

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**NATIONAL LAW CENTER ON HOMELESSNESS
AND POVERTY**

1411 K Street NW, Suite 1400
Washington, D.C. 20005

Plaintiff,

v.

OFFICE OF MANAGEMENT AND BUDGET,

725 17th Street, NW
Washington, D.C. 20503

JEFFREY ZIENTS

Acting Director, Office of Management and
Budget

725 17th Street, NW
Washington, D.C. 20503

Defendants.

Case: 1:12-cv-01020

Assigned To : Lamberth, Royce C.

Assign. Date : 6/21/2012

Description: FOIA/Privacy Act

COMPLAINT

Plaintiff National Law Center on Homelessness and Poverty (“NLCHP”) alleges:

Nature of the Action

1. This is an action under the Freedom of Information Act (“FOIA”) for injunctive and other appropriate relief, including the immediate release of portions of agency records requested by NLCHP from the Office of Management and Budget (“OMB”) that OMB has improperly withheld. OMB has arbitrarily withheld portions of the requested records, notwithstanding that records containing the same type of information that NLCHP has requested have been already released to the public.

2. NLCHP sought the records to assess the compliance of federal agencies with the McKinney-Vento Act, which was enacted in 1987 to respond to the “critically urgent needs of the homeless.” H.R. Conf. Rep. No. 100-174 at 95 (1987), reprinted in 1987 U.S.C.C.A.N. 441, 474. Through Title V of the McKinney-Vento Act, Congress established a federally mandated procedure whereby any property no longer needed by the federal government is made available to “representatives of the homeless” for use as facilities to assist homeless people. Part of Plaintiff NLCHP’s mission is to promote federal programs for the homeless and to monitor the government’s compliance with the McKinney-Vento Act.

3. A Presidential Memorandum issued on June 10, 2010 directed OMB to provide guidance and coordinate with federal agencies on eliminating “excess” or “surplus” federal properties. OMB was also directed to work with the General Services Administration (“GSA”) to develop cost saving targets for each agency. A Presidential Memorandum issued on September 14, 2010 provided an update on OMB’s efforts. OMB stated that it was working with GSA “to develop agency-by-agency cost saving targets and detailed plans to reach them.” In accordance with these Presidential Memoranda, OMB collected information regarding federal properties that are no longer needed in the form of reports submitted by 24 agencies.

4. On March 22, 2011, NLCHP requested, pursuant to the FOIA, the property reports submitted to OMB in connection with the Presidential Memoranda. OMB denied NLCHP’s request on October 3, 2011 and initially refused to provide any reports, claiming that all such information was exempt under the (b)(5) exemption of the FOIA. On appeal, and after extensive negotiation with NLCHP, OMB released 428 pages of the reports, of which more than 350 pages (more than 80%) were redacted as exempt from disclosure. After further negotiation, OMB “informally” released the entirety of three of the 24 agency reports, because those reports

had previously been made publicly available. However, OMB continues to maintain that most information in the remaining reports is exempt from disclosure, even though those reports contain exactly the same type of information that has been related publicly by several agencies.

5. Because OMB has rebuffed NLCHP's continued attempts to obtain the redacted information, NLCHP seeks relief from this Court on the grounds that OMB's refusal to release these records is arbitrary and capricious, and in violation of the requirements of the FOIA.

Jurisdiction and Venue

6. 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), 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

Parties

7. Plaintiff NLCHP, a 501(c)(3) non-profit organization located in Washington, D.C., is dedicated to preventing and ending homelessness. NLCHP plays a key role in coordinating efforts to provide services for the homeless among other homeless service providers, serves as the legal arm of the nationwide movement to end homelessness, and plays a critical role in ensuring that the government properly complies with the McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11301 *et seq.*, ("McKinney-Vento Act").

8. Defendant OMB is a Department of the Executive Branch of the United States Government. OMB is an agency within the meaning of 5 U.S.C. § 552(f). Defendant Jeffrey Zients is the Acting Director of OMB. He is sued in his official capacity.

OMB's Obligations Under FOIA

9. The FOIA requires agencies of the federal government, such as OMB, to release requested records to the public unless one or more specific statutory exemptions apply.

10. OMB must respond to a party making a FOIA request within 20 working days of the request, notifying the party of at least its determination whether to provide the requested information, the reasons for its determination, and of the party's right to appeal any negative determination. 5 U.S.C. § 552(a)(6)(A)(i).

