

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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| NOSSAMAN LLP, |) | 1:10-cv-1627 OWW SKO |
| |) | SCHEDULING CONFERENCE ORDER |
| Plaintiff, |) | |
| |) | |
| v. |) | Cross-Motions for Summary |
| |) | Judgment Filing Deadline: |
| UNITED STATES DEPARTMENT OF |) | 6/30/11 |
| HOMELAND SECURITY, |) | |
| |) | Oppositions Thereto Filing |
| Defendant. |) | Deadline: 7/22/11 |
| |) | |
| |) | Replies Thereto Filing |
| |) | Deadline: 8/5/11 |
| | | |
| | | Hearing on Cross-Motions |
| | | for Summary Judgment: |
| | | 9/12/11 10:00 Ctrm. 3 |

I. Date of Scheduling Conference.

February 9, 2011.

II. Appearances Of Counsel.

Nossaman LLP by Paul S. Weiland, Esq., and Robert D. Thornton, Esq., appeared on behalf of Plaintiff.

Yoshinori H.T. Himel, Esq., Assistant U.S. Attorney,
appeared on behalf of Defendant.

III. Summary of Pleadings.

27 1. On March 16, 2009, Plaintiff sent a Freedom of
28 Information Act ("FOIA") request ("FOIA Request") to Defendant

1 Department of Homeland Security Federal Emergency Management
2 Agency ("FEMA"). The FOIA Request seeks specific public records
3 relating to FEMA's administration of the National Flood Insurance
4 Program ("NFIP") in the Counties of San Joaquin, Yolo,
5 Sacramento, Solano, and Contra Costa and the cities specified in
6 each of those counties. Complaint, ECF No. 6, Ex. 1. After
7 nearly 8 months of repeated requests for a response to the FOIA
8 Request (*id.*, Exs. 3-4), Plaintiff filed a formal administrative
9 appeal of the constructive denial of its FOIA Request on November
10 10, 2009 ("Formal Appeal"). *Id.*, Ex. 5. After nearly 10 months
11 of repeated requests for a response to its Formal Appeal (*id.* Ex.
12 7), and after nearly 18 months without any response to its FOIA
13 Request, on September 9, 2010, Plaintiff filed the Complaint in
14 this litigation.

15 2. In its Complaint, Plaintiff contends, *inter alia*, that
16 Defendant failed to produce responsive records in response to the
17 FOIA Request, that Defendant failed to produce a response to the
18 FOIA Request within the time permitted by law, that Defendant
19 failed to conduct an adequate search for agency records, that
20 Defendant unlawfully withheld responsive agency records, and that
21 Defendant failed to take final action in response to Plaintiff's
22 November 10, 2009 Formal Appeal within the time permitted by law.
23 Plaintiff prays for declarations of these violations, an order to
24 produce all responsive records, and attorneys' fees and costs.

25 3. Defendant has searched its files for responsive records
26 and has found about 200 pages. In October 2010 about half were
27 released, with individuals' names redacted to protect personal
28 privacy under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and the

1 remainder are being processed for release.

2 4. Plaintiff has lately contended that records generated
3 or maintained by Insurance Services Office Inc. of Central Point,
4 Oregon, are agency records whether or not the agency has ever
5 seen them. Defendant is investigating to arrive at a factual and
6 legal determination on this new contention.

7 IV. Orders Re Amendments To Pleadings.

8 1. On October 19, 2010, the due date for the Defendant's
9 first responsive pleading in this litigation, FEMA emailed
10 Plaintiff a letter styled as FEMA's "final response" to the March
11 16, 2009 FOIA Request. Included with the letter were 7 files
12 containing various responsive agency records, some of which were
13 redacted, in part, under FOIA Exemption 6, 5 U.S.C. § 552(b) (6)
14 (exempting from disclosure "personnel and medical files and
15 similar files the disclosure of which would constitute a clearly
16 unwarranted invasion of personal privacy"). In the course of
17 multiple telephonic early meetings of counsel beginning on
18 October 27, 2010 to the present, counsel for the Defendant has
19 informed Plaintiff's counsel that additional agency records
20 responsive to the FOIA Request have been located, and are being
21 reviewed and/or redacted pursuant to one or more of the
22 exemptions to production under FOIA, 5 U.S.C. § 552(b) .

