

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CITIZEN ACTION, and
DAVID McCOY

Plaintiffs,

Civil No.

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY REGION 6,
ENVIRONMENTAL PROTECTION
AGENCY OFFICE OF INSPECTOR GENERAL,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel release of agency records unlawfully withheld from the Plaintiff by the U.S. Environmental Protection Agency, Environmental Protection Agency Region 6 (“EPA Region 6”) and the U.S. Environmental Protection Agency Office of Inspector General (“OIG”). This suit seeks to compel EPA Region 6 and the OIG to produce records sought in five FOIA requests submitted to the EPA Region 6 and the OIG agency by Plaintiff Citizen Action beginning in December 7, 2007.

Plaintiff’s FOIA requests sought EPA Region 6 records related to defective groundwater monitoring wells at the Sandia National Laboratory (SNL) Mixed Waste Landfill in Albuquerque, New Mexico. Plaintiff’s FOIA requests also sought EPA OIG records related to an OIG investigation of a Citizen Action New Mexico Hotline complaint alleging that the New Mexico Environment Department mismanaged the SNL MWL monitoring wells and that EPA Region 6 did not exercise oversight.

2. This Complaint seeks to compel EPA, EPA Region 6 and the EPA OIG to produce agency records that resulted from the EPA Region 6 and EPA OIG reviews as to whether the SNL MWL monitoring wells were effectively managed at Sandia National Laboratories. Among the documents sought is an EPA Region 6 technical report entitled “*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*” (Oversight Review) that was not provided to Citizen Action by EPA Region 6 or the EPA OIG. As described below, the Oversight Report was a major document of concern described in an April 14, 2010 EPA OIG Hotline Report. The Hotline Report can be accessed at <http://www.epa.gov/oig/reports/2010/20100414-10-P-0100.pdf>

3. The EPA Office of Inspector General identified in the April 14, 2010 Hotline Report that “[T]he EPA concerns were consistent with Citizen Action New Mexico’s [CAMN] but that information was not disclosed nor was the basis for any resolution of those concerns documented.” The EPA OIG identified that EPA Region 6

“(1) took inappropriate steps to keep the details of the MWL monitoring wells assessment from the public, (2) decided not to provide documentation or sometimes not to document their concerns about the MWL monitoring wells, (3) provided a letter to CANM that did not note the specific details of the assessment, or (4) improperly placed a national security marking (Confidential) on the assessment.”

4. The EPA OIG Hotline Report identified that “In 2007, the Region’s technical review team found several areas of disagreement with NMED decisions regarding the monitoring wells at the MWL.” Moreover, the EPA Region 6 Project Engineer for Sandia “intentionally did not document concerns with NMED’s management of the MWL monitoring wells specifically to withhold the information from the public.” The OIG stated: “Access to information is crucial for informed public involvement. ... As a result transparency and public involvement are adversely affected.”

II. JURISDICTION AND VENUE

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

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

III. PARTIES

7. Plaintiff Citizen Action is a non-profit public interest group whose mission is to protect the health and well-being of Albuquerque communities from the release of radioactive and hazardous contamination from a Cold War waste site known as the Mixed Waste Landfill (MWL), located at Sandia National Laboratories (SNL) and that lies above the drinking water aquifer for Albuquerque, New Mexico. Citizen Action accomplishes this goal through education; outreach to stakeholders; and advocacy for environmental and social justice. Citizen Action has grown to a coalition of seventeen groups and many private individuals advocating for clean up of the Mixed Waste Landfill at SNL. Citizen Action is a 501 (c)(3) non-profit organization which operates under the fiscal auspices of the New Mexico Community Foundation of Santa Fe, New Mexico. Citizen Action disseminates information to the public through its website (www.radfreenm.org) which receives an average of 8,000-10,000 visits per month; through an active member list serve of approximately 1,300 members; through public venues such as town hall meetings, hearings, and public forums; bulk mailings to its members and affiliated organizations; and through its contacts with the local media. David McCoy is the executive director of Citizen Action.

8. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA”) through the EPA REGION 6 is responsible for overseeing the operations of the Resource Conservation and Recovery Act at Sandia National Laboratories (SNL) according to a memorandum of agreement with the New Mexico Environment Department (“NMED”). Defendant UNITED STATES OFFICE OF INSPECTOR GENERAL is responsible for reviewing whether EPA Region 6 carries out its oversight responsibilities for SNL. The EPA OIG is responsible to investigate Hotline allegations from the public for waste, fraud and abuse. EPA Region 6 and the EPA OIG are responsible for responding to FOIA requests made to it concerning records regarding EPA Region 6, EPA OIG and SNL’s operations and activities and therefore are sued as Defendants in this action.

IV. FACTS

December 7, 2007 FOIA Requests to EPA Region 6

9. On March 1, 2007 David McCoy, on behalf of Citizen Action, sent a letter to Carl Edlund, P.E., Director of Multi-Media and Permitting Division at the Environmental Protection Agency Region 6 in Dallas, TX that requested the US EPA National Risk Management Research Laboratory to perform an analysis of the well monitoring network at the Sandia National Laboratories’ Mixed Waste Landfill (MWL). The letter also requested consideration of a report by the New Mexico Environment Department. U.S. Senator Bingaman also requested the review on behalf of Citizen Action in April 2007. Region 6 replied that it was conducting an internal review of all well monitoring information, and that it would provide a response to CANM as soon as possible.

10. EPA Region 6 technical staff person, Richard Mayer represented to McCoy by telephone that a technical report for the groundwater monitoring issues had been written and sent to the EPA Region 6 legal office for review.

11. On 11/26/2007, McCoy spoke with Ashley Phillips at EPA Region 6 by telephone inquiring about the status of the legal review of the technical report. Ms. Phillips informed McCoy that no report by EPA staff technicians existed.

12. In December 13, 2007, Region 6 issued a 3-page letter to Citizen Action that contained no technical report to support the statements in the letter.

13. On 12/20/2007, McCoy again contacted EPA Region 6 counsel Ashley Phillips and was again informed that no technical report regarding the groundwater monitoring wells existed.

14. Citizen Action was misled by EPA Region 6 to believe that no technical report existed. Citizen Action became informed of the title and existence of the EPA Region 6 technical report entitled "*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*" (Oversight Review) with the issuance of the EPA OIG Hotline Report April 14, 2010 entitled *EPA Region 6 Needs to Improve Oversight Practices*.

December 7, 2007 FOIA Request to EPA Region 6 FOIA Officer

15. On December 7, 2007 Citizen Action sent a FOIA request to the FOIA Officer at EPA Region 6. The request sought documents related to the EPA conduct of the internal review of all well monitoring information, including well logs, site geology, and groundwater sampling results at the Mixed Waste Landfill. The request sought any report prepared by EPA Region 6

and any documents used to prepare the report. Citizen Action's FOIA request also contained a request for a fee waiver for any costs associated with processing the request.

16. On December 10, 2007 EPA Region 6 acknowledged receipt of Citizen Action's December 07, 2007 FOIA request and made assignment of number 06-RIN-00123-08-A.

17. A January 09, 2008 letter from Nancy Yarberry, Regional FOIA Officer for 06-RIN-00123-08-A cited the need for consultation with another agency or EPA office having substantial subject matter interest in your request.

18. On January 24, 2008 a denial letter by Lynda F. Carroll, Assistant Regional Administrator for Management, EPA Region 6 was sent to Citizen Action. The denial stated "Please note that EPA Region 6 has not prepared a final 'report.'" The denial listed numerous other documents that were withheld.

