

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **04-B-1264 (OES)**

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

COMPLAINT under FREEDOM OF INFORMATION ACT

PLAINTIFF **MARY M. HULL**, by and through her counsel, Curtis L. Kennedy, files this
Complaint:

PRELIMINARY STATEMENT

1. MARY M. HULL (“HULL”) has tried unsuccessfully to get information disclosed pursuant to the Freedom of Information Act (FOIA) about the Qwest Pension Plan under examination by the United States Department of Labor (DOL). Her request was fully rebuked by the Kansas City office of the DOL. On March 19, 2004, HULL timely internally appealed to the Solicitor of Labor whose representatives have repeatedly promised there would be a response forthcoming. Despite the passage of ninety (90) days, well past the deadline established by FOIA, there has been no response, and nothing has been disclosed. Hence, HULL requests an order of this Court enjoining the DOL from further delaying and refusing to provide her all information responsive to her outstanding FOIA request.

JURISDICTION AND VENUE

2. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of the Freedom of Information Act , 29 U.S.C. § 552 (FOIA), and upon 28 U.S.C. § 1331.

3. Venue of this action lies in the District of Colorado, pursuant to 5 U.S.C. § 552(a)(4)(B), because HULL resides in this District.

THE PARTIES

4. Named Plaintiff, MARY M. HULL is a United States citizen and resident of Aurora, Colorado. She retired from U S WEST, Inc. effective February 28, 1990. She is a retiree receiving a service pension annuity from the Qwest Pension Plan.

5. HULL is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan and she receives a service pension in the form of a monthly annuity.

6. Defendant UNITED STATES DEPARTMENT OF LABOR (DOL) is an agency of the federal government required to comply with the terms of FOIA. ¹ Elaine L. Chao is the Secretary of DOL. Howard M. Radzely is the Solicitor of DOL.

FACTS

¹ FOIA is to be broadly construed in favor of disclosure, and the government bears the burden of justifying nondisclosure under a particular FOIA exemption. See Audobon Soc'y v. United States Forest Serv., 104 F.3d 1201, 1203 (10th Cir. 1997).

7. On March 3, 2004, HULL's counsel sent to a DOL Acting Deputy Director her request under FOIA and the entire text of the letter appears below:

March 3, 2004

Robert Webber, **(Via Fax and First Class Mail)**
Acting Regional Director
DEPARTMENT OF LABOR
1100 Main St., Suite 1200
Kansas City, MO 64105-5148
Tele: 816-426-5131, ext. 112
Fax: 816-426-5511

Syd Canon,
FOIA Request Coordinator, Disclosure Officer
DEPARTMENT OF LABOR
1100 Main St., Suite 1200
Kansas City, MO 64105-5148
Tele: 816-426-5131, ext. 118

Re: Investigation of Qwest Pension Plan / **Freedom of Information Act Request**

Mr. Webber and Ms Canon:

Ms. Canon, thank you for your telephone call yesterday, in response to my February 24 letter about the ongoing investigation of the Qwest Pension Plan. In order to avoid any confusion about my inquiry, I want to go on record as having presently invoked the Freedom of Information Act (FOIA), as amended, 5 U.S.C. § 552. Since October 2003, I have been communicating with your office and awaiting confirmation of the DOL's conclusion of the ongoing investigation of the Qwest Pension Plan. I understand there is no one within the Kansas City office who is able to predict when the investigation will be concluded, if ever, and I am told that I should check back after the beginning of next year, 2005. The group of Qwest Pension Plan participants whom I represent are simply not satisfied with this report, and some have voiced concerns that the Department of Labor is simply stalling its work as part of an election year politics process.

Accordingly, please let this letter serve as an official FOIA request by myself and on behalf of the requesters identified herein, and notice of my agreement to pay the reasonable assessable fees associated with the DOL's processing of this request, as explained herein below. As you know, FOIA has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral

part of that process. The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. Since the Qwest. Since the U S WEST merger in mid-2000, rumors have furiously circulated amongst Qwest Pension Plan participants about the scope, purpose and intent of the DOL's investigation. That the investigation is now well beyond a second year further fuels the level of uncertainty among thousands of Qwest Pension Plan participants who demand to know what is going on, and why?

