

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE,)
17 Battery Place)
Suite 1329)
New York, NY 10004,)

ATCHAFALAYA BASINKEEPER,)
162 Croydon Ave.)
Baton Rouge, LA 70806,)

GALVESTON BAYKEEPER,)
P.O. Box 71)
Seabrook, TX 77586)

Case No.

Judge:

LOUISIANA BAYOUKEEPER,)
4927 Deborah Ann Dr.)
Barataria, LA 70036)

Magistrate:

APALACHICOLA RIVERKEEPER,)
232 Water Street)
PO Box 8)
Apalachicola, FL 32320,)

LOUISIANA ENVIRONMENTAL)
ACTION NETWORK,)
162 Croydon Ave.)
Baton Rouge, LA 70806,)

Plaintiffs,)

v.)

UNITED STATES COAST GUARD,)
2100 2ND STREET, S.W. 7101)
Washington, D.C. 20593,)

Defendants.)

COMPLAINT

INTRODUCTION

1. This lawsuit challenges the U.S. Coast Guard's denial of two Freedom of Information Act (FOIA) requests regarding an ongoing oil leak in the Gulf of Mexico.

2. Gulf Coast residents and the broader American public have a stake in oil spills and leaks in the Gulf of Mexico, as well as the Coast Guard's handling of these leaks.

3. Oil wells have been leaking for more than eight years at a location approximately 11 miles from the mouth of the Mississippi River, the "Mississippi Canyon Block 20" site.

4. The Plaintiffs sent two separate FOIA requests asking for information about this oil leak to the Coast Guard.

5. Yet the Coast Guard will not provide responsive documents to the Plaintiffs or the public about the cause of the leak, the volume of oil being leaked, what is being done to stop the leak, when the leak will be stopped, and other relevant and important facts.

JURISDICTION

6. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 2201 because this case concerns a federal question that arises under FOIA, 5 U.S.C. § 552, and all administrative remedies have been exhausted.

VENUE

7. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B).

STANDARD OF REVIEW

8. On complaint under FOIA, the court shall determine the matter *de novo*. 5 U.S.C. § 552(a)(4)(B).

PARTIES

Plaintiffs

9. The Plaintiffs are the Waterkeeper Alliance, the Atchafalaya Basinkeeper, the Galveston Baykeeper, the Louisiana Bayoukeeper, the Apalachicola Riverkeeper, and the Louisiana Environmental Action Network (collectively the “Waterkeepers”).

10. The Plaintiff Waterkeeper Alliance is a nonprofit corporation organized under the laws of New York. Waterkeeper Alliance is an umbrella organization comprised of nearly 200 member Waterkeeper programs globally, including the Atchafalaya Basinkeeper, Apalachicola Riverkeeper, Galveston Baykeeper, Louisiana Bayoukeeper, and Lower Mississippi Riverkeeper program of the Louisiana Environmental Action Network. Waterkeeper Alliance provides a way for communities to stand up for their right to clean water and for the wise and equitable use of water resources, both locally and globally.

11. The Plaintiff Atchafalaya Basinkeeper is a nonprofit corporation organized under the laws of Louisiana. Its mission is to protect the Atchafalaya Basin for present and future generations by maintaining good water quality throughout the Atchafalaya watershed.

12. The Plaintiff Galveston Baykeeper is a nonprofit corporation organized under the laws of Texas. Its mission is to restore and protect the waters of Galveston Bay and the Gulf of Mexico through education, scientific research, advocacy, and legal means.

13. The Plaintiff Louisiana Bayoukeeper is a nonprofit corporation organized under the laws of Louisiana. Its mission is to engage and activate coastal communities to promote sustainable stewardship of the South Louisiana Bayou Country Watersheds and their natural resources to benefit all citizens.