19. On **February 15, 2008** Citizen Action New Mexico appealed the January 24, 2008 denial letter by Lynda F. Carroll for **06-RIN-00123-08-A**. Citizen Action requested all documents withheld by the EPA to include documents listed by the January 2008 EPA Region 6 denial letter:

- Twenty-one internal draft summary documents
- Approximately 93 pages of internal e-mails
- Approximately 68 pages of personal notes
- Handwritten notes from two telephone conversations (nine pages).
- Copies of MWL well DVDs.
- Copies of general reference documents

20. A February 19, 2008 EPA letter to David McCoy acknowledged receipt of FOIA appeal 06-RIN-00123-08-A by Office of General Counsel Barbara Bruce

21. On June 18, 2008 McCoy sent an email to EPA General Counsel Kevin Miller requesting a status update on the appeal for 06-RIN-00123-08-A.

22. On August 7, 2008, US EPA General Counsel Kevin Miller sent a denial letter to David B. McCoy, Esq. regarding FOIA Appeal 06-RIN-00123-08-A.

23. An EPA OIG investigation of a Citizen Action Hotline complaint began in October 2008 when a three-man investigation team met with Citizen Action and Registered Geologist Robert Gilkeson. McCoy learned from a conversation with OIG Investigator Edward Baldinger that EPA Region 6 had in fact prepared a report by EPA Region 6 technical staff.

January 28, 2009 FOIA Request to EPA Region 6

24. On January 28, 2009 a Freedom of Information request was sent to U.S. EPA, Region 6 seeking production of the Technical Analyses of Sandia National Laboratories (SNL) Mixed Waste Landfill (MWL) Well Monitoring Network, including full and complete copies of the reviews or reports that were prepared by EPA Region 6 Staff (Richard Mayer and others) along with other records.

25. On March 9, 2009 McCoy sent an email to Leticia Lane stating that no response had been received for the January 28, 2009 FOIA request.

26. On March 10, 2009 an email from Leticia Lane to McCoy indicated that the request had been located and was referenced as 06-RIN-00246-09.

27. On April 7, 2009 Laurie King, Chief, Federal Facilities Section (6PD-F) denied provision of the documents requested in the 06-RIN-00246-09 on the basis of August 7, 2008 denial by Kevin Miller.

28. By email sent on May 8, 2009 Citizen Action appealed the April 7, 2009 letter of denial of Laurie King.

29. On May 14, 2009 the receipt of the appeal was acknowledged by Barbara Bruce, FOIA Specialist, Finance and Operations Law Office for FOIA 06-RIN-00246-09 received in the Office of General Counsel on May 11, 2009.

30. On May 15, 2009, Kevin Miller responded that the appeal for FOIA 06-RIN-00246-09 was not timely filed and denied the appeal.

June 16, 2009 FOIA Request to EPA Region 6

31. On June 16, 2009 Citizen Action sent a FOIA Request similar to the January 28, 2009 FOIA request to EPA Region 6 for Technical Analyses of Sandia National Laboratories (SNL) Mixed Waste Landfill (MWL) Well Monitoring Network. The FOIA request was for “Full and complete copies of the review(s) or report(s) that were prepared by EPA Region 6 Staff (Richard Mayer and others on his team) in response to a complaint that was filed with EPA Region 6 about the defective monitoring well network at Sandia National Laboratories’ Mixed Waste Landfill.”

32. On July 20, 2009 a denial letter issued from Lynda F. Carroll for the June 16, 2009 FOIA request designated as 06-RIN-00396-09.

33. On August 13, 2009, Citizen Action filed an appeal of the July 20, 2009 Lynda F. Carroll denial letter. Among the grounds for appeal included that factual analyses had actually been conducted by EPA Region 6 but were not previously identified as such:

1. The EPA Region 6 denial letter of July 20, 2009, now identifies 21 “various internal analyses of the well monitoring network at the Sandia MWL” as being conducted by Region 6 technical staff.
2. In the August 7, 2008 FOIA denial letter the 21 documents were not previously identified as analyses by technical staff that could contain factual information or data.
3. The 21 referenced documents that were possibly written by Richard Mayer, Troy Hill possibly along with others on the Region 6 technical staff are likely to contain technical

and factual data related to a review of the well monitoring network at the Sandia National Laboratories' Mixed Waste Landfill (MWL).

