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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JUL 15 2009
at 2 o'clock and 55 min. P.M.
SUE BEITIA, CLERK

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City and County of Honolulu

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CITY AND COUNTY OF)
HONOLULU,)
)
Plaintiff,)
)
v.)
)
U.S. ENVIRONMENTAL)
PROTECTION AGENCY, LISA P.)
JACKSON, as Administrator of the)
United States Environmental)
Protection Agency, and LAURA)
YOSHII, as Acting Regional)
Administrator of the United States)
Protection Agency,)
Defendants.)

Case No.: **CV 09-003 21 SOM LEK**
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF; SUMMONS
FREEDOM OF INFORMATION
ACT CASE

Plaintiff, the City and County of Honolulu (“CCH”), alleges as follows:

INTRODUCTION

1. CCH brings this action under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (“FOIA”) against Defendants United States Environmental Protection Agency (“EPA”), Lisa P. Jackson, Administrator of EPA, and Laura Yoshii, Acting Administrator of EPA Region 9 for an injunction and declaratory relief compelling the production of documents improperly withheld from CCH.

THE PARTIES

2. Plaintiff CCH is a municipality established under the laws of the State of Hawai’i.

3. The disclosure of the information CCH requests is in the public interest because such disclosure is likely to contribute significantly to CCH’s and the public’s understanding regarding EPA’s final decisions to deny the renewal of the Clean Water Act (“CWA”) 301(h), 33 U.S.C. § 1301(h), waiver of secondary treatment requirements for CCH’s Honouliuli and Sand Island Waste Water Treatment Plants (“WWTPs”). There are no other documents, other than EPA’s records, which could provide CCH or the public with any meaningfully detailed understanding of EPA’s final decisions, and without the documents CCH may be irreparably harmed. Furthermore, the Environmental Appeals Board (“EAB”)

cannot make a fully informed decision regarding CCH's administrative appeals of the final decisions until it can consider all of the bases of EPA's decisions.

4. CCH is adversely affected by EPA's refusal to release the requested documents because such refusal discourages CCH and the public from obtaining public records from EPA. In addition, without the requested information, CCH and members of the public will not be able to ascertain whether EPA's decisions were reasoned and justified, or arbitrary and capricious.

5. Defendant EPA is an agency of the government of the United States within the meaning of 5 U.S.C. § 552(f).

6. Defendant Lisa P. Jackson is the Administrator of EPA and is sued in her official capacity only. If ordered by the Court, Ms. Jackson has the authority and ability to remedy the harm inflicted by Defendants' actions.

7. Defendant Laura Yoshii is the Acting Administrator of EPA Region 9 and is sued in her official capacity only. If ordered by the Court, Ms. Yoshii has the authority and ability to remedy the harm inflicted by Defendants' actions.

JURISDICTION

8. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

9. This Court has personal jurisdiction over the EPA, the Administrator of EPA, and the Acting Administrator of EPA Region 9. The EPA is a federal agency established by the government of the United States.

VENUE

10. Venue in the United States District of Hawai'i is proper under 5 U.S.C. § 552(a)(4)(B) because plaintiff resides and has its principal place of business in the District of Hawai'i.

STATUTORY BACKGROUND

11. FOIA requires federal agencies to provide copies of its records to those who request them. 5 U.S.C. § 552(a)(3)(A).

12. FOIA requires each agency of the federal government, within 20 working days of receiving a request under FOIA, to determine whether to comply with a request, immediately notify the requestor of such determination and the reasons therefor, and notify the requestor of the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i).

13. Where a party appeals an agency determination with respect to a records request, the agency must make the appeals determination within 20 working days of receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

14. The time limits prescribed for responding to a FOIA request or appeal may be extended by written notice to the requestor. 5 U.S.C. § 552(a)(6)(B)(i).

15. Agency records that involve the following matters may be withheld from disclosure under 5 U.S.C. § 552(b)(5), (6) and (7): (a) 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; (b) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (c) records or information compiled for law enforcement purposes. 5 U.S.C. §§ 552(b)(5), (6), (7), respectively.

16. The court has jurisdiction to enjoin an agency from withholding agency records and to order the production of any records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo. 5 U.S.C. § 552(a)(4)(B).

