

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-01264-LTB-OES

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

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**PLAINTIFF'S RESPONSE IN OPPOSITION re [23]  
DEFENDANT'S July 11, 2005 MOTION FOR SUMMARY JUDGMENT and  
PETITION FOR *IN CAMERA* REVIEW with Rule 56(f) Affidavit by PLAINTIFF HULL**

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Plaintiff MARY M. HULL (HULL), through her counsel, hereby responds to Defendant's July 11, 2005 Motion for Summary Judgment and submits her Rule 56(f) Affidavit and requests an *in camera* review. Plaintiff's action is brought under the Freedom of Information Act, 29 U.S.C. § 552 (FOIA).

**Brief Background Regarding the DOL's July 11, 2005 Summary Judgment Motion.**

On April 1, 2005, Defendant Department of Labor (DOL) filed a request under Fed.R.Civ.P. 56 for dismissal of this action. The DOL contended or strongly implied that there was an *on-going enforcement proceeding* and, therefore, contended about 1,400 out of 6,500 requested pages of documents were being withheld because supposedly those 1,400 pages were exempt under FOIA Exemption 7(A). Then, only one week later on April 7, 2005, the DOL closed its case file.

But, the DOL did not tell HULL and her counsel that the investigation had been closed. On April 19, 2005, HULL filed a responsive brief arguing her position that FOIA Exemption 7(A) should not be applied to the remaining withheld papers. HULL's position was completely justified. On May 18, 2005, the DOL filed a reply brief conceding that there was no longer an on-going investigation or enforcement proceeding and FOIA Exemption 7(A) no longer applied.

By conceding FOIA Exemption 7(A) no longer applies, the DOL has rendered moot its April 1, 2005 filed motion for summary judgment. (Docket Entry No. 13). However, many of the DOL's documents previously classified as covered by only FOIA Exemption 7(A) have been re-labeled by the DOL and alleged to be covered by a different FOIA Exemption, such as FOIA Exemption 5.

During June 2005, the DOL gave HULL about 1,200 pages of documents that had been previously withheld ostensibly due to FOIA Exemption 7(A).

On July 11, 2005, the DOL filed a new motion for summary judgment (Docket Entry No. 23), this time arguing that FOIA Exemptions 2, 3, 4, 5, 7(C) and 7(E) apply to some 200 remaining pages not yet revealed to HULL and her counsel. The DOL submitted an affidavit and a Vaughn Index curtly describing the withheld papers.

**Plaintiff's Statement of Her Claim.** Plaintiff MARY M. HULL asserts one claim for relief arising under FOIA. By letter dated March 3, 2004, HULL requested the Kansas City office of the Department of Labor (DOL) to provide her information regarding its investigation of the Qwest Pension Plan. HULL is a participant retiree in the pension plan. By letter dated March 4, 2004, Defendant refused to comply and withheld everything, fully relying upon FOIA Exemption 7(A). By letter dated March 16, 2004, HULL timely appealed to the Solicitor of Labor which office did not provide a timely response within twenty days. On June 18, 2004, almost 90 days after HULL had appealed to the Solicitor of Labor, she filed her Complaint.

After this Complaint was filed and served, the Solicitor's response was delivered in the mail to HULL's counsel. The Solicitor's response was to uphold the Kansas City DOL's decision not to make any disclosures, again relying upon FOIA Exemption 7(A). Again, every piece of requested paper was withheld. The full text of the parties correspondence is reproduced in full within the Complaint.

FOIA Exemption 7(A) 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).

HULL fully exhausted all administrative remedies made available to her. This action under FOIA was timely filed.

In summary, HULL contends in her Complaint that the DOL could not in good faith justify non disclosure of everything that had been withheld from HULL, and FOIA Exemption 7(A) relied upon by the DOL did not fully apply to everything the DOL had been withholding from HULL. The DOL’s *blanket* denial of HULL’s request did not comply with the letter and spirit of FOIA.

HULL contends the DOL stalled, acted in bad faith, and abused Exemption 7(A) of the FOIA. Furthermore, HULL contends there was no legitimate basis for the DOL to not provide HULL any of the requested information together with an index of all withheld or redacted documents. She contended there was neither an ongoing investigation nor any enforcement proceeding. A citizen should not have to commence federal court litigation in order to shake-up a federal agency and get compliance with FOIA. But, that is what happened here.