14. The Plaintiff Apalachicola Riverkeeper is a nonprofit corporation organized under the laws of Florida. Its mission is to provide stewardship and advocacy for the protection of the Apalachicola River and Bay, its tributaries and watersheds, in order to improve and maintain the environmental integrity of these waterways. Further, its mission is to preserve their natural, scenic, recreational, and commercial fishing character.

15. The Plaintiff Louisiana Environmental Action Network (“LEAN”) is a nonprofit corporation organized under the laws of Louisiana. LEAN’s mission is to preserve and protect the state’s land, air, water, and other natural resources, and protect the organization’s members and other Louisiana residents from pollution threats. The Lower Mississippi Riverkeeper is a program of LEAN, and its mission is to protect, preserve, and restore the Mississippi River Delta’s ecological integrity for current users and future generations through advocacy and citizen action.

16. The Waterkeepers rely on information they receive in response to FOIA requests to fulfill their missions, to educate the public, and to help their members protect their health, livelihoods, watersheds, and environments.

Defendants

17. The Defendant, the Coast Guard, is a federal agency as defined by FOIA, 5 U.S.C. § 551(1). It is also an administrative agency of the federal government as defined by the Administrative Procedure Act. 5 U.S.C. § 701(b)(1).

LEGAL BACKGROUND

FOIA

18. Under FOIA, 5 U.S.C. § 552, federal agencies must make information available to the public. Each agency “. . . upon any request for records which (i) reasonably describes such

records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

19. The U.S. Supreme Court has repeatedly recognized FOIA’s “basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

20. FOIA provides limited exemptions to the mandatory disclosure of information on request. 5 U.S.C. § 552(b). Due to the FOIA’s focus on disclosure, the exemptions must be narrowly construed. *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1265-66 (2011).

21. Under FOIA, an agency bears the burden to sustain its action. 5 U.S.C. § 552(a)(4)(B).

FOIA Exemption 5

22. FOIA provides an exemption for the disclosure of “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).

23. The Supreme Court has held that the main purpose of Exemption 5 is to protect the deliberative process privilege. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50 (U.S. 1975).

24. The privilege covers pre-decisional materials “reflecting deliberative or policy-making processes, but not materials that are purely factual.” *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982) (internal quotations omitted).

FOIA Exemption 7

25. FOIA provides an exemption for the disclosure of “records or information compiled for law enforcement purposes...[that] could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

26. Exemption 7 protects the “legitimate needs [of law enforcement agencies] 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.” *N.L.R.B. v. Robin Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

27. But “to prevail under Exemption 7(A), the government must show, by more than conclusory statement[s], how the particular kinds of investigatory records requested *would interfere with* a pending enforcement proceeding.” *Campbell v Dep’t of Health & Human Services*, 682 F.2d 256, 259 (D.C. Cir. 1982) (emphasis added).

Failure to Respond Timely to the FOIA Request

28. FOIA provides deadlines to respond to FOIA requests and to administrative appeals in 5 U.S.C. § 552(a)(6)(A)-(B). The deadline to respond to a FOIA request is 20 days from the receipt of the request, and the deadline to respond to an administrative appeal is 20 days from the receipt of the administrative appeal. 5 U.S.C. § 552(a)(6)(A).

29. The failure of an agency to meet the deadlines constitutes an exhaustion of administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

FACTUAL BACKGROUND

First FOIA Request

30. On October 19, 2011, the Waterkeepers submitted a FOIA request with the Coast Guard’s Washington D.C. Office requesting “any and all public records relating to reporting,

investigation or other response activities associated with releases of oil or other pollutants from the platform and/or associated wells or pipeline” located in Mississippi Canyon block 20 and 20A, and associated with Taylor Energy, beginning on September 17, 2004.

31. On January 20, 2012, the Coast Guard partially granted the Waterkeepers’ FOIA request for documents related to three “activities” related to Mississippi Canyon block 20, but withheld the release of documents related to a fourth “activity”—the eight-year oil leak.

