern and practice of using arbitrary and capricious requests and administrative stalling devices to avoid and delay public scrutiny. The 2007 FOIA Amendments were adopted, in part, to improve requester's access to effective judicial remedy for individual requests and to provide judicial remedy for a pattern and practice involving federal agencies' failures to comply with statutory deadlines.

42. BLM has asserted regulations in support of its practice of delay that are facially invalid and/or invalid as applied in the present matter.

43. BLM has withheld records through inaction and Defendant's responses, which failed to make a timely, complete, and lawful determination on Plaintiff's FOIA request.

44. Defendant's repeated failure to meet previously promised deadlines precludes resolution of this matter via informal agreement.

45. Judicially enforceable remedy is necessary and appropriate to vindicate the FOIA rights asserted in Plaintiff's FOIA request and to remedy Defendant's unlawful withholding of agency records.

46. Plaintiff now seeks judicial review and effective judicial relief from this Court by: 1) finding that Defendant has violated FOIA prohibitions against unlawfully withholding agency

records; 2) ordering Defendant to conduct a lawful search with a cut-off date corresponding to the date of such order, 3) ordering Defendant to produce all unlawfully withheld records by a date certain; and, 4) determining which, if any, agency records may be withheld by Defendant under any FOIA exemption that may have survived waiver. 5 U.S.C. 552 *et seq.*

II. JURISDICTION AND VENUE

47. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552 *et seq.* (FOIA), and 28 U.S.C. §1331 (federal question). FOIA provides “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §552(a)(4)(B). The district court “shall determine the matter de novo” and has broad discretion to structure judicial review of the case. *Id.*

48. Venue in this Court is proper. 5 U.S.C. §552(a)(4)(B). Plaintiff is a Colorado non-profit corporation which resides in Colorado. All documents requested by Plaintiff concern issues related to and/or activities conducted by the Federal Government.

49. Defendant failed to make a full and lawful determination on Plaintiff’s May 1, 2013 FOIA request within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(i).

50. In the alternative, Defendant failed to make a full and lawful determination on Plaintiff’s June 11, 2013 amendment within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(i).

51. None of Defendant’s verbal or written correspondence regarding Plaintiff’s FOIA request constituted a timely, full, and lawful determination and as such is construed as a denial of the request.

52. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Plaintiff’s FOIA request. 5 U.S.C. §552(a)(6)(C)(i)

(“Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”)

53. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiff’s harms can be remedied by an order of this Court.

III. PARTIES

54. Plaintiff, SAN JUAN CITIZENS ALLIANCE (“SJCA” or “Plaintiff”) filed a FOIA request on May 1, 2013, which it amended on June 11, 2013. SJCA is a Colorado non-profit corporation with offices located in Durango, Colorado and Farmington, New Mexico. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA. SJCA has standing to bring this FOIA suit.

55. BLM recognized the public interest nature of Plaintiff’s FOIA request. Defendant granted Plaintiff a waiver of copying fees based on the agency’s determination that the request for information is in the public interest and is not primarily in the requestor’s commercial interests. In seeking the fee waiver, Plaintiff also demonstrated that the agency records obtained through FOIA would be widely distributed and disseminated. BLM’s failure to meet the statutory deadline has waived BLM’s ability to charge fees in this matter.

56. SJCA uses FOIA as an important avenue for keeping current with agency activities and is harmed when it is denied timely access to agency records to which it is entitled. SJCA intends to continue its use of FOIA to access agency records in the possession of BLM. One of the

purposes of FOIA is to promote the active oversight role of public advocacy groups. SJCA uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the agency decision-making activities and in oversight. SJCA intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. SJCA brings this action on its own behalf and on behalf of its adversely affected members.

57. Timely access to all requested agency records, including those created and obtained since the filing of the FOIA request is crucial to the ability of SJCA and SJCA's members to carry out its educational, advocacy, and oversight activities regarding the ongoing federal regulation of public lands in the Four Corner's region.