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(F), in her Complaint, HULL seeks 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. Furthermore, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), HULL seeks 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 FOIA Exemptions.

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

In this FOIA case, HULL cannot compel production of the very documents that are being withheld under an asserted FOIA exemption. Formal discovery is not a means for a party to circumvent an agency's assertion of FOIA's exemptions and obtain the contents of withheld documents--the issue that lies at the very heart of a FOIA case. *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983) (affirming denial of discovery when directed to substance of withheld documents at issue).

As shown by HULL's Affidavit submitted herewith under Fed.R.Civ.Proc. Rule 56(f), since HULL cannot conduct formal discovery of the requested documents, she cannot establish facts essential to justify her opposition to the DOL's motion for summary judgment. The only way to proceed is for the Court to hold an *in camera* inspection.

## I. ARGUMENT

### A. **Dismissal is Premature, as HULL Requests an *In Camera* Review of Remaining Withheld Documents For a Determination of Whether The Documents Are Being Improperly Withheld.**

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 (10<sup>th</sup> Cir. 1997). FOIA requires federal agencies to make records within its possession promptly available to citizens who request them.

See 5 U.S.C. § 552(a)(3). Unless the information sought falls within one of the nine specified exemptions, the agency must make disclosure. See 5 U.S.C. § 552(b)(1)-(9). Before this Complaint was filed, only one exemption was at issue in this FOIA request: the so-called “7(A) exemption.” This exemption allows a federal agency to withhold “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.” 5 U.S.C. § 552(b)(7)(A).

FOIA provides federal courts with jurisdiction to enjoin an agency from withholding agency records and to order the production of such records only if they are being “*improperly withheld* from the complainant.” 5 U.S.C. § 552(a)(4)(B) (emphasis added). In enacting Exemption 7(A), “Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). However, Congress did not intend to preclude disclosure of any investigatory records; rather, Congress sought to protect against interference with investigatory files prior to the completion of an actual or contemplated enforcement proceeding. *Id.* at 232.

Utilizing this framework, the Court should conclude that the DOL failed to demonstrate that Exemption 7(A) shielded all of the requested data from disclosure. In its first motion for summary judgment, the DOL did not demonstrate with “concrete examples” the way in which the premature public release of the requested documents could interfere with enforcement proceedings. Instead, the DOL submitted an affidavit by someone not even remotely connected with the so-called “investigation” giving only speculative and not the “actual, contemplated enforcement proceeding” that Congress had in mind when drafting Exemption 7(A). See *Id.* at 232.

Courts grappling with FOIA Exemption 7(A) have held that interference with open or prospective cases means hindering an agency's ability to control its investigation, enabling suspects to elude detection and intimidate witnesses, or prematurely revealing evidence or strategy. See, e.g., *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998). The DOL never affirmatively established any potential interference of this nature.

The DOL's approach taken during the two-step FOIA administrative proceedings and after this lawsuit was commenced that all of its investigative records are within the scope of Exemption 7(A) makes the limitation that the records be reasonably "expected to interfere with law enforcement proceedings" meaningless. The DOL's stance contradicted the congressional intent in fashioning FOIA and its exemptions. Exemption 7(A) is not intended to "endlessly protect material simply because it was in an investigatory file." *Robbins Tire*, 437 U.S. at 230. The exemption requires a government agency to show by more than conclusory statements how the particular kinds of investigatory records would interfere with a pending enforcement proceeding. *Campbell v. Dept. of Health and Human Serv.*, 682 F.2d 256, 265-66 (D.C. Cir. 1982).

Now that the DOL has formally 'closed' its file concerning the Qwest Pension Plan, the DOL is withholding documents consisting of about 200 pages that are allegedly withheld under either FOIA Exemption 4 or FOIA Exemption 5. Plaintiff is unsatisfied and she renews her request for an *in camera* inspection of those documents.