34. By letter of November 12, 2009, Kevin Miller, Assistant General Counsel, the August 13, 2009 appeal was denied because “[T]here is a reasonable likelihood that the Agency would be harmed by release.”

August 17, 2009 FOIA Request to EPA Office of Inspector General

35. In October 2008, the Environmental Protection Agency (EPA) Office of Inspector General (OIG) sent a three-man investigative team comprised of OIG personnel Messrs. Larry Dare, John Coll and Edward Baldinger to investigate a hotline complaint of Citizen Action and Registered Geologist Robert Gilkeson regarding: the inadequate well monitoring network at Sandia National Laboratories' Mixed Waste Landfill (MWL) and lack of EPA Region 6 oversight for the Resource and Conservation Recovery Act (RCRA) program run by the authorized state agency, the New Mexico Environment Department (NMED). A report was produced by the investigative team.

36. On August 17, 2009 Citizen Action made a FOIA request for “full and complete copies of all work papers and documents containing factual information including any report prepared for the investigation including all documents in any form” related to the 2008 investigation.

37. US EPA Larry F. Gottesman, National FOIA Officer provided an August 19, 2009 letter of acknowledgement for receipt of August 17, 2009 FOIA request for “copy of records related to copy of 2008 report regarding the well monitoring network at Sandia National Laboratories' Mixed Waste Landfill (MWL), etc.”

38. An August 26, 2009 email from Shushona Hyson to David McCoy regarding the FOIA request RIN-01862-09 dated August 17, 2009 stated:

“You requested a copy of the 2008 report regarding the well monitoring network at Sandia National Laboratories Mixed Waste Landfill along with any accompanying documents and work papers. OIG is still conducting its review of this location and a report is being prepared at this time. ... After a report is issued, the Office of Inspector General (OIG) will be able to process your request.”

39. A November 24, 2009 letter referencing RIN-01862-09 from US EPA OIG Shushona Hyson stated: “Additional time is needed to respond to your request. ... An initial determination is expected February 26, 2010.”

40. On January 11, 2010, EPA OIG sent a denial letter for the August 17, 2009 FOIA request.

41. Citizen Action filed an Appeal of Denial of Freedom of Information (FOIA) Request RIN 01862-09 on February 2, 2010.

42. A January 11, 2010 letter from US EPA Assistant Inspector General Eileen McMahon denied the Citizen Action FOIA request of August 17, 2009.

43. On February 2, 2010 Citizen Action sent an Appeal of Denial of Freedom of Information (FOIA) Request RIN 01862-09 to Counsel to the Inspector General, Office of Counsel, Office of Inspector General. The appeal stated:

“A report was produced by the EPA OIG investigative team. Citizen Action seeks that report and accompanying schedules, documents and work papers.”

44. A March 24, 2010 email from Shushona Hyson requested an extension of time of 60 days to process the appeal.

45. A March 24, 2010 email from McCoy to Shushona Hyson objected to extension for the appeal.

46. An undated letter from EPA, Washington D.C. OIG for the February 2, 2010 appeal granted the release of the documents sought by Citizen Action in the August 17, 2009 FOIA request.

47. An undated letter from Mark Bialek, Associate Deputy Inspector General and Counsel, EPA, Washington D.C. response for the February 2, 2010 appeal granted the release of the documents sought by Citizen Action in the August 17, 2009 FOIA request.

48. In or about June 2010, McCoy called the EPA OIG and left a message that the documents for the August 17, 2009 FOIA request had not been fully provided.

49. E-mail correspondence between McCoy and Mona Mafi, Associate Counsel to the Inspector General on June 09, 2010 and August 06, 2010 describes numerous documents that were not subsequently released to Citizen Action. The June 9, 2010 email from Mafi to McCoy responds to "... your [McCoy's] recent inquiry about documents that you believe were missing from the response we provided to your FOIA appeal. As you know, we decided to release all of the requested documents in full, without any redactions."

