

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PEOPLE FOR THE ETHICAL TREATMENT)
OF ANIMALS, INC.,)

1536 16TH Street, N.W.)
Washington, D.C. 20036,)

Plaintiff,)

v.)

BUREAU OF INDIAN AFFAIRS,)

1849 C Street, N.W.)
Washington, D.C. 20240,)

Defendant.)

Case:
Assigned To:
Assign. Date:
Description: FOIA/Privacy Act

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5. U.S.C. section 552 *et seq.*, to obtain access to records pertaining to lease agreements in the possession of the Bureau of Indian Affairs (“BIA” or “Defendant”). Although Defendant is legally responsible for administering and enforcing the requested agreements, Defendant claims that—with the exception of three agreements—it has been unable to locate any additional documents responsive to Plaintiff’s FOIA request. After failing to conduct a reasonable search for responsive documents, Defendant failed to make a timely (or indeed, any) determination in response to Plaintiff’s administrative appeal seeking compliance with FOIA.

2. Plaintiff therefore seeks a court order:

- a. declaring that the nature and extent of Defendant's search for responsive documents was unreasonable;
- b. requiring Defendant to conduct a good-faith search for any and all responsive records and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's request; and
- c. ordering Defendant to produce all responsive documents forthwith.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

4. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff, People for the Ethical Treatment of Animals, Inc. ("PETA" or "Plaintiff"), is a Virginia nonstock corporation and an animal protection charity exempt from taxation pursuant to § 501(c)(3) of the Internal Revenue Code. PETA has an office at 1536 16th Street, N.W., Washington, D.C.

6. Defendant BIA is an agency of the United States Government, headquartered at 1849 C Street, N.W., Washington, D.C. Defendant has possession, custody, and control of the records to which Plaintiff seeks access.

STATEMENT OF FACTS

7. Congress has charged the BIA with the duty to manage Indian trust lands and to assure that possession of those lands occurs only pursuant to lawful authority. Consistent with this duty, the BIA established regulations that govern the leasing and per-

mitting of Indian lands. *See* 25 C.F.R. Part 162 (“Lease Regulations”).

8. The Lease Regulations specify that the BIA is responsible for ensuring that tenants comply with the operating requirements of their leases through appropriate inspections and enforcement actions. If a lease is required and possession is taken without a lease by a party other than an Indian landowner of the tract, the BIA treats the unauthorized use as a trespass and “will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.” *See id.*

9. To implement the Lease Regulations and ensure that tenants comply with their lease obligations, the *BIA must have possession of the leases* that the BIA is charged with administering.

10. On August 2, 2010, PETA submitted a FOIA request (the “August Request”) to Defendant seeking access to certain leases administered by Defendant pursuant to the Lease Regulations, concerning the following persons or entities:

- a. Santa’s Land;
- b. Cherokee Bear Zoo and/or Barry Coggins;
- c. Chief Saunooke Bear Park and/or Chief Saunooke Trading Post and/or Cole Klapsaddle.

See Exhibit 1 (August 2, 2010 Letter from Amanda Schwoerke to Laura Cloud), attached hereto and incorporated as if fully set forth herein. The August Request was limited to records dating from the time period beginning January 1, 2003. *See id.*

11. The August Request was received by Defendant and assigned FOIA Control No. BIA-2010-01249. *See* Exhibit 2 (September 23, 2010 Letter from Acting Director,

Eastern Region to Amanda Schwoerke), attached hereto and incorporated as if fully set forth herein.

12. In response to the August Request, Defendant produced only three lease agreements:

- a. Lease No. T-S52-507-97, entered into by Santa's Land on April 9, 1997;
- b. Supplement and Amendment No. 3 to Lease No. T-S52-1332-88, entered into by Santa's Land on May 31, 2005 ("Santa's Land Supplement"); and
- c. Supplement and Amendment No. 3 to Lease No. T-S52-277-94, entered into by Chief Saunooke Bear Park ("CSBP") on January 9, 2007 ("CSBP Supplement").

See Exhibit 3, attached hereto and incorporated as if fully set forth herein.

13. Defendant produced no lease agreements at all regarding the Cherokee Bear Zoo or Barry Coggins.

14. In the event that Defendant's lack of production could be ascribed to the fact the August Request only sought records "from the time period beginning January 1, 2003," PETA sent Defendant another FOIA request on October 12, 2010, which sought the same information as the August Request, but was not limited to post-January 1, 2003 records (the "October Request"). The October Request did not include any records that Defendant had already released to PETA in response to the August Request. *See* Exhibit 4 (October 12, 2010 Letter from Amanda Schwoerke to Chanda Joseph), attached hereto and incorporated as if fully set forth herein.