23 2. In addition, Plaintiff takes the position that records
24 produced and maintained by Defendant's private contractor on
25 Defendant's behalf in the discharge of Defendant's statutory and
26 regulatory duties under the National Flood Insurance Act and the
27 NFIP in the counties and cities included in the FOIA Request are
28 "agency records" under FOIA; therefore, FEMA must also conduct a

1 reasonable search of its contractor's records. Defendant is
2 considering Plaintiff's position, but may reach the conclusion
3 that records that are not in FEMA Region 9's physical possession
4 are not "agency records," and no such search is required under
5 the FOIA.

6 3. In light of the above developments that occurred after
7 Plaintiff filed its Complaint on September 9, 2010, Plaintiff may
8 request leave of this Court to amend the Complaint.

9 V. Factual Summary.

10 A. Admitted Facts Which Are Deemed Proven Without Further
11 Proceedings.

12 1. The subject FOIA Request is a letter dated March
13 16, 2009 from Audrey M. Huang of Nossaman LLP transmitted via
14 email to Kevin J. Clark, Freedom of Information Contact, Federal
15 Emergency Management Agency Region 9.

16 2. The subject Formal Appeal was initiated by way of
17 a letter dated November 10, 2009 from Paul S. Weiland, Nossaman
18 LLP, to the Associate General Counsel (General Law) of the
19 Department of Homeland Security Federal Emergency Management
20 Agency.

21 3. As of the date of filing of the Complaint on
22 September 9, 2010, FEMA had not responded to Plaintiff's FOIA
23 Request or its Formal Appeal.

24 4. On October 19, 2010, Defendant sent Plaintiff a
25 letter styled as its "final response" to the FOIA Request, and
26 produced some agency records responsive to the request.

27 5. In the October 19, 2010 production of records,
28 Defendant redacted names of public officials under Exemption 6, 5

1 U.S.C. § 552(b)(6), asserting that the names are "personnel and
2 medical files and similar files the disclosure of which would
3 constitute a clearly unwarranted invasion of personal privacy."

4 6. On January 14, 2011, counsel for Defendant
5 informed counsel for Plaintiff that Defendant has located more
6 agency records responsive to the FOIA Request.

7 7. Plaintiff has not received a full and final
8 response to their FOIA request.

9 B. Contested Facts.

10 1. None.

11 VI. Legal Issues.

12 A. Uncontested.

13 1. This Court's subject matter jurisdiction for this
14 lawsuit is invoked under 5 U.S.C. § 552(a)(4)(B). Subject matter
15 jurisdiction is never waived but is not challenged at this time.

16 2. Plaintiff Nossaman has standing to sue as the
17 requester under the FOIA, and may be deemed to have exhausted its
18 administrative remedies.

19 3. Venue in the Eastern District of California is not
20 contested.

21 4. Plaintiff was entitled, under 5 U.S.C.
22 § 552(a)(6)(A)(I) and 6 C.F.R. § 5.6(b), to receive a full
23 response to the FOIA Request within 20 workdays of the request.

24 5. Defendant did not conduct a reasonable search
25 within 20 workdays of the request, or provide a full response to
26 the FOIA request within 20 workdays of the request.

27 6. Because FEMA failed to produce any responsive
28 agency records in its control within the time limits provided by

1 5 U.S.C. § 552(a)(6), it may not charge any search fees required
2 to locate the agency records it has yet to produce in response to
3 the FOIA Request. 5 U.S.C. § 552(a)(4)(A)(viii).

4 7. Plaintiff was entitled to a determination on the
5 Formal Appeal within the 20 working days provided by FOIA. 5
6 U.S.C. § 552(a)(6)(A)(ii).

7 8. Defendant did not reach a determination on the
8 Formal Appeal within the 20 working days provided by law.

9 B. Contested.

10 1. Whether Defendant's declaration concerning its
11 search for responsive records will carry its burden of showing
12 adequate search under the FOIA.

13 VII. Consent to Magistrate Judge Jurisdiction.

14 1. The parties have not consented to transfer the
15 case to the Magistrate Judge for all purposes, including trial.

16 VIII. Corporate Identification Statement.

17 1. Any nongovernmental corporate party to any action in
18 this court shall file a statement identifying all its parent
19 corporations and listing any entity that owns 10% or more of the
20 party's equity securities. A party shall file the statement with
21 its initial pleading filed in this court and shall supplement the
22 statement within a reasonable time of any change in the
23 information.