Accordingly, a FOIA request is made for all agency records of the Department of Labor's enforcement investigation, audit and examination from 2001 to the present of the Qwest Pension Plan, formerly known as the U S WEST Pension Plan, including written and electronic (e-mail) communications with plan administrators and fiduciaries, plan legal counsel, plan actuaries, plan accountants and plan advisors incident to the ongoing investigation. This request includes interview reports, informal and formal discovery requests, subpoenas and orders, and the written and electronic (e-mail) responses given thereto. Our position is that all matters concerning the Qwest Pension Plan's operation, investments and administration are not private matters subject to any FOIA exemption. Therefore, to the extent the DOL's position is to the contrary, we trust there will be an attempt to remove all alleged "exempt information" so as to make the documents suitable for release.

We understand that you will provide a written or electronic (e-mail) response within twenty (20) days and advise of the DOL's decision to grant, defer or refuse access to all or part of the documents we have requested, along with an explanation of the reasons for the decision and the fees to be charged to me. Thank you.

Sincerely,
Curtis L. Kennedy
Individual Requester, and on behalf of the Association of U S WEST/Qwest Retirees

Nelson B. Phelps, Individual Requester
QWEST PENSION PLAN PARTICIPANT
1500 So. Macon St.
Aurora, CO 80012-5141
Tele: 303-743-7928

Mary M. Hull, Individual Requester
QWEST PENSION PLAN PARTICIPANT
8729 West Port Royale Lane
Peoria, AZ 85381
Tele: 623-815-1938

8. The next day, by letter dated March 4, 2004, the Kansas City office of the DOL fully denied HULL's request and the entire text of the denial letter appears below:

March 4, 2004

Mr. Curtis L. Kennedy
Attorney at Law

8505 E. Princeton Avenue
Denver, CO 80237-1741

Re: Qwest Pension Plan

Dear Mr. Kennedy:

Your Freedom of Information Act request was received in this office on March 3, 2004. You are requesting information relating to our investigation of Qwest Pension Plan.

The information you are seeking is part of an ongoing investigation. I am denying release of this information under Exemption 7(A). This exemption protects information concerning pending or prospective law enforcement proceedings, the disclosure of which could reasonably be expected to interfere with that proceeding.

Department of Labor regulations provide that any applicant whose request for records is denied in whole or in part may file an appeal within 90 days from the date the response is received by the applicant. If an appeal is made, it must be in writing and must state the grounds for appeal including any supporting statements or arguments. An appeal should be addressed to the Solicitor of Labor, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C., 20010. To expedite processing, the envelope and appeal should be clearly labeled "FOIA Appeal".

If you have any questions regarding this response or if you need further assistance, you may contact Syd Canon at (816) 426-5121 ext. 118.

Sincerely,

ROBERT L. WEBBER
Acting Regional Director

9. Accordingly, the DOL relied upon FOIA exemption 7(A) which prohibits disclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such. . . information. . . could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A).

10. On March 16, 2004, HULL's counsel submitted her appeal letter to the Solicitor of Labor and the entire text of the appeal letter appears below:

Howard M. Radzely
Solicitor of Labor

March 16, 2004

(Via First Class Mail)

Office of the Solicitor
Division of Legal Counsel
DEPARTMENT OF LABOR
Francis Perkins Building, Room N-2428
200 Constitution Avenue NW
Washington, DC 20010

Re: **Freedom of Information Act Request – APPEAL**
March 4, 2004 FOIA Denial
March 3, 2004 FOIA Request

Solicitor Radzely:

This is a timely appeal submitted under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. § 552, of the March 4, 2004, decision letter from Acting Regional Director Robert L. Webber fully denying the March 3, 2004, FOIA request served on the Employee Benefits Security Administration in Kansas City. Copies of both my March 3 letter and Mr. Webber's March 4 letter are attached hereto. The FOIA request concerns information about the Qwest Pension Plan. Accordingly, please let this letter serve as an appeal by myself and on behalf of the requesters identified in the March 3 letter.