17. The court may assess attorney fees and litigation costs against the United States if the plaintiff substantially prevails. 5 U.S.C. § 552(a)(4)(E).

FACTUAL BACKGROUND

18. On February 3, 2009, CCH submitted a FOIA request to EPA Region 9 requesting copies of any and all documents in the possession or control of the EPA relating to the Final Decision of the Regional Administrator Pursuant to 40 CFR Part

125, Subpart G dated January 5, 2009, regarding an application from CCH for a renewed variance from full secondary treatment under section 301(h) of the Clean Water Act for its ocean discharge from the Honouliuli Wastewater Treatment Plant.

19. On February 3, 2009, CCH submitted a FOIA request to EPA Region 9 requesting copies of any and all documents in the possession or control of the EPA relating to the Final Decision of the Regional Administrator Pursuant to 40 CFR Part 125, Subpart G dated January 5, 2009, regarding an application from CCH for a renewed variance from full secondary treatment under section 301(h) of the Clean Water Act for its ocean discharge from the Sand Island Wastewater Treatment Plant.

20. The FOIA requests CCH filed reasonably described the records requested and were made in accordance with FOIA and EPA published rules.

21. On March 19, 2009, EPA responded to CCH's February 3, 2009. FOIA requests regarding the Honouliuli and Sand Island WWTPs, which EPA assigned as FOIA requests 09-RIN-00197-09 and 09-RIN-00198-09, respectively.

22. In a March 19, 2009 letter, EPA stated that it was releasing the following documents in response to CCH's February 3, 2009 FOIA requests 09-RIN-00197-09 and 09-RIN-00198-09: "documents that are releasable in whole or in part [and which] are listed in the enclosed List of Releasable Documents. . . . [W]e have [also] chosen, in our discretion, to release certain documents that are

otherwise privileged and could have been withheld. Release of certain documents or categories of documents does not constitute a waiver of the FOIA privileges that EPA may assert with respect to other documents.”

23. The March 19, 2009 letter also enclosed a privilege log of responsive documents that EPA withheld from release, in whole or in part, allegedly pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5), (6) and/or (7).

24. On March 25, 2009, CCH submitted an appeal of EPA’s March 19, 2009 letter (the “March 25, 2009 Appeal”) to EPA’s Office of Environmental Information, Records, Privacy and FOIA Branch, challenging the grounds upon which certain documents were withheld from production under disclosure exemptions 5 U.S.C. §§ 552(b)(5) based on four claims of privilege - deliberative process privilege, attorney client privilege, attorney work product doctrine, and law enforcement privilege - asserted in the privilege log.

25. In its March 25, 2009 Appeal, CCH argued that some responsive documents were wrongly withheld from production based on the deliberative process privilege because EPA failed to meet its burden of showing that these documents fall within the privilege. Specifically, CCH argued that these documents were not protected by the deliberative process privilege because they : (a) appear to

contain primarily or exclusively factual material; (b) are post-decisional; and/or (c) were adopted as agency position.

26. CCH also argued that some responsive documents were wrongly withheld from production based on the attorney client privilege or attorney work product doctrine because EPA failed to meet its burden of showing that these documents fall within these privileges. Specifically, CCH argued that these documents were not protected by the attorney client or attorney work product privileges because they: (a) do not appear to involve communications to or from an attorney; (b) do not appear to have been generated in anticipation of litigation; (c) may have been disclosed to a third party who did not have an interest in maintaining the privilege; and (d) fail to show whether the attorney involved was acting in his/her professional capacity with respect to the particular matter involved.

27. In addition to the flaws CCH identified in its appeals above, the privilege log description fails to adequately explain why documents are withheld pursuant to law enforcement Exemption 7. Additionally, in the March 25, 2009 Appeal, CCH pointed out that its requests for a waiver of secondary treatment is an administrative permitting matter, not an administrative enforcement actions.

28. On April 23, 2009, EPA's Office of General Counsel responded to the March 25, 2009 Appeal concerning FOIA requests 09-RIN-00197-09 and 09-RIN-

00198-09. In that letter, EPA's Office of General Counsel determined that CCH's appeal should be granted in part and denied in part. EPA determined that certain withheld documents contained some reasonably segregable information that could be, and was, released. EPA's boilerplate appeal decision failed to address a number of the arguments CCH raised, yet EPA found that it properly withheld the remainder of the documents pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5) and (7). EPA also enclosed an "updated" privilege log concerning FOIA requests 09-RIN-00197-09 and 09-RIN-00198-09, identifying 51 documents that EPA was withholding, in whole or in part, in response to these requests.