24 IX. Discovery Plan and Cut-Off Date.

25 1. Discovery in FOIA cases is the exception, not the rule.
26 See *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F.Supp.2d 19, 25
27 (D.D.C. 2000) ("discovery in a FOIA action is generally
28 inappropriate."). Instead of discovery, the agency files

1 declarations aimed at affording the plaintiff "a meaningful
2 opportunity to contest, and the district court an adequate
3 foundation to review, the soundness" of the agency's action.
4 *Berman v. CIA*, 501 F.3d 1136, 1141 (9th Cir. 2007). Before the
5 making of those declarations, "no factual issue as to the scope
6 and adequacy of the search exists." *Niren v. INS*, 103 F.R.D. 10,
7 11-12 (D. Ore. 1984). After their filing, a plaintiff may be in
8 a position to contend that they are conclusory, are controverted
9 or are made in bad faith. See *Wolf v. CIA*, 473 F.3d 370, 374
10 (D.C. Cir. 2007) ("[s]ummary judgment is warranted on the basis
11 of agency affidavits when the affidavits describe 'the
12 justifications for nondisclosure with reasonably specific detail
13 . . . and are not controverted by either contrary evidence in the
14 record nor by evidence of agency bad faith.'"). Accordingly,
15 after defendant files its declarations, Plaintiff reserves its
16 right under Fed.R.Civ.P. 56(f) to ask the Court to allow
17 discovery.

18 Dates agreed for (a) Filing pre-trial motions (no later than
19 45 days before Pre Trial Conference), (b) Pre-Trial Conference,
20 (c) trial date:

21 2. Motion cutoff date: If the parties cannot reach
22 agreement on whether records produced and maintained by FEMA's
23 contractor, but which are not in FEMA's physical possession, or
24 if the parties dispute the applicability of Exemption 6 or any
25 other asserted legal basis for withholding responsive records in
26 whole or in part, Plaintiff will file a motion for summary
27 judgment on or before May 20, 2011, in which event Plaintiff may
28 file a simultaneous cross-motion for summary judgment.

1 3. Pretrial conference date: Defendant contends that
2 trial is improbable because FOIA cases lack factual disputes and
3 are resolved on motions for summary judgment. See *Cooper Cameron*
4 *Corp. v. Dep't of Labor*, 280 F.3d 539, 543 (5th Cir. 2002)
5 ("Summary judgment resolves most FOIA cases."). Therefore,
6 Defendant contends that no pretrial or trial date need be
7 suggested. Plaintiff contends that the October 19, 2011 "final
8 response" to its March 16, 2009 FOIA Request and subsequent
9 location of further responsive agency records supports a showing
10 of lack of good faith effort to locate responsive records, a
11 clear failure to provide a full response to the FOIA Request
12 within the time permitted by law. Defendant has also failed to
13 reach a determination on Plaintiff's Formal Appeal within the
14 time provided by law. Therefore, Plaintiff contends that
15 Defendant's anticipated motion for summary judgment will be
16 denied. Plaintiff further contends that the same evidence would
17 support a cross-motion for summary judgment and/or a motion for
18 leave to conduct discovery. Trial may be required if disputed
19 issues of material fact exist after completion of discovery.

20 4. Trial date: None is suggested at this time. If the
21 Defendant's motion for summary judgment is denied because one or
22 more material facts remain to be decided, the parties will supply
23 a supplemental joint scheduling report setting forth a proposed
24 discovery plan, trial date, and related deadlines.

25 5. Disclosure of FOIA responses: Defendant will endeavor
26 to have its production of documents responsive to the FOIA
27 requests and a Vaughn index served upon the Plaintiff on or
28 before May 20, 2011.

1 6. The parties will file cross-motions for summary
2 judgment on or before June 30, 2011. The oppositions shall be
3 filed on or before July 22, 2011. The replies shall be filed on
4 or before August 5, 2011. September 12, 2011 at 10:00 a.m. in
5 Courtroom 3 will be the hearing date for the cross-motions.

6 7. Depending upon the outcome of dispositive motions, a
7 further scheduling conference shall be set if necessary.