The March 3, 2004 FOIA request was for all agency records of the Department of Labor's enforcement investigation, audit and examination from 2001 to the present of the Qwest Pension Plan, formerly known as the U S WEST Pension Plan, including written and electronic (e-mail) communications with plan administrators and fiduciaries, plan legal counsel, plan actuaries, plan accountants and plan advisors incident to the ongoing investigation. The FOIA request included interview reports, informal and formal discovery requests, subpoenas and orders, and the written and electronic (e-mail) responses given thereto.

Acting Director Webber invokes Exemption 7(A) under FOIA, which exemption authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." It is our position that Exemption 7(A) is being abused. It should be beyond question that Exemption 7(A) is temporal in nature and is not intended to endlessly protect material simply because requested papers are in some investigatory file somewhere in the Kansas City office. Furthermore, Mr. Webber says nothing about whether any enforcement proceedings are a real possibility. There is no legal action pending. Mr. Webber states that "the information [we] are seeking is part of an ongoing investigation." He chose his words carefully. He does not say "ongoing law enforcement investigation." Exemption 7(A) may be invoked so long as a law enforcement proceeding is pending, or so long as an enforcement proceeding is fairly regarded as prospective or as preventative. Unfortunately, Mr. Webber's rudimentary statement leaves Qwest Pension Plan participants to guess whether any "prospective" law enforcement proceeding has either a concrete possibility

or is merely hypothetical. What are they to think? Is there a prospective criminal action? civil action? regulatory proceeding? Mr. Webber should have pointed to a specific pending or contemplated law enforcement proceeding that could be harmed by the requested disclosure. Mr. Webber did not do that. Moreover, he did not bother to specify the distinct, generic categories of documents at issue and the harm that would result from their release to me and the requesters.

Clearly, Acting Director Webber's *blanket* denial does not comply with either the letter or spirit of FOIA. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and FOIA has become an integral part of that process. FOIA has been one of the primary means by which members of the public inform themselves about their government. Since the Qwest / U S WEST merger in mid-2000, rumors have furiously circulated amongst Qwest Pension Plan participants about the scope, purpose and intent of the DOL's investigation launched by officials in the Kansas City office. That the investigation is now well beyond a second year and, reportedly nothing is happening, further fuels the level of uncertainty among thousands of Qwest Pension Plan participants who demand to know what is going on, and why?

Mr. Solicitor, if the Kansas City DOL office is allowed to withhold all the requested pension plan related information simply because Mr. Webber, or someone in his office, might imagine that the requested information *might* have some bearing on some hypothetical enforcement proceeding concerning the Qwest Pension Plan, the FOIA is rendered meaningless. We don't believe the requested information can be refused just because the law enforcement arm of the DOL asserts, without a firm basis, that release would interfere with future actions.

Even if we assume that Qwest is a potential target for either a criminal, civil or regulatory proceeding by the DOL, isn't virtually all of the FOIA requested information that which was provided by Qwest? We do not believe Exemption 7(A) affords protection when the target of the investigation has possession of the FOIA requested information or submitted the very information in question. How could there be any harm to Qwest or the DOL by allowing us access to Qwest Pension Plan related documents produced by Qwest? The documents relate to the funded trust established and maintained specifically for the exclusive benefit of Qwest Pension Plan participants, not Qwest. Revealing the requested documents is certainly not going to reveal anything not already known by Qwest.

A distinguishing feature of FOIA is that the agency, the Kansas City DOL office, bears the burden of sustaining its action of withholding records. That burden cannot be met in this instance. Therefore, we request that you reverse Mr. Webber's decision and direct his office to promptly grant me and the requesters access to all or part of the documents we have requested. Thank you.