11. Upon a party's appeal of OMB's denial, OMB must make a determination with respect to the appeal within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

12. The FOIA lists a limited number of exemptions that, when properly asserted, can allow an agency to deny production of records, including matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

13. If portions of an otherwise disclosable record contain information that is exempt, the FOIA requires that an agency provide the record and redact the exempt portion of the document. 5 U.S.C. § 552(b).

Events Giving Rise to NLCHP's FOIA Request

14. Title V of the McKinney-Vento Act requires that federal agencies identify federal properties that are no longer needed, i.e., that are "excess," "surplus," "underutilized," or "unutilized," and report the properties to the Department of Housing and Urban Development ("HUD") so that the properties can be made available to homeless service providers. *See* 42 U.S.C. § 11411.

15. HUD and other federal agencies are subject to a series of court orders from this Court mandating compliance with various provisions of Title V. *See Nat'l Coalition for the Homeless v. U.S. Veterans Admin.*, 695 F. Supp. 1226 (Sept. 30, 1988); *Nat'l Coalition for the Homeless v. U.S. Veterans Admin.*, No. 88-2503, 1988 U.S. Dist. LEXIS 19455 (Dec. 15, 1988); *Nat'l Coalition for the Homeless v. U.S. Veterans Admin.*, 715 F. Supp. 392 (May 22, 1989); *Nat'l Coalition for the Homeless v. U.S. Veterans Admin.*, 765 F. Supp. 1 (Feb. 13, 1991); *Nat'l Coalition for the Homeless v. U.S. Veterans Admin.*, 819 F. Supp. 69 (April 21, 1993).

16. Pursuant to that Order, the government is required to submit monthly reports to NLCHP that: identify properties made available to assist the homeless; provide the status of all applications submitted and pending; report all properties sold, transferred or otherwise disposed of; and provide information regarding all persons and organizations that contact the government to inquire about applying for any property, including the date of contact and the property which was the subject of the inquiry. Using these monthly reports, NLCHP has and continues to monitor the government's compliance with the McKinney-Vento Act.

17. A June 10, 2010 Presidential Memorandum entitled "Disposing of Unneeded Federal Real Estate -- Increasing Sales Proceeds, Cutting Operating Costs, and Improving Energy Efficiency" raised concerns for NLCHP regarding a potential conflict between the directives issued in the Memorandum and the requirements of Title V. The Memorandum suggested that certain unneeded federal properties may be sold to reduce the federal deficit. Such disposition would be unlawful if the properties that will be disposed of are those that should have, in the first instance, been made available to homeless service providers pursuant to Congress's directive in Title V.

18. In September 2010, the Administration issued another Presidential Memorandum which included a memorandum from OMB that identified 55,000 federal properties as under- or not-utilized and as candidates for generating \$3 billion in cost savings. The Memorandum further referenced 14,000 additional “excess” properties. The numbers of properties referenced in the Memorandum did not appear to correspond with the information provided to NLCHP in the monthly reports submitted pursuant to the Order, causing NLCHP to be concerned that certain agencies were holding back (i.e., “land-banking”) properties from the Title V process in violation of the statute and this Court’s Order.

19. In the September Memorandum, OMB stated that it was collecting information regarding federal properties that are no longer needed in the form of reports submitted by various agencies.

20. Following the issuance of the Memoranda, and in light of its concern that there may be discrepancies between the information that the government has provided to NLCHP through monthly reports, on the one hand, and the information provided to the public in the Presidential Memoranda, on the other, NLCHP made informal requests to OMB and other agencies regarding the references to additional properties.

21. Such requests were not successful, which led NLCHP to submit a formal FOIA request to OMB for these records. OMB is not a party to the *National Coalition for the Homeless* litigation.

NLCHP’s FOIA Request to OMB

22. On March 22, 2011, NLCHP requested, pursuant to the FOIA, the property reports submitted to OMB in connection with the Presidential Memoranda. *See* Exhibit 1. Notably, NLCHP did not request that OMB provide its proposals or plans for the federal

properties. NLCHP merely requested the property reports identifying excess properties that were submitted to OMB by other federal agencies.

23. OMB did not respond to NLCHP's FOIA request within 20 days, as required by the FOIA. Instead, OMB briefly acknowledged receipt of NLCHP's FOIA request, stated that it was logged in and is being processed, and assigned a tracking number. More than six months passed before OMB issued a substantive response to the FOIA request.

OMB's Denial of NLCHP's FOIA Requests

24. In a letter postmarked October 3, 2011, OMB finally issued a response to NLCHP. OMB denied NLCHP's request for property reports under FOIA Exemption 5. Specifically, OMB stated that the "reports are exempt from mandatory disclosure...because they are interagency, predecisional deliberative documents." The denial further stated that the disclosure of the property reports "would inhibit the frank and candid exchange of views this [sic] is necessary for effective government decision-making." *See* Exhibit 2.