**B. There Are Disputed Issues of Fact Whether the Withheld Documents Truly Fit Within Either FOIA Exemption 4 Or FOIA Exemption 5.**

HULL contends the DOL unnecessarily delayed and denied her FOIA request while asserting FOIA Exemption 7(A) when there really was neither an on-going investigation nor an enforcement proceeding. The DOL's actions strongly suggest bad faith. As stated in HULL's Affidavit filed herewith, not one paper can be found in the DOL's file which is either dated or created between early May 2004 and April 7, 2005, the date the DOL closed its case file. But, the DOL waited until June 2005 to release requested documents that had been wrongfully withheld under FOIA Exemption 7(A).

Now, the DOL tries to assert FOIA Exemption 5 concerning some 50 pages of documents that have been withheld. FOIA Exemption 5, (5 U.S.C. § 552(b)(5)), exempts from disclosure "inter agency or intra-agency" records that are normally privileged in the civil discovery context. *Casad v. United States Department of Health and Human Services*, 301 F.3d 1247, 1251 (10<sup>th</sup> Cir. 2002) (holding that the HHS had met the burden of demonstrating that a particular document, a "summary statement" that described a proposal forwarded to an advisory counsel and then on to the institute directors was, indeed, a predecisional, deliberative document covered by FOIA Exemption 5).

While the DOL has submitted a supplemental affidavit by Miriam McD. Miller, there is nothing stated therein that confirms everyone of the 11 withheld documents is "predecisional" in nature. She does not come right out and plainly say each withheld paper reflects a communication that "makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Moreover, some of the 11 withheld documents are not even dated. (See Document 23, DOL's Vaughn Index - Defendant's Exhibit A-12). Hull reasonably believes the DOL cannot meet that burden, just as the DOL would not

have met its burden to justify withholding under FOIA Exemption 7(A).

Moreover, the DOL has not made any effort to separate or redact anything on the 50 pages withheld because the DOL makes a blanket contention that disclosure of the alleged “non-privileged” information would “produce a meaningless document.” (See Document 23, DOL’s July 11 motion at p. 7). Hull disagrees and respectfully requests, at the very least, she be given the redacted documents. See 5 U.S.C. § 552(b) (FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided”).

In her Complaint, HULL asks this Court to exercise its discretion to conduct an *in camera* review of any withheld and redacted documents not produced. HULL does not abandon this request. Since the DOL wrongfully categorized *everything* as exempt from FOIA disclosure only to change course months after the lawsuit, there is an issue about the DOL’s good faith, and HULL has good reason to continue with her request for an *in camera* inspection of the following documents to which the DOL asserts FOIA Exemption 5: Bates Nos. **750-758, 2905-2909, 2927-2928, 2942, 2947-2948, 2956, 2966-2968, 4989-4990, 4991-4993, 5007, 5009-5011, 5482-5488, 5490 and 5498-5521.**

Pursuant to Rule 56(f), the court should order a continuance of the DOL’s motion for summary judgment and make such “other order as is just.” Therefore, HULL requests the Court to conduct an *in camera* inspection of the remaining documents or approximately 200 pages and make a determination whether the papers are properly exempt under either FOIA Exemption 4 or FOIA Exemption 5.

**C. The DOL's is Unjustifiably Withholding Pension Plan Fiduciary Related Documents That Do Not Fit Within FOIA Exemption 4.**

The DOL has wrongfully refused to give HULL documents directly pertaining to operation and management of the Qwest Pension Plan. The DOL contends these documents are protected by FOIA Exemption 4. FOIA Exemption 4, (5 U.S.C. § 552(b)(4)), exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

Within the DOL's case file requested by HULL is Bates Nos. **2949-2952, 4080-4125 and 4128-4166** which documents are identified in the Vaughn Index as “email from DOL to Qwest concerning Investment Committee Meeting Minutes” and “Investment Committee Minutes & Related Documents.” The Qwest Pension Plan's Investment Committee serves as a plan fiduciary. (See HULL Affidavit ¶ 14.A). The financial information concerns the Qwest Pension Plan, not an individual and, certainly, not a trade secret or other confidential information. That document should be subjected to *in camera* review and ordered produced to HULL.

