

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

QUEEN ANNE'S CONSERVATION ASSOCIATION)
108 Immanuel Lane)
Millington, MD 21651)
)
Plaintiff,)
)
v.)

United States Department of State
2201 C Street, NW
Washington, DC 20520

Case: 1:10-cv-00670
Assigned To : Kollar-Kotelly, Colleen
Assign. Date : 4/30/2010
Description: FOIA/Privacy Act

and)

United States General Services Administration)
1800 F Street, NW)
Washington, DC 20006)
)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the United States Department of State's ("DoS's") and the United States General Service Administration's ("GSA's") violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, by failing to provide responsive records relating to the proposed construction of a DoS Foreign Affairs Security Training Center ("FASTC") in Ruthsburg, Queen Anne's County, Maryland. Ruthsburg is a small, agricultural community. The FASTC facility will be a very large operation that trains as many as 10,000 people a year in security related skills such as munitions and explosive exercises, high speed and defensive driving simulations and mock terrorist attacks. Plaintiff Queen Anne's Conservation Association ("QACA") requested information under FOIA relating to FASTC's activities and its potential impacts. Although the agencies have acknowledged that the information is urgently

needed by the community and granted QACA's request for expedited processing, the agencies have nonetheless refused to provide relevant records and have only released a handful of documents to date. Meanwhile, DoS and GSA are proceeding with a perfunctory review of FASTC's potential environmental impacts under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* They have already closed the public comment period pertaining to the scope of issues the agencies will review under NEPA, and have announced that a draft Environmental Assessment ("EA") will be released for a limited public comment period in late spring, 2010. Informed public comment on that document will be crucial to the discussion on whether the project should proceed and/or whether an Environmental Impact Statement ("EIS") should be prepared. It is therefore imperative that DoS and GSA comply with FOIA by providing the requested information relating to FASTC and its impacts a reasonable time before the public comment period so that the public can meaningfully participate in the agencies' review of FASTC's impacts in an informed manner.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).
3. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) because the defendant agencies are headquartered in the District of Columbia.

PARTIES

4. Plaintiff QACA is a non-profit organization incorporated in the State of Maryland with its principal place of business in Queen Anne's County. QACA was established forty years ago to conserve Queen Anne's County's rural character of small towns, farms, and coastal communities by disseminating information to County residents concerning activities that might

affect the character of the County. One of QACA's principal activities – if not the primary activity of QACA – is the dissemination of information to the residents of Queen Anne's County concerning activities that are taking place in Queen Anne's County. To this end, QACA maintains a mailing/distribution list of County residents that cuts across all members of the County's community, and QACA frequently sends information and updates to all households in the County. QACA also maintains a website where it posts information regarding such activities and distributes relevant information at public meetings, including meetings that QACA has sponsored for such purposes as well as meetings convened by the County government and other entities.

5. Defendant United States Department of State is an Executive Branch Department and has possession or control of the records Plaintiff seeks in this action. DoS is the agency that seeks to construct and operate the FASTC facility.

6. Defendant United States General Services Administration is an Executive Branch Agency and has possession or control of the records Plaintiff seeks in this action. GSA is the agency that is facilitating DoS's acquisition and/or construction of the FASTC facility on behalf of DoS.

**STATUTORY FRAMEWORK AND FACTS GIVING
RISE TO QACA'S CAUSE OF ACTION**

I. STATUTORY BACKGROUND -- THE FREEDOM OF INFORMATION ACT

7. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. Under Exemption 4, the government can refuse to

produce “trade secrets and commercial or financial information obtained from a person and privileged or confidential;” under Exemption 5, the government can refuse to produce “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.” Id. § 552(b)(4), (5).

8. Upon receiving a FOIA request, an agency has twenty working days to respond. Id. § 552(a)(6)(A). Although the agency may grant itself an extension of ten additional days in “unusual circumstances,” FOIA does not permit an agency to delay a response indefinitely. Id. § 552(a)(6)(B).

9. Under FOIA, a requestor is entitled to a waiver of fees associated with responding to a FOIA request when the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government” Id. § 552(a)(4)(A)(iii). Congress required agencies to promulgate regulations that grant FOIA requests “expedited processing” “in cases in which the person requesting the records demonstrates a compelling need,” id. § 552(a)(6)(E), in which case the agencies are directed to “process [the requests] as soon as practicable.” Id. § 552(a)(6)(E)(iii). Under the Department of State’s regulations, a “‘compelling need’ is deemed to exist” when the “information is urgently needed . . . to inform the public concerning actual or alleged Federal Government activity,” the purpose is not to advance a commercial interest, and the value of the information will be diminished if not promptly received. 22 C.F.R. § 171.12(b); see also 41 C.F.R. § 105-60.402-2 (GSA regulations).