29. EPA's decisions to continue to withhold the responsive documents and redact responsive information from produced documents under FOIA requests 09-RIN-00197-09 and 09-RIN-00198-09 suffer from the flaws identified in paragraphs 25 to 27 above.

FIRST CLAIM FOR RELIEF

Violation of FOIA
5 U.S.C. § 552(a) et seq.

30. Plaintiff CCH reasserts and realleges paragraphs 1 - 29 above.

31. Defendant EPA has improperly withheld documents responsive to Plaintiff CCH's FOIA requests 09-RIN-00197-09 and 09-RIN-00198 - pursuant to

FOIA disclosure exemptions 5 U.S.C. §§ 552(b)(5), (6) and (7). Moreover, EPA's extensive redactions to documents responsive to these requests has resulted in their effective withholding.

32. Defendant EPA has failed to provide sufficient justification for withholding certain documents and improperly redacting responsive information from certain produced documents under 5 U.S.C. §§ 552(b)(5), (6) and (7).

REMEDY

33. CCH has no plain, speedy, and adequate remedy, in the ordinary course of law, other than the relief sought in this Complaint, because there is no other mechanism for compelling EPA to take the action necessary under the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff CCH seeks the following relief

1. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 enjoining EPA from withholding the requested documents, including the extensively redacted documents;

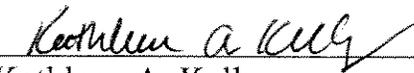
2. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 ordering EPA to immediately provide sufficient identification and justification of the documents withheld should EPA have properly withheld any documents, including a Vaughn index providing particularized explanations of how disclosure

would violate the claimed exemptions; A declaratory judgment pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 compelling EPA to produce all documents, including the extensively redacted documents, that should not be withheld from CCH;

3. An award for attorneys' fees and costs to CCH; and
4. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii
July 15, 2009

Respectfully submitted,
CARRIE OKINAGA
Corporation Counsel

By: 
Kathleen A. Kelly
Attorneys for Plaintiff
The City and County Of Honolulu

UNITED STATES DISTRICT COURT

for the

District of Hawaii

CITY AND COUNTY OF HONOLULU,

Plaintiff

U.S. ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, as Administrator of the United States Environmental Protection Agency, and LAURA YOSHII, as Acting Regional Administrator of the United States Protection Agency,

Defendant

Civil Action No.

Summons in a Civil Action

To: *(Defendant's name and address)*

USEPA Headquarters, Room 7506A-ARN, Office of General Counsel, General Law Office-2377A, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460 (Attn: Barbara Bruce)

LISA P. JACKSON, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Ave., N.W. Mail Code: 1101A, Washington, D.C., 20460

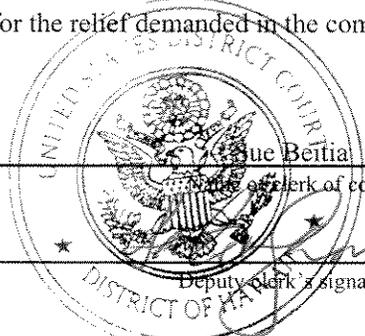
LAURA YOSHII, USEPA Region 9, 75 Hawthorne St., Mail Code: ORA-1, San Francisco, CA 94105
A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

CARRIE K.S. OKINAGA, Corporation Counsel, KATHLEEN A. KELLY, Deputy Corporation Counsel, City and County of Honolulu, 530 South King Street, Room 110, Honolulu, Hawaii 96813

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: JUL 15 2009



Deputy Clerk of court

Deputy Clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

- (1) personally delivering a copy of each to the individual at this place, _____
_____ ; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____ ; or
- (4) returning the summons unexecuted to the court clerk on _____ ; or
- (5) other (*specify*) EDWARD H. KUBO, JR., U.S. Attorney for the District of Hawaii,
PJJK Federal Building, Room 6-100, Ala Moana Boulevard, Honolulu,
Hawaii 96850

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

Date: _____

Server's signature

Printed name and title

Server's address