25. The property reports that NLCHP requested pursuant to the FOIA include information on properties that the agencies have already individually determined to be excess or surplus and therefore cannot be exempt from disclosure under the deliberative process privilege, FOIA Exemption 5, as asserted by OMB. The information sought by NLCHP reflects various agencies' conclusions regarding cost saving targets and excess properties, not OMB's internal deliberations. Indeed, NLCHP tailored its FOIA request so that it was not requesting internal documents created by OMB that could be considered predecisional or deliberative.

26. As a result of OMB's improper invocation of Exemption 5, on November 2, 2011, NLCHP submitted an appeal of OMB's denial to the agency.

27. The 20 days that the FOIA provides for a response to an appeal expired on December 5, 2011, and OMB failed to provide a response. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

28. On December 20, 2011, an OMB official contacted counsel for NLCHP regarding the appeal by phone and e-mail. In that correspondence, OMB indicated that the property reports requested by NLCHP contained information not related to excess and surplus property. Apparently concluding that the agency had erred in initially withholding the reports, OMB stated that it would not provide the agency records, as requested by NLCHP, but that it would create a wholly new “summary document” with excerpted “sentences or paragraphs” that relate to identification of excess or surplus property.

29. After numerous discussions with OMB in which NLCHP noted that the FOIA requires that agencies disclose existing agency records and not create wholly new documents, *see, e.g.*, Ltr. from S. Perryman to M. Reed, dated January 24, 2012, attached hereto as Exhibit 3, OMB agreed to provide all 24 reports with the information that it claimed to be exempt redacted. During the discussions between NLCHP’s counsel and OMB, OMB vacillated in its descriptions of why the redacted information was entitled, in its view, to Exemption 5 status.

30. By January 27, 2012, OMB finally provided the records requested, but redacted the majority of the material. OMB redacted in their entirety more than 350 pages of the 428 pages that consist of the reports. OMB maintains that all of these pages are deliberative under FOIA Exemption (b)(5). OMB’s complete production of records is attached as Exhibit 4.

31. On February 16, 2012, NLCHP’s counsel again conferred with OMB. This time, an attorney from the Department of Justice who represents the defendant agencies in the *National Coalition for the Homeless* litigation also participated. In that discussion, OMB admitted that certain of the property reports that it had claimed were exempt from public

disclosure under the FOIA had actually been released in full to the public by the agencies. OMB agreed to provide “informally” any reports that had been publicly released, but still maintained its position that other similar property reports were entitled to exemption under the FOIA.

32. In the discussion on February 16, counsel from the Department of Justice also indicated that OMB would not be providing the requested reports through third-party discovery in the *National Coalition for the Homeless* litigation, necessitating that NLCHP continue to pursue disclosure of these records under the FOIA.

33. In the time since, OMB has only provided three full reports, attached hereto as Exhibit 5, and continues to maintain that the remaining reports, which contain substantially the same type of information as the reports that have already been made public, are exempt from the FOIA almost in their entirety. Nor did OMB produce a single document in discovery in the *National Coalition for the Homeless* litigation.

34. To remedy OMB’s improper redactions of the majority of the requested records, NLCHP brings suit in this Court to review the agency’s refusal to provide the substantial portions of the records pursuant to the FOIA. Through submitting a FOIA request to OMB, and then properly appealing the request through the agency and waiting over 20 days for a response, NLCHP has exhausted the required administrative remedies.

**COUNT I: VIOLATION OF FOIA
(IMPROPER REFUSAL TO RELEASE PUBLIC RECORDS)**

35. NLCHP incorporates by reference and alleges paragraphs 1-34 as if fully set forth below.

36. In refusing to provide the complete property reports, and, instead, providing only heavily redacted versions of the reports, OMB has violated the FOIA, 5 U.S.C. § 552, *et seq.* Among other things, the reports that NLCHP requested under the FOIA are not deliberative.

They do not reflected OMB's internal deliberations. Instead, the reports requested are final reports prepared by 24 agencies and reflect those agencies' conclusions.

37. In the alternative, in improperly redacting portions of the reports that are not exempt from disclosure, OMB has violated the FOIA, 5 U.S.C. 552, *et seq.*

WHEREFORE, NLCHP requests that this Court:

- A. order Defendant to disclose the requested records in their entirety;
- B. provide for expeditious proceedings in this action;
- C. award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,



June 21, 2012

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