10. Should an agency invoke an exemption and refuse to provide documents pursuant to a FOIA request, or should an agency deny a request for a fee waiver or a request for expedited

treatment of a FOIA request, a requestor may appeal the determinations. See, e.g., 5 U.S.C. § 552(a)(6)(A); 5 U.S.C. § 552(a)(6)(E)(ii)(II); see also, e.g., 22 C.F.R. § 171.50 (State Department Appeal of Denials of Expedited Processing); 22 C.F.R. § 171.51 (State Department Appeals Of Denials of Fee Waivers or Reductions).

11. An agency must make a determination on an appeal of an invocation of an exemption and refusal to provide documents within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). The agency can grant itself an extension of ten additional days in “unusual circumstances,” but FOIA does not otherwise permit an agency to delay a decision on appeal indefinitely. See id. § 552(a)(6)(B).

12. President Obama has recently issued a mandate that federal agencies “adopt a presumption in favor of disclosure, in order to renew [the Government’s] commitment to the principles embodied in FOIA, and to usher in a new era of open Government.” Memorandum for Heads of Exec. Dep’ts. and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009). He has reinforced that the government should follow a “presumption of disclosure [that] should be applied to all decisions involving FOIA.” Id. Just recently the administration released a memorandum to agency and department heads reiterating the “President’s commitment to create an unprecedented level of openness in government.” Memorandum for Agency and Department Heads, Freedom of Information Act (Mar. 16, 2010).

13. Under FOIA, if an agency: fails to make a decision within a required time period, including a decision on an appeal within the prescribed time period; refuses to provide requested documents; or makes an adverse determination on appeal, the requester can file a complaint in

the United States District Court to challenge the agency's actions. See 5 U.S.C. § 552(a)(4)(A)(vii), (a)(4)(B), (a)(6)(C)(i), (a)(6)(E)(iii).

II. FACTUAL BACKGROUND

A. RUTHSBURG, QUEEN ANNE'S COUNTY MARYLAND, AND THE PROPOSED FASTC SITE

14. Ruthsburg is located in Queen Anne's County ("QAC"), Maryland on the Delmarva peninsula. QAC has a population of approximately 49,000 and an unemployment rate below the national average. Of the County's 239,000 land acres, 90% is in agriculture, forest or wetland, with agriculture the single largest sector at about 165,000 acres.

15. Ruthsburg, reflecting the nature of QAC generally, is a small town amidst farmland and woods. Agriculture is the mainstay of Ruthsburg and QAC. According to the QAC's Department of Economic Development and Agriculture, agriculture is QAC's largest industry. QAC has some 400 farm operations and nearly all of the land in the Ruthsburg area is farmed or forested. QAC's farms are the highest producers of corn, wheat and soybeans in the state. Poultry, horse and llama farms are other components of the area's agricultural industry.

16. FASTC is proposed to be built on two productive, operating farms totaling approximately 2,000 acres in Ruthsburg. Several single family farm residences abut the site. As is common in agricultural areas, the site is serviced by a narrow two lane roadway, obtains its water from wells, has no municipal water or sewer service and only limited electrical service.

17. The FASTC site is also adjacent to the Tuckahoe State Park and drains to the Tuckahoe Creek, a Tier II, government-designated Stronghold Watershed. Tuckahoe Creek has been identified as one of the top ten most biologically diverse watersheds in the state. Tuckahoe

Creek's designations indicate that the Maryland Department of Natural Resources has found Tuckahoe Creek to be one of the "most important [waters] for the protection of Maryland's aquatic biodiversity" and a "place where rare, threatened, or endangered freshwater fish, amphibians, reptiles, or mussel species have the highest numbers." The FASTC site also contains occupied habitat for federally listed species, and is located within a Sensitive Species Project Review Area.

B. THE DEPARTMENT OF STATE'S FASTC FACILITY AND SELECTION OF THE RUTHSBURG SITE

18. The Department of State operates training programs in defensive security skills for security officials. Training includes exercises that involve the use of explosives, munitions and firing ranges. Other training includes mock attacks, defensive driving tactics and the use of armored vehicles. Aircraft are also used, incidentally or otherwise, in association with training operations.

19. For years DoS taught these skills at a number of government facilities throughout the United States, including in particular at military bases. However, DoS has recently sought to consolidate its security training at one location, which DoS refers to as the proposed Foreign Affairs Security Training Center. The Department of State's stated objective in consolidating the training exercises in one location is to increase the efficiency of its training operations.