50. On June 9, 2010 an email from McCoy to Mafi provided a list of documents that were believed to be missing. One of the documents contained in the working papers, according to a telephone conversation 9/9/2010 that McCoy had with the now retired OIG investigation Team Leader, would be the withheld EPA Region 6 document, "Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review," identified by the OIG April 14, 2010 Hotline Report along with the working papers from each of the three investigators, Ed Baldinger, Larry Dare and John Coll, and interviews with EPA Region 6 personnel.

51. On August 6, 2010 Mafi informed McCoy "the follow-up request to your FOIA appeal response is currently pending." No records have subsequently been provided to Citizen Action.

June 3, 2010 FOIA Request to EPA Region 6

52. On April 14, 2010 Citizen Action learned from the issuance of the US EPA OIG Hotline Report "*Region 6 Needs to Improve Oversight Practices*" that EPA Region 6 had in fact written a technical report that was stamped as "Confidential," denied as existing by EPA Region

6 and that was not cited by title or described in any responses to Citizen Action's prior FOIA requests.

53. On April 14, 2010, the USEPA Office of Inspector General issued a Hotline Report <http://www.epa.gov/oigearth/reports/2010/20100414-10-P-0100.pdf> that identified that EPA Region 6 engaged in widespread mislabeling of information that also included a Region 6 report entitled "*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*" (At pp.1 and 21). The Hotline Report was based on the complaint from Citizen Action that the New Mexico Environment Department (NMED) mismanaged the Sandia National Laboratories' Mixed Waste Landfill (MWL) monitoring wells.

54. After Citizen Action learned of the existence and misclassification of the Region 6 Oversight Report, Citizen Action filed a FOIA request on June 3, 2010 specifically for that document by title. On October 8, 2010 Region 6 issued a letter of denial stating:

"Said documentation regarding this site has already been addressed in our January 24, 2008 and July 20, 2009, responses to your FOIA requests."

Contrary to the October 8, 2010 response by Region 6, none of the EPA Region 6 response letters of January 2008 and July 2009, nor the General Counsel August 7, 2008 and November 12, 2009 and undated 2010 responses give the title for nor address any aspect for the existence or contents of the Oversight Report.

55. The actions of EPA Region 6 to withhold FOIA documents are described by EPA OIG Hotline Report that stated (p.3):

"Region 6 withheld information from the public regarding the MWL monitoring wells through:

- discontinuation of record keeping,
- misleading communications, and

- inappropriate classification.”

56. The EPA OIG Hotline Report found (p.3):

Inappropriate Classification. The Project Engineer withheld the Oversight Review from the public by marking it Confidential, a security classification category.

57. EPA OIG did not provide the Oversight Review to Citizen Action although it stated in its undated appeal response for the February 2, 2010 FOIA request that the release of documents sought by Citizen Action in the August 17, 2009 FOIA request was granted.

58. Citizen Action’s June 3, 2010 FOIA request to EPA Region 6 was for the technical report entitled “*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*” (“Oversight Review”) and related documents cited in the April 14, 2010 EPA OIG Hotline Report. The EPA Region Oversight Review had been improperly marked with a national security marking (Confidential).

59. On June 4, 2010 a letter from EPA Region 6 RE: FOIA Request Identification Number No. 06-FOI-00375-10 acknowledged receipt of the Citizen Action FOIA request dated June 3, 2010.

60. On June 4, 2010 EPA Region 6 acknowledged receipt of the June 3, 2010 FOIA request and identified it as RIN 06-FOI-00376-10.

61. On August 3, 2010 an email from US EPA Region 6 Leticia Lane re 06-FOI-00375-10 and 06-FOI-00376-10 stated:

“06-FOI-00375-10 – Status on this one is that one of our Divisions has a voluminous amount of documents for search and review. The target date for your response is July 23, 2010.