According to the Vaughn Index produced by the DOL, Bates Nos. **2142-2150, 2298-2303, 2305-2312, 2322-2326, 2337-2343, 2345-2346, 2349-2352, 2362-2366, 2380-2382, 2385-2405, 2415-2419, 2447-2449, 2450-2452, 2465-2466, 2476-2485, 2496-2503, 2506, 2515-2523, 2529-2532, 2534-2535, 2537-2540, 2544, 4168, 4170-4172 and 6524-6534** are documents identified as “Employee Benefits Committee recommendations pertaining to plan amendments.” The Qwest Employee Benefits Committee is the named fiduciary of the Qwest Pension Plan and that committee's decisions about plan amendments and plan administration are not trade secrets and do not involve someone's personal financial information. (HULL Affidavit ¶ 14B). Those documents should be subjected to *in camera* review and ordered produced to

HULL.

The DOL should not be allowed to withhold from HULL the contracts for services to be rendered to the Qwest Pension Plan. But, the DOL is asserting FOIA Exemption 4 with respect to service contracts by Towers Perrin, Watson Wyatt and Bankers Trust concerning operation and management of the Qwest Pension Plan. (See explanation in HULL Affidavit ¶ 14.C).

HULL requests the Court to conduct an *in camera* review of Bates Nos. **860-935 and 951-999** and order those documents produced to HULL.

Likewise, the DOL should not be allowed to withhold from HULL a document identified as “Qwest Management Company Annual Report for 2000,” for which document the DOL is asserting FOIA Exemption 4. This document concerns Qwest Pension Plan investments and is the plan’s “investment policy.” (See HULL Affidavit at ¶ 14.D). The Court should conduct an *in camera* review of Bates No. **2165-2192** and order that document produced to HULL.

Finally, the DOL should not be allowed to withhold from HULL documents identified as the “Plan Bond,” the “Fiduciary Liability Policy” and one document merely labeled “Reimbursements,” Bates Nos. **3344-3451 and 4305-4319**. Those documents do not fit within FOIA Exemption 4. Those documents should be subjected to *in camera* review and ordered produced to HULL.

**D. The DOL Should Be Ordered to Produce to HULL Documents That Were Previously Withheld Solely On Account of FOIA Exemption 7(A) Which is No Longer Applicable.**

The DOL has given no explanation for withholding the following documents which were previously withheld solely on account of FOIA Exemption 7(A) which exemption no longer applies: Bates Nos. **783-801, 803-810, 1740-1754, 2943-2944, 3076-3339 and 4072-4073**. (See HULL Affidavit ¶ 16). The Court should order the DOL to produce those documents to

HULL.

**E. The DOL Should Be Ordered to Produce to HULL Documents Not Produced Computer Disks For Which No FOIA Exemption Has Been Claimed.**

The DOL has given no explanation for not releasing to HULL eleven computer disks that are listed in the Vaughn Index. (See HULL Affidavit ¶ 17). Since there is no applicable FOIA Exemption, the DOL should be ordered to produce those documents and computer disks to HULL.

**F. The *In Camera* Review Will Prove HULL Has Substantially Prevailed and Due to the DOL's Needless Delay and Actions In this Case, She Should Be Awarded Attorney's Fees and Costs.**

Months after a the DOL filed a general denial Answer to the Complaint and a scheduling conference was held, the DOL finally saw fit to give HULL over 4,000 pages of documents requested long ago. There is no dispute about the fact that HULL's lawsuit was the catalyst for obtaining the DOL's compliance with FOIA. And the DOL gave no facts to show any reasonableness for the government's asserted legal basis for withholding the 4,000 pages of documents all that time.

Then, the DOL needlessly filed a motion for summary judgment on April 1, 2005, only to close the case file on April 7, 2005. The DOL was not up-front and did not timely disclose this important fact to either HULL or her counsel. On April 20, 2005, HULL and her counsel filed a responsive brief, together with HULL's affidavit, on April 20, 2005.

The day before the DOL filed its May 18, 2005 reply brief in support of its April 1, 2005 motion for summary judgment, the DOL first informed HULL and her counsel that the investigation file had been closed as of April 7, 2005. (See HULL Affidavit at ¶9). Had the DOL been more up-front and timely disclosed this important bit of information, HULL could

have avoided putting her counsel through the expense and effort of filing the April 20, 2005 response brief. (Id.).