20. As conceived by DoS, FASTC is expected to train as many as 10,000 students a year. It will have indoor and outdoor shooting ranges, outdoor explosives and munitions ranges, defensive driving courses, and a mock urban environment for training for urban assaults and terrorist attacks. It will also have an aircraft landing area, storage for armored vehicles, and

approximately 180,000 square feet of classroom, cafeteria and dormitory space. DoS intends to provide for domestic law enforcement training on weekends at the FASTC facility.

21. As part of the American Recovery and Reinvestment Act of 2009, (“ARRA”), DoS was allocated \$75 million to which DoS added another \$35.55 million in already appropriated funds, to begin the process of obtaining land and building FASTC. DoS established a number of minimum criteria for the potential FASTC site, including that the site must be within 150 miles of Washington DC. DoS and GSA, which is facilitating DoS’s acquisition/construction of FASTC, identified approximately 30 potential sites for the FASTC facility. Approximately five of these sites were found to satisfy DoS’s criteria for FASTC in Virginia, West Virginia and Maryland.

22. In late 2009, DoS announced that it had selected the site in Ruthsburg, Queen Anne’s County, Maryland as its preferred site for FASTC. Thereafter, DoS and GSA began a public relations campaign to persuade residents of Queen Anne’s County and government officials to support FASTC. DoS and GSA have refused, however, to provide critical information to the community about what specific activities will be conducted at the FASTC site, what FASTC’s environmental impacts may be, what alternative sites were reviewed and found acceptable for FASTC, and why the Ruthsburg facility was ultimately chosen as the preferred FASTC site. Moreover, the agencies’ statements about the activities that will be conducted at FASTC and their potential for impacts have been contradictory.

23. On January 9, 2010, Senator Barbara Mikulski wrote to GSA declaring GSA’s public relations efforts to advance the FASTC facility at the Ruthsburg site an “unmitigated disaster.” Correspondence from Sen. Barbara A. Mikulski to Stephen R. Leeds, Acting

Administrator, GSA (January 8, 2010). GSA had “treated [citizens] with a disregard that borders on arrogance,” was “completely unprepared to answer basic questions about” FASTC, and quite simply refused to “take into account the fact that citizens of the local community must be fully involved in any decision to build or expand federal facilities.” Id. To date, DoS and GSA have still refused to provide residents of Ruthsburg, and of Queen Anne’s County generally, crucial information about FASTC.

C. QACA’S FOIA REQUESTS TO DOS AND GSA

24. On January 19, 2010, QACA submitted FOIA requests to DoS and GSA because QACA was unable to obtain critical information from either DoS or GSA absent a formal request under FOIA. QACA’s FOIA request asked for documents relating to, among other things:

- a. The process of the identification and/or selection of Ruthsburg, Queen Anne’s County, Maryland for the potential siting of FASTC;
- b. The training activities to be conducted at FASTC;
- c. State or federally listed species on or around the preferred Ruthsburg FASTC site, and any impacts on those species, including but not limited to the Delmarva Fox Squirrel; and
- d. Impacts to Tuckahoe State Park, Adkins Arboretum, Tuckahoe Creek, the Choptank River, and other natural resources.

In an effort to facilitate the rapid production of these records, with only a few specific exceptions, QACA limited its request to records generated on or after June 1, 2009 – essentially a seven-month-time span preceding the date of QACA’s requests.

25. QACA sought expedited production of relevant documents, citing the fact that the requested information was urgently needed so that the public could participate in the review of FASTC's environmental impacts that the agencies had already initiated under NEPA. As NEPA's regulations make clear, informed public input is "essential" to the agencies' review of FASTC's environmental impacts, and the agencies have a duty to "insure . . . information is available to public officials and citizens" in a timely manner that allows for meaningful public participation. 40 C.F.R. § 1500.1(b).

26. The agencies have already closed the public comment period pertaining to the scope of impacts the agencies will review in an EA under NEPA. They are now proceeding with their actual review of FASTC's impacts and have announced that they will provide the EA to the public for a limited public comment period in late spring. The agencies have still not provided critical information to the community so that the community can provide meaningful comments during the agencies' NEPA review of FASTC's potential impacts.

27. QACA also sought waiver of document search and copying fees, as provided for by FOIA for requests that are "in the public interest because [they are] likely to contribute significantly to public understanding of the operations or activities of the government and [are] not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

D. DoS'S RESPONSE TO QACA'S FOIA REQUEST

28. On January 22, 2010, DoS requested that QACA clarify its FOIA request. On January 25, 2010, QACA sent a revised FOIA request to DoS. On January 29, 2010, DoS responded to QACA's FOIA request by denying QACA's request for expedition and its request for a fee waiver, and by stating that DoS will begin processing QACA's request.