32. On June 25, 2012, the Coast Guard released only 19 out of 256 identified responsive pages, but withheld most documents, citing Exemptions 5 and 7.

33. The released documents consisted of weather and tide reports; environmental sensitivity indices and maps; a New Orleans hurricane evacuation map, and only one item—a photograph of a nautical chart with a white arrow marking the oil leak site—that even acknowledged the eight-year leak’s existence.

34. Upon information and belief, the Coast Guard withheld documents that are subject to disclosure under FOIA.

35. On August 10, 2012, the Waterkeepers requested in writing a “Vaughn Index” or privilege log, but the Coast Guard declined to provide one.

36. On August 20, 2012, the Waterkeepers filed an administrative appeal with the Coast Guard.

37. On December 12, 2012, the Coast Guard sent the Waterkeepers a letter acknowledging receipt of the appeal, and notifying the Waterkeepers that the Coast Guard “cannot accurately estimate when your appeal will be decided” due to a backlog. Letter from G. Brewer, FOIA Officer, U.S. Coast Guard to Michelle Hall, Tul. Env’tl. L. Clinic (Dec. 12, 2012).

38. The Coast Guard has not made a decision responsive to the Waterkeepers' administrative appeal.

Second FOIA Request

39. On December 5, 2011, the Waterkeepers, through counsel, filed a FOIA request with the Coast Guard Office to receive all documents or other materials relating to "Taylor Energy Company LLC's decommissioning efforts in Mississippi Canyon block 20, lease number OCS-G 04953."

40. The Coast Guard acknowledged receipt of the December 5, 2011 FOIA request and requested additional time for legal review.

41. It has been more than a year since that request, and the Waterkeepers still have not yet received any responsive documents.

42. Upon information and belief, the Coast Guard withheld documents that are subject to disclosure under FOIA.

FIRST CAUSE OF ACTION

(Illegal Denial of FOIA Request)

43. The Coast Guard violated FOIA, 5 U.S.C. § 552, by withholding non-exempt materials that are responsive to the Waterkeepers' October 19, 2011, FOIA request.

44. The Coast Guard's failure to timely respond to the Waterkeepers' administrative appeal constitutes an exhaustion of the Waterkeepers' administrative remedies. 5 U.S.C. § 552(a)(6)(A)-(C).

SECOND CAUSE OF ACTION

(Denial by Delay)

45. The Coast Guard violated FOIA, 5 U.S.C. § 552, by failing to timely disclose to the Waterkeepers all non-exempt materials that are responsive to the Waterkeepers' December 5, 2011, FOIA request.

46. The Coast Guard's failure to meet the statutory deadline to respond constitutes an exhaustion of Waterkeepers' administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray that the Court award the following relief:

47. An order from this Court compelling the Coast Guard to provide to the Waterkeepers all material responsive to the Waterkeepers' FOIA requests within 20 days.

48. To the extent that the Court determines that any of the responsive material is exempt, an order instructing the Coast Guard, within 20 days, to redact the responsive documents, to delete exempted material, and give all responsive information to the Waterkeepers.

49. Attorney fees and litigation costs based on 5 U.S.C. § 552(a)(4)(E)(i), and costs based on 28 U.S.C. § 2412(a).

50. A finding, pursuant to 5 U.S.C. § 552(a)(4)(F)(i), that the circumstances surrounding the withholdings raise questions about whether the Coast Guard personnel acted arbitrarily and capriciously with respect to the withholding.

51. Such other relief as this Court may deem appropriate.

Respectfully submitted on March 5, 2013,

/s/ Adam Babich

Adam Babich, D.C. Bar No. 382747

Machelle Lee Hall, LA Bar No. 31498

Tulane Environmental Law Clinic

6329 Freret Street

New Orleans, LA 70118-6321

Phone: (504) 865-5789; direct dial 862-8800 or 862-8814

Fax: (504) 862-8721

Counsel for the Waterkeepers