In June 2005, HULL and her counsel received approximately 1,200 additional pages of documents which documents the DOL contends are no longer subject to FOIA Exemption 7(A), because the DOL contends the case file was closed on April 7, 2005. A review of the 1,200 additional pages just released to HULL shows that none of the papers were either created or placed in the DOL's 'investigation' file after May 2004. Nothing was happening. But, for over a year until May 2005, the DOL contended otherwise. A review of the papers finally produced clearly validates HULL's contention in her June 2004 FOIA based Complaint that there truly was no longer either an on-going investigation or any enforcement proceeding and that FOIA Exemption 7(A) could not rightfully be asserted as an excuse for not providing her the requested papers.

Now, the DOL contends that about 200 pages will not be disclosed to HULL, either partially or in whole part, because the papers are allegedly covered by either FOIA Exemption 4 or FOIA Exemption 5. HULL and her counsel have not seen any of the approximately 200 pages now being withheld by the DOL and they cannot establish facts essential to justify opposition to the DOL's motion for summary judgment filed on July 11, 2005.

Admittedly, HULL has not yet obtained either a judgment or consent decree which would label her the party that has "substantially prevailed."<sup>1</sup> However, after an *in camera* inspection of the remaining withheld documents, HULL expects the Court will order the DOL to release

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<sup>1</sup> Plaintiff is aware of the recent line of cases including *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002, applying the Supreme Court's rule in *Buckhannon Board & Care Home, Inc.*, 532 U.S. 598 (2001) and ruling that attorney fees are not authorized to a plaintiff under a fee-shifting statute, such as FOIA, without a judgment on the merits or a court-ordered consent decree and rejecting a "catalyst theory; See, e.g., *Union of Needletrades v. INS*, 336 F.3d 200, 206 (2d Cir. 2003) (declaring that although plaintiff "accomplished the objective it sought to achieve" by bringing a FOIA suit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees").

additional documents to HULL. In addition, HULL has requested the Court to issue an order directing the DOL to turn over the withheld 11 computer disks, plus all of the documents that do not fit within either FOIA Exemption 4 or FOIA Exemption 5. In the end, it should be apparent that HULL has “substantially prevailed,” which is the standard under FOIA.

FOIA provides that the court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case ... in which the complainant has substantially prevailed." 5 U.S.C. §552(a)(4)(E). Assessment of attorney's fees in an FOIA case is discretionary with the district court. *Aviation Data Serv. v. FAA*, 687 F.2d 1319, 1321 (10th Cir. 1982) (holding that the district court should be guided by the following four factors: "(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in the law.").

## **II. CONCLUSION**

For the aforesaid reasons and as set forth in the Rule 56(f) Affidavit submitted and attached hereto, Plaintiff MARY M. HULL opposes Defendant's July 11, 2005 motion for summary judgment and requests, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), an order requiring the DOL to produce to the Court the 200 pages of documents being withheld 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 either FOIA Exemption 4, 5 U.S.C. § 552(b)(4), or FOIA Exemption 5, 5 U.S.C. § 552(b)(5) . The Court should also order the DOL to produce to HULL the numerous pages of documents identified in HULL's Affidavit for which documents the DOL asserts no FOIA Exemption. Finally, the Court should order the DOL to

produce to HULL those documents which the DOL has conceded are no longer subject to FOIA Exemption 7(A) but have not yet been produced.

HULL requests an oral argument hearing before the Court.

DATED this 29<sup>th</sup> day of July, 2005.