58. Defendant BUREAU OF LAND MANAGEMENT ("BLM") is an agency within the Department of the Interior subject to FOIA mandates. DEPARTMENT OF THE INTERIOR'S SOUTHWEST REGIONAL OFFICE OF THE SOLICITOR ("Solicitor") is an agency within the Department of the Interior whose attorneys assisted BLM with its response. As a federal agency, the Solicitor is also subject to FOIA mandates. BLM is responsible for responding to FOIA requests submitted to it and so is sued as a defendant in this action. The Solicitor was provided with responsive agency records as BLM's attorney and, on information and belief, the Solicitor currently possesses some of the responsive agency records. Defendant has violated FOIA by unlawful delay in processing the FOIA request and by withholding agency records that are not subject to a lawful FOIA Exemption.

59. Plaintiff has suffered concrete and particularized injuries by Defendant's unlawful delays and withholding of agency records. Plaintiff's injuries can be redressed by this suit and granting of the remedies requested herein.

60. Where BLM has engaged in an ongoing arbitrary and capricious pattern and practice of refusing to fully, timely, and lawfully respond to Plaintiff's FOIA request and to provide responsive records in a timely matter, Plaintiff's rights under FOIA as well as its ability to carry out its organizational mission have been, and will be, severely impaired. The relief sought in this lawsuit would remedy the ongoing impairment of Plaintiff's FOIA rights.

VI. FIRST CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant has Unlawfully Withheld Agency Records which Plaintiff's requested pursuant to FOIA.*

61. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

62. Plaintiff filed a written FOIA request on May 1, 2013.

63. Defendant has not made a determination on whether or not to disclose or withhold agency records responsive to the May 1, 2013 FOIA request.

64. Defendant withheld agency records requested by Plaintiff's May 1, 2013 written request.

65. Defendant continues to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's May 1, 2013 FOIA request for agency records.

66. Defendant continues to violate FOIA by illegally withholding agency records that are responsive to the May 1, 2013 request, but which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

VI. SECOND (ALTERNATIVE) CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant has Unlawfully Withheld Agency Records which Plaintiff's requested pursuant to FOIA.*

67. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

68. Defendant withheld agency records requested by Plaintiff's May 1, 2013 written request. Defendant arbitrarily and capriciously induced SJCA to amend and narrow its May 1, 2013 FOIA request based on the agency's promise of an expedited agency response.

69. On June 11, 2013 SJCA amended its May 1, 2013 FOIA request. Although SJCA has herein withdrawn the amendment and relies on the May 1, 2013 request, FOIA violations based on the June 11, 2013 amendment is pled in the alternative.

70. Defendant continues to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's May 17, 2013 FOIA request for agency records, as amended June 11, 2013.

71. Defendant continues to violate FOIA by illegally withholding agency records that are responsive to the May 1, 2013 request, as amended June 11, 2013, but which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

72. Defendant's actions to induce the June 11, 2013 amendment are arbitrary and capricious. 5 U.S.C. § 552(a)(4)(F)

VIII. REQUEST FOR RELIEF

FOR THESE REASONS, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. FIND and DECLARE that Defendant violated FOIA by failing to lawfully respond to Plaintiff's FOIA request in accordance with the statutory deadline;

2. FIND and DECLARE that Defendant violated FOIA by failing to produce requested agency records responsive to Plaintiff's May 1, 2013 FOIA request in accordance with the statutory deadline;

3. (In the alternative) FIND and DECLARE that Defendant violated FOIA by failing to produce requested agency records responsive to Plaintiff's May 1, 2013 FOIA request, as amended June 11, 2013, in accordance with the statutory deadline;

4. FIND and DECLARE that Defendant continues to violate FOIA by illegally withholding responsive agency records that are not subject to a lawful FOIA Exemption (5 U.S.C. § 552(b));

5. ORDER that Defendant immediately conduct a full search for records responsive to Plaintiff's FOIA request with a cut-off date set on the date such Order is entered;

6. ORDER that Defendant forthwith provide Plaintiff with all records that have been identified as responsive to the FOIA request and not subject to a FOIA Exemption;

7. ORDER Defendant to refrain from relying on regulations or practices found invalid in the present matter in all future FOIA undertakings;

8. Enter specific finding of fact regarding arbitrary and capricious conduct of agency personnel and refer the matter to the Merit System Protection Board for investigation. 5 U.S.C. § 552(a)(4)(F);

9. GRANT the Plaintiff their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and

10. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED December 17, 2013

s/ Travis E. Stills

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