29. On February 26, 2010, QACA appealed DoS's denial of QACA's request for expedition and fee waiver. Among other things, QACA argued that the information was urgently needed, within the meaning of FOIA and DoS's FOIA regulations, given the agencies' pending NEPA review and the importance of the public's ability to meaningfully participate in the review.

30. On March 18, 2010, DoS rendered a decision on QACA's appeal. DoS reversed its earlier decision with regard to expedited processing of QACA's FOIA request. DoS determined that QACA had established that expedited processing was warranted under DoS's FOIA regulations. DoS's regulations provide for expedited processing where there is an urgent need for the information and the value of the information would be lost if the records are not quickly released. Given the agencies' ongoing NEPA review and the urgency the agencies' actions have created, DoS granted QACA's request for expedited processing, but DoS did not commit to providing the records by a date certain. DoS deferred its determination on QACA's request for a fee waiver until a later time.

31. To date, DoS has still not provided a single record to QACA in response to QACA's FOIA request.

E. GSA'S RESPONSE TO QACA'S FOIA REQUEST

32. On January 19, 2010, GSA concluded that QACA's request met the requirements for expedited processing and fee waiver and granted QACA's request for expedited processing and fee waiver. On February 12, 2010, GSA denied QACA's entire FOIA request with the exception of a single one-page document posted on the government's website. GSA provided no log or index of documents withheld, nor did it otherwise identify the documents it was refusing

to disclose. Instead, GSA denied QACA's request for documents -- including, e.g., documents relating to the existence of federally listed species in the FASTC site, the activities that will be conducted at the FASTC facility, and other purely factual information -- by invoking Exemption 5 (interagency deliberative process memoranda) and, to an unidentified extent, Exemption 4 (trade secret and/or commercial information). GSA did not segregate factual information from documents and provide redacted factual parts of documents.

33. On March 10, 2010, QACA appealed GSA's denial of QACA's request for documents under FOIA. On March 24, 2010, GSA informed QACA that GSA was invoking its ten day extension of time in which to respond to QACA's FOIA request. On April 27, 2010, GSA issued its decision on QACA's appeal. GSA produced seven documents -- a press release, two letters from the Queen Anne's County Board of Commissioners to DoS, a presentation and a transcript from a public meeting, and two single page public FASTC fact sheets, including the single page fact sheet from the government's website which it previously produced. GSA did not provide any redacted documents which provided segregated, factual information. Instead, GSA continued to invoke Exemptions 5 and 4 over all other documents -- even documents that relate to factual information such as the presence of federally listed species on or around the FASTC site -- except for a few discrete instances in which GSA referred QACA to DoS to ask for the documents, though DoS has not provided QACA a single document to date. GSA provided no log or index of documents withheld, nor did it otherwise identify the documents it was refusing to disclose.

QACA'S CLAIM FOR RELIEF

34. By failing to provide all records responsive to Plaintiff's FOIA request, by unlawfully invoking FOIA Exemptions 4 and 5, by failing to provide segregable factual information from documents otherwise lawfully withheld, and by failing to provide documents in an expedited manner, DoS and GSA are in violation of FOIA, 5 U.S.C. § 552, and implementing regulations.

35. By failing to grant Plaintiff's request for a fee waiver, DoS is in violation of FOIA, *id.*, and its implementing regulations.

36. QACA has a right to promptly obtain the requested records, and to have all fees associated with QACA's FOIA request waived.

WHEREFORE, QACA prays that this Court:

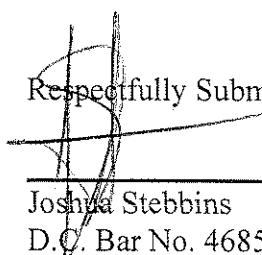
(1) Declare that DoS and GSA have violated FOIA by failing to timely provide all records responsive to QACA's January 19, 2010, FOIA requests, by unlawfully invoking FOIA Exemptions 4 and 5 to avoid producing the information, and by failing to provide segregable factual information from documents otherwise lawfully withheld;

(2) Order DoS and GSA to make all of the requested records and/or parts of records required to be disclosed under FOIA available to QACA, including but not limited to documents unlawfully withheld under any FOIA exemptions, a reasonable time before the agencies' public comment period in the context of the agencies' review of FASTC's impacts under NEPA;

(3) Award Plaintiff its costs and reasonable attorneys' fees in this action; and

(4) Grant such other and further relief, including preliminary injunctive relief, as the Court may deem just and proper.

Respectfully Submitted,



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