62. On June 18, 2010, Larry F. Gottesman sent a letter requesting a response to six factors to obtain a fee waiver for the June 3, 2010 FOIA 06-FOI-00375-10.

63. On June 23, 2010 Larry F. Gottesman sent a letter granting the request for a fee waiver for the June 3, 2010 FOIA 06-FOI-00375-10.

64. On August 3, 2010 a letter from Leticia Lane, EPA Region 6 FOIA Officer to Citizen Action requested a new target date of August 23, 2010 for FOIA 06-FOI-00375.

65. A Letter of Denial for FOIA 06-FOI-00375 was sent to Citizen Action on October 8, 2010 by Leticia Lane, EPA Region 6 FOI Officer.

66. Citizen Action made an October 21, 2010 Appeal of the October 8, 2010 Letter of Denial for FOIA 06-FOI-00375.

67. On October 27, 2010 US EPA, Washington, D.C. FOIA Specialist Barbara Bruce, Office of General Counsel sent an acknowledgement of receipt of the October 21, 2010 FOIA appeal for 06-FOI-00375-10-A (HQ-APP-00011-16).

68. No further response to the Citizen Action October 21, 2010 Appeal has been made by the EPA General Counsel for FOIA for 06-FOI-00375-10-A.

V. CAUSE OF ACTION

69. The FOIA, 5 U.S.C. § 552(a)(6)(A)(i) requires any agency to which a FOIA request has been made to make a determination on the request within twenty working days, and to immediately notify the person making the request of the determination and the agency's reasons for the determination.

70. The FOIA requires the Defendant to provide the records that the Plaintiff requested and Defendant has failed to do so. The FOIA requires the Defendant to make a

determination on Plaintiff's request within twenty working days and to provide the requested information and Defendant has failed to do so.

VI. CLAIM FOR RELIEF

71. Because of these violations, Defendant has improperly withheld agency records from Plaintiff in violation of the FOIA within the meaning of 5 U.S.C. § 552(a)(4)(B), according to EPA's Records Management Policy and the Federal Records Act of 1950, as amended.

72. Plaintiff is adversely affected by Defendants' failure to provide the required information under the FOIA because without that information Plaintiff cannot inform the public concerning the subject of the request, which will contribute significantly to the public's understanding of the operations or activities of the government.

73. 5 U.S.C. § 552(a)(6)(C) states in relevant part that: "Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."

74. The FOIA gives this court jurisdiction to order Defendant to provide Plaintiff with the records he has requested pursuant to 5 U.S.C. § 552(a)(4)(B).

75. Defendant's pattern and practice of unlawfully withholding agency records from Plaintiff is a violation of the FOIA and is also arbitrary, capricious and an abuse of discretion within the meaning of Section 706 of the Administrative Procedure Act.

76. This court may assess reasonable attorneys fees against the United States if the Plaintiff substantially prevails in this action pursuant to 5 U.S.C. § 552(a)(4)(E).

VII. REQUEST FOR RELIEF

77. FOR THESE REASONS, Plaintiff respectfully requests that this court enter judgment providing the following relief:

a. Declare that Defendants UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA REGION 6 AND THE EPA OIG have improperly withheld agency records from Plaintiff by: 1) failing to provide the requested information, and 2) failing to comply with the procedural time limits established by the FOIA;

b. Declare that Defendants UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA REGION 6 AND THE EPA OIG have engaged in a pattern and practice of unlawfully withholding agency records from Plaintiff in violation of the FOIA and ;

c. Direct by injunction that the Defendants immediately provide Plaintiff with the records it has requested;

d. Grant Plaintiff its costs of litigation, including reasonable attorneys fees as provided by the FOIA, 5 U.S.C. § 552(a)(4)(E); and

e. Provide such further relief as the Court deems just and proper to avoid similar violations of the FOIA by Defendants in response to future FOIA requests for agency records submitted by Plaintiff to EPA.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF NANCY L. SIMMONS, PC

Electronically submitted

By: _____

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