8 X. Motions - Hard Copy.

9 1. The parties shall submit one (1) courtesy paper copy to
10 the Court of any motions filed. Exhibits shall be marked with
11 protruding numbered or lettered tabs so that the Court can easily
12 identify such exhibits.

13 XI. Settlement Conference.

14 1. The parties will notify the Courtroom Deputy in the
15 event they believe a Settlement Conference will assist resolution
16 of the case.

17 2. Unless otherwise permitted in advance by the
18 Court, the attorneys who will try the case shall appear at the
19 Settlement Conference with the parties and the person or persons
20 having full authority to negotiate and settle the case on any
21 terms at the conference.

22 3. Permission for a party [not attorney] to attend
23 by telephone may be granted upon request, by letter, with a copy
24 to the other parties, if the party [not attorney] lives and works
25 outside the Eastern District of California, and attendance in
26 person would constitute a hardship. If telephone attendance is
27 allowed, the party must be immediately available throughout the
28 conference until excused regardless of time zone differences.

1 Any other special arrangements desired in cases where settlement
2 authority rests with a governing body, shall also be proposed in
3 advance by letter copied to all other parties.

4 4. Confidential Settlement Conference Statement.

5 At least five (5) days prior to the Settlement Conference the
6 parties shall submit, directly to the Magistrate Judge's
7 chambers, a confidential settlement conference statement. The
8 statement should not be filed with the Clerk of the Court nor
9 served on any other party. Each statement shall be clearly
10 marked "confidential" with the date and time of the Settlement
11 Conference indicated prominently thereon. Counsel are urged to
12 request the return of their statements if settlement is not
13 achieved and if such a request is not made the Court will dispose
14 of the statement.

15 5. The Confidential Settlement Conference

16 Statement shall include the following:

17 a. A brief statement of the facts of the
18 case.

19 b. A brief statement of the claims and
20 defenses, i.e., statutory or other grounds upon which the claims
21 are founded; a forthright evaluation of the parties' likelihood
22 of prevailing on the claims and defenses; and a description of
23 the major issues in dispute.

24 c. A summary of the proceedings to date.

25 d. An estimate of the cost and time to be
26 expended for further discovery, pre-trial and trial.

27 e. The relief sought.

28 f. The parties' position on settlement,

1 including present demands and offers and a history of past
2 settlement discussions, offers and demands.

3 **XII. Request For Bifurcation, Appointment Of Special Master,**
4 **Or Other Techniques To Shorten Trial.**

5 1. None.

6 **XIII. Related Matters Pending.**

7 1. *Coalition for a Sustainable Delta and Kern County Water*
8 *Agency v. Federal Emergency Management Agency, et al., Case No.*
9 *1:09-cv-2024 OWW DLB.*

10 2. Defendant says that these cases are unrelated except
11 for Plaintiff's use of the subject FOIA request as a tactic to
12 avoid possible discovery limits on its clients in the other case,
13 brought under the Endangered Species Act. The courts have stated
14 that Congress did not enact FOIA for the purpose of civil or
15 criminal discovery.

16 **XIV. Compliance With Federal Procedure.**

17 1. The Court requires compliance with the Federal
18 Rules of Civil Procedure and the Local Rules of Practice for the
19 Eastern District of California. To aid the court in the
20 efficient administration of this case, all counsel are directed
21 to familiarize themselves with the Federal Rules of Civil
22 Procedure and the Local Rules of Practice of the Eastern District
23 of California, and keep abreast of any amendments thereto.

24 **XV. Effect Of This Order.**

25 1. The foregoing order represents the best
26 estimate of the court and counsel as to the agenda most suitable
27 to bring this case to resolution. The trial date reserved is
28 specifically reserved for this case. If the parties determine at

1 any time that the schedule outlined in this order cannot be met,
2 counsel are ordered to notify the court immediately of that fact
3 so that adjustments may be made, either by stipulation or by
4 subsequent scheduling conference.

5 2. Stipulations extending the deadlines contained
6 herein will not be considered unless they are accompanied by
7 affidavits or declarations, and where appropriate attached
8 exhibits, which establish good cause for granting the relief
9 requested.

10 3. Failure to comply with this order may result in
11 the imposition of sanctions.

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13 IT IS SO ORDERED.

14 Dated: February 9, 2011

15 /s/ Oliver W. Wanger
16 UNITED STATES DISTRICT JUDGE

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