15. The October Request was received by Defendant and given FOIA Control No. BIA-2011-00035. *See* Exhibit 5 (October 22, 2010 Letter from Acting Director, Eastern

Region to Amanda Schwoerke, attached hereto and incorporated as if fully set forth herein.

16. On or about October 22, 2010, Defendant sent a letter to PETA informing it that “there are no records” responsive to the October Request, and that all responsive records were already provided in response to the August Request. *See id.*

17. Defendant’s lack of production simply cannot be reconciled with the fact that to perform the oversight and enforcement obligations with which it is charged by law, Defendant must have possession of the relevant lease agreements.

18. Furthermore, the Santa’s Land and CSBP Supplements clearly indicate that other responsive lease agreements do exist. Among other things, the Santa’s Land Supplement states that Lease No. T-S52-1332-88 was previously modified by Supplement and Amendment Nos. 1 and 2 on April 26, 1994 and April 14, 1998, respectively. The contracting parties likewise modified Lease No. T-S52-277-94 twice prior to January 9, 2007. By their plain terms, the Santa’s Land and CSBP Supplements amended these leases “in the following particulars and in no other,” so that the original leases continue to operate.

19. Notwithstanding the evidence of the existence of the original leases and/or the earlier supplements, Defendant failed to conduct a reasonable search and failed to produce such documents in response to the August Request.

20. On December 2, 2010, PETA lodged an administrative appeal with Defendant, challenging the adequacy of Defendant’s search and contending that Defendant unreasonably disregarded evidence that responsive records existed that Defendant did not release. *See Exhibit 6 (Freedom of Information Appeal (FOIA Control No.*

BIA-2011-00035) including Exhibits A through D), attached hereto and incorporated as if fully set forth herein.

21. FOIA requires that Defendant make a determination on PETA's administrative appeal within twenty working days after its receipt. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

22. After the deadline for determining the administrative appeal expired, Plaintiff's counsel contacted Defendant repeatedly to seek a status update on the appeal. Defendant informed Plaintiff's counsel that Defendant was sending a "deadline extension letter"—although the time for seeking an extension had already passed. As of the date of this Complaint, Defendant has failed, even belatedly, to request an extension for determining PETA's administrative appeal.

23. On or about January 14, 2011, Defendant informed Plaintiff's counsel that Plaintiff "should have" a determination of the administrative appeal within one to two weeks. As of the date of this Complaint, Defendant has failed to make such a determination and has failed to provide the requested documents.

24. Because Defendant failed to comply with the time limit for responding to the administrative appeal, Plaintiff is deemed to have exhausted any and all administrative remedies pursuant to FOIA. The matter is therefore ripe for judicial review.

COUNT ONE – VIOLATION OF FOIA

25. Plaintiff realleges paragraphs 1 through 24 as if fully stated herein.

26. An agency responding to a FOIA request must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.

27. Defendant did not make a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the in-

formation requested. Defendant's search was inadequate as a matter of law because it was not reasonably calculated to uncover all relevant documents.

28. Defendant failed to conduct a reasonable search because it knew, or reasonably should have known, that the original leases and their supplements—which Defendant is responsible for administering and enforcing—exist, and yet failed to locate and produce those records.

29. Defendant has violated FOIA's requirement to produce all non-exempt records responsive to Plaintiff's request within the time limits required by FOIA.

30. Plaintiff is being irreparably harmed by reason of Defendant's FOIA violation, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) Declare that Defendant violated FOIA by failing to conduct a search reasonably calculated to uncover all relevant documents and by failing to comply with Plaintiff's FOIA request;

(2) order Defendant to conduct a search for any and all responsive records to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;

(3) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption;

(4) enjoin Defendant from continuing to withhold any and all non-exempt records

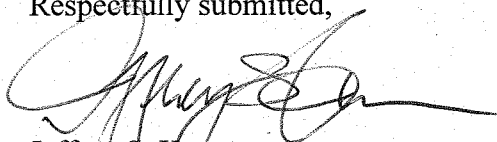
responsive to Plaintiff's FOIA request;

(5) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E);

(6) retain jurisdiction over this action to ensure that Plaintiff's FOIA request is timely processed and that Defendant does not wrongfully withhold any responsive records; and

(7) grant Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted,



Jeffrey S. Kerr
D.C. Bar No. 420323

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Counsel for Plaintiff

Dated: March 17, 2011.