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*/s/* Curtis L. Kennedy  
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**RULE 56(f) AFFIDAVIT OF PLAINTIFF MARY M. HULL**

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I, Plaintiff MARY M. HULL, first being duly sworn, declare under penalty of perjury and state of my own personal knowledge and submit the following, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in opposition to Defendant's July 11, 2005 Motion for Summary Judgment:

1. I am the Plaintiff in this civil action, a United States citizen over the age of 21 years, and I reside at 678 Clarkson St., Denver, CO 80218-3202.
2. I serve as the elected President of the Association of U S WEST Retirees (AUSWR), a non-profit organization dedicated to promote the interests of over 20,000 U S WEST and Qwest retirees. AUSWR's mission includes taking appropriate and necessary action to investigate, protect and preserve the interests of retirees, their spouses and beneficiaries in the Qwest Pension Plan and other employee benefit plans.
3. For the benefit of myself and thousands of AUSWR retirees, I directed Attorney Curtis L. Kennedy to pursue this action under the Freedom of Information Act (FOIA). There is great public interest in the outcome of this matter and the information sought under FOIA is being shared with thousands of retiree pension participants who requested my efforts to help

police questionable activities concerning the Qwest Pension Plan.

4. In about May 2001, I became aware and the AUSWR organization was informed that the United States Department of Labor's regional office in Kansas City had commenced an investigation of the Qwest Pension Plan concerning questionable activities. By March 2004, it appeared to me and numerous AUSWR members that the almost three year old investigation was stalled and would not be completed. Therefore, on March 3, 2004, I began my formal FOIA request for information about the investigation. The Department of Labor (DOL) totally refused my request not giving me even a single document concerning the investigation and case file.

5. Therefore, I directed this lawsuit be commenced on June 18, 2004, and immediately served on the DOL via the United States Attorney's Office.

6. Months after my lawsuit was commenced, a general denial Answer had been filed and scheduling proceedings commenced, in late December 2004, the DOL finally produced about 4,500 pages of documents which the DOL had previously consistently refused to give me, claiming the documents were all subject to FOIA Exemption 7(A). At that time, the DOL advised me that approximately 1,400 pages of documents continued to be withheld under FOIA Exemption 7(A) and the DOL contended either its investigation or enforcement proceeding was "on-going."

7. On April 1, 2005, the DOL filed a motion for summary judgment contending that the remaining papers in the DOL's case file were properly withheld under FOIA Exemption 7(A) because allegedly there was still an on-going investigation or pending enforcement proceeding and that release of the papers would either impede or prove harmful to the DOL's on-going work.

8. Therefore, I directed my counsel to file a response to the DOL's April 1, 2005, motion for summary judgment, which response, together with my affidavit, was filed on April

20, 2005. Unbeknownst to me and my counsel was the fact that the DOL had, indeed, closed the case file on April 7, 2005.

9. The day before the DOL filed its May 18, 2005 summary judgment motion reply brief, the DOL first informed me and my counsel that the DOL's case file had been closed as of April 7, 2005. Had the DOL been more up-front and timely disclosed this important bit of information, I could have avoided putting my counsel through the trouble and expense of filing the April 20, 2005 response brief.

10. In late June 2005, I received approximately 1,200 additional pages of documents which documents the DOL contends are no longer subject to FOIA Exemption 7(A).

11. My review of the 1,200 additional pages released to me in late June 2005 shows that none of the papers were either created or placed in the DOL's case file between early May 2004 and April 7, 2005, the date the case file was closed.

12. Presently, the DOL contends that about 200 pages will not be disclosed to me, either partially or in whole part, because the papers are allegedly covered by either FOIA Exemption 4 or FOIA Exemption 5. I have not seen any of the approximately 200 pages now being withheld by the DOL and I cannot establish facts essential to justify opposition to the DOL's motion for summary judgment filed on July 11, 2005.

13. Since I cannot conduct formal discovery, I cannot present evidence that the remaining documents are being improperly withheld.

14. I request the Court to conduct an *in camera* inspection of the following plan administration operation and fiduciary decision making documents being withheld by the DOL to which documents Defendant claims FOIA Exemption 4 applies:

A. According to the Vaughn Index provided by the DOL, Bates Nos. **2949-2952, 4080-4125 and 4128-4166** are documents identified as "email from DOL to Qwest

concerning Investment Committee Meeting Minutes” and “Investment Committee Minutes & Related Documents.” The Qwest Pension Plan’s Investment Committee serves as a plan fiduciary of the Qwest Pension Plan and I am a participant retiree of the plan. I request those documents be subjected to *in camera* review and ordered produced to me;