Sincerely,

Curtis L. Kennedy

Individual Requester, and on behalf of the Association of U S WEST/Qwest Retirees

Nelson B. Phelps, Individual Requester
QWEST PENSION PLAN PARTICIPANT
1500 So. Macon St.
Aurora, CO 80012-5141
Tele: 303-743-7928

Mary M. Hull, Individual Requester
QWEST PENSION PLAN PARTICIPANT
8729 West Port Royale Lane
Peoria, AZ 85381
Tele: 623-815-1938

Attachment

c: Association of U S WEST/Qwest Retirees (general membership)

Timothy D. Hauser, Esq.
Associate Solicitor
Plan Benefits Security Division
U. S DEPARTMENT OF LABOR
P.O. Box 1914
Washington, D.C. 20013
Tele: 202-693-5600
Fax: 202-693-5610

(Via First Class Mail)

11. **Exhaustion of Available Administrative Procedures.** Before filing this FOIA civil action, HULL timely exhausted all administrative remedies made available to her. On March 16, 2004, HULL timely appealed the DOL's March 3, 2004, denial of her FOIA request to the Solicitor of Labor which office acknowledges receipt of HULL's timely internal appeal.

12. Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(iii), the Solicitor of the DOL had twenty (20) days to make a determination with respect to HULL's March 16, 2004 appeal. However, to date, the Solicitor of the DOL has not responded and is **already 70 days past the deadline.**

13. There are no "unusual circumstances" within the meaning of FOIA, 5 U.S.C. § 552(a)(6)(B)(iii), to justify the DOL's delay responding to HULL's FOIA appeal to the Solicitor of the DOL. The DOL is not exercising due diligence.

14. Defendant DOL cannot in good faith justify non disclosure of everything that has been withheld from HULL, and the FOIA exemption relied upon by the DOL does not fully apply to everything the DOL has been withholding from HULL. The DOL's *blanket* denial of HULL's request does not comply with the letter and spirit of FOIA.

15. HULL contends the DOL is stalling, acting in bad faith, and abusing exemption 7(A) of the FOIA. Furthermore, HULL contends there is no legitimate basis for the DOL to not provide HULL the requested information together with an index of all withheld or redacted documents.

16. Within the meaning of FOIA, 5 U.S.C. § 552(a)(6)(C)(1), HULL has fully exhausted all available internal claims procedures under FOIA. It would be folly to require HULL to continue to await the DOL's untimely response.

17. This action under FOIA has been timely filed.

CLAIM FOR RELIEF

18. HULL incorporate and reallege by reference the foregoing paragraphs 1 through 17, as if they were fully set forth herein.

19. Pursuant to FOIA, 5 U.S.C. Section 552, HULL is entitled to bring this action and she requests this Court issue an order finding that the circumstances surrounding the withholding of documents responsive to her FOIA request raises questions whether DOL agency personnel acted arbitrarily or capriciously with respect to the withholding.

20. Pursuant to Pursuant to FOIA, 5 U.S.C. Section 552, HULL is entitled to an order enjoining the Defendant DOL from withholding records responsive to her FOIA request and this Court should exercise its discretion to conduct an *in camera* review of any redacted documents not produced to determine whether said documents are within exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARY M. HULL seeks orders and judgments against Defendant as follows:

A. Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(F), issue an order finding that the circumstances surrounding the withholding of documents responsive to HULL's FOIA request raises questions whether DOL agency personnel acted arbitrarily or capriciously with respect to the withholding;

B. Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), issue an order enjoining the DOL from withholding documents responsive to HULL's FOIA request and order the DOL to produce to the Court the DOL's file so that the Court can conduct an *in camera* review of any withheld and/or redacted documents to determine whether said documents are properly within the scope of exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A);

C. Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), grant HULL such other appropriate temporary, preliminary and permanent injunctive relief against DOL, including an order directing future timely compliance with FOIA requests; and

D. Pursuant to 5 U.S.C. § 552(a)(4)(E), order Defendant DOL to pay the reasonable value of Plaintiff's attorney's fees for services performed, necessary expenses of litigation, and costs of this action.

DATED this 18th day of June, 2004.

Respectfully submitted,

CURTIS L. KENNEDY
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Telephone: (303) 770-0440
CurtisLKennedy@aol.com
ATTORNEY FOR PLAINTIFF

Named Plaintiff's Address:

Mary M. Hull
678 Clarkson Street
Denver, CO 80218-3202