B. According to the Vaughn Index produced by the DOL, Bates Nos. **2142-2150, 2298-2303, 2305-2312, 2322-2326, 2337-2343, 2345-2346, 2349-2352, 2362-2366, 2380-2382, 2385-2405, 2415-2419, 2447-2449, 2450-2452, 2465-2466, 2476-2485, 2496-2503, 2506, 2515-2523, 2529-2532, 2534-2535, 2537-2540, 2544, 4168, 4170-4172 and 6524-6534** are documents identified as “Employee Benefits Committee recommendations pertaining to plan amendments.” The Qwest Employee Benefits Committee is the named fiduciary of the Qwest Pension Plan and that committee’s decisions about plan amendments and plan administration are not trade secrets and do not involve someone’s personal financial information. I request those documents be subjected to *in camera* review and ordered produced to me;

C. According to the Vaughn Index produced by the DOL, Bates Nos. **860-935 and 951-999** are service contracts with Towers Perrin, Watson Wyatt and Bankers Trust concerning the operation and management of the Qwest Pension Plan. The Qwest Pension Plan’s annual Form 5500s report that these businesses are paid millions of dollars annually with Qwest Pension Plan monies. I request those documents be subjected to an *in camera* review and ordered produced to me;

D. According to the Vaughn Index produced by the DOL, Bates No. **2165-2192** is identified as “Qwest Management Company Annual Report for 2000.” This document concerns Qwest Asset Management Company, which is the pension plan fiduciary in charge of

selecting and carrying out investments using pension plan funds. On a file index page produced by the DOL, Bates No. 7, the DOL further describes the document as “Investment Policy.” The document clearly concerns operation and fiduciary investments of Qwest Pension Plan funds. I request the documents be subjected to an *in camera* review and ordered produced to me; and

E. According to the Vaughn Index produced by the DOL, Bates Nos. **3344-3451 and 4305-4319** are identified as the “Plan Bond,” the “Fiduciary Liability Policy” and one document is merely labeled “Reimbursements.” All of those documents concern Qwest Pension Plan administration. I request the Court conduct an *in camera* review and order those documents produced to me.

15. I request the Court to conduct an *in camera* inspection of the following documents being withheld by the DOL which Defendant claims FOIA Exemption 5 applies: Bates Nos. **750-758, 2905-2909, 2927-2928, 2942, 2947-2948, 2956, 2966-2968, 4989-4990, 4991-4993, 5007, 5009-5011, 5482-5488, 5490 and 5498-5521**. The DOL did not even try to redact any portions and, at the very least, I request that the DOL be ordered to carry out that action and produce the documents to me.

16. According to the Vaughn Index produced by the DOL, to date, the following documents which were previously withheld solely on account of FOIA Exemption 7(A) which exemption no longer applies have not been produced to me: Bates Nos. **783-801, 803-810, 1740-1754, 2943-2944, 3076-3339 and 4072-4073**. The DOL has given me no explanation for not producing those papers when 1,200 pages were sent to me during the end of June 2005. I request the Court order the DOL to produce those papers to me.

17. Also, the DOL has given no explanation for not releasing to me eleven computer disks that are listed in the Vaughn Index and the DOL does not claim a FOIA Exemption with



**CERTIFICATE OF SERVICE**


I hereby certify that on the 29<sup>th</sup> day of July, 2005, a true and correct copy of the above and foregoing document with the Clerk of the Court using the CM/ECF system.

I also certified that on this 29<sup>th</sup> day of July, 2005, a true and correct copy of the above and foregoing document was delivered to Defendant's counsel of record via email as follows:

Michael C. Johnson, Esq.  
Assistant United States Attorney  
UNITED STATES ATTORNEY'S OFFICE  
1225 17<sup>th</sup> Street, 7<sup>th</sup> Floor  
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E-mail: [michael.johnson2@usdoj.gov](mailto:michael.johnson2@usdoj.gov)

Also, copy of the same was delivered via email to Plaintiff Mary M. Hull.

Mimi Hull  
678 Clarkson St.  
Denver, CO 80218-2302  
E-mail: [MM5Hull@msn.com](mailto:MM5Hull@msn.com)

  
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*Attorney for Plaintiff: Mary M. Hull*