

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 04-cv-01264-LTB-PAC

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

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**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION  
FOR JUDICIAL DECREE AND AWARD OF ATTORNEY FEES  
AND REIMBURSEMENT OF EXPENSES**

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Defendant, the United States Department of Labor (hereafter, Defendant or "DOL"), through its attorneys of record, hereby responds to Plaintiff Mary M. Hull's March 31, 2006, Motion for Judicial Decree and Award of Attorney's Fees and Reimbursement of Expenses (hereafter "Plaintiff's Motion"). *See* Docket Entry No. 41. This case involves Plaintiff's Freedom of Information Act ("FOIA") request for a copy of the 6,587-page file containing records compiled by DOL's Employee Benefits Security Administration ("EBSA") during its investigation of the Qwest Pension Plan ("QPP") under the Employee Retirement Income Security Act of 1974 ("ERISA"). DOL voluntarily disclosed approximately 5,500 pages to Plaintiff during the course of this litigation. The Court ordered DOL to disclose nine of the approximately 500 pages that

remained in dispute. Although FOIA contains a fee-shifting provision, 5 U.S.C. § 552(a)(4)(E), Plaintiff has failed to establish that she is entitled to an award of attorney fees and costs under the applicable four-part legal test discussed below. Specifically, Plaintiff has failed to establish entitlement to fees because (1) the litigation provided minimal, if any, benefit to the public; (2) the litigation served only private commercial interests; (3) Plaintiff had a commercial incentive to litigate her FOIA claim even without an award of attorney's fees; and (4) DOL had a reasonable basis for withholding the nine pages of material that this Court ultimately ordered it to release.

## I. STATEMENT OF FACTS

### A. Plaintiff's Status as President of an Organization of Thousands of Retirees

Plaintiff retired from employment with U S WEST effective February 28, 1990. Docket No. 1 (Complaint) at ¶ 4. U S West later merged with Qwest Communications. She receives a service pension annuity from the Qwest Pension Plan ("QPP") and is a participant in the QPP. *Id.* at ¶¶ 4, 5.

Plaintiff is the elected president of the Association of U S WEST Retirees (AUSWR), an organization of over 20,000 retirees formed ten years ago. Plaintiff's Motion at 1, n.1. AUSWR was established to "preserve and protect those benefits that we worked so hard to earn and that were promised to us." AUSWR Mission Statement, available at [www.uswestretiree.org/mission](http://www.uswestretiree.org/mission). AUSWR was formed when retirees apparently learned "that U S West had improperly charged millions of dollars of expenses

to the U S West Pension Plan and was moving towards renegeing on a lifetime promise of health care benefits.” Plaintiff’s Motion at 1, n.1.

**B. Plaintiff’s FOIA Request and the Department of Labor’s Initial Administrative Response**

On March 3, 2004, Plaintiff requested all the records pertaining to EBSA's investigation of the QPP's potential fiduciary violations under ERISA. *See* Docket No. 13 (Defendant’s Motion for Summary Judgment) at Miller Declaration (hereafter, “Dec.”), ¶ 3 and Exhibit A-1. On March 4, 2004, EBSA denied the request on the grounds that its investigation was in progress, citing FOIA Exemption 7(A), which authorizes withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). *See* Docket No. 13 at Miller Dec., ¶ 4 and Exhibit A-2.

On June 16, 2004, the Solicitor of Labor – DOL's designated FOIA appeal arbiter – affirmed EBSA's decision on appeal. *See* Docket No. 13 at Miller Dec., ¶ 6 and Exhibit A-4. The Solicitor explained the basis for the decision in detail. *Id.* Citing *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 236 (1978), the Solicitor stated that "[i]t is not necessary to make this determination [*i.e.*, the applicability of FOIA Exemption 7(A)] with respect to a particular record. Rather, a generic approach is proper and acceptable." Docket No. 13, Exhibit A-4 at 2. The Solicitor concluded that "the records or information you have requested are of the types which, if released at this time, would prematurely

reveal the Government's case and impede it in any ensuing enforcement action and, therefore, could reasonably be expected to interfere with enforcement proceedings." *Id.* Further, in response to Plaintiff's query whether virtually all the information requested was provided by Qwest, and, therefore not protected under Exemption 7(A), the Solicitor responded that the information was within 7(A) because "public release of the information requested at this time may discourage further submissions of this type of information by the target and may also hinder a voluntary resolution of the case as the targets of the investigation would have less incentive to cooperate with EBSA." *Id.*

### **C. Plaintiff's Complaint and DOL's Administrative Response**

Plaintiff filed this action on June 18, 2004. *See* Docket No. 1. On October 19, 2004, DOL wrote to Plaintiff that it was prepared to release the disclosable portions of the file on the condition that Plaintiff provide assurance of payment of the estimated fee of \$750.<sup>1</sup> *See* Exhibit A, attached hereto (DOL's Oct. 19, 2004 letter). On October 25, 2004, Plaintiff wrote to DOL stating she would "promptly send full payment when you are ready to bill me." *See* Exhibit B, attached hereto (Plaintiff's Oct. 25, 2004 letter). On December 2, 2004, DOL notified Plaintiff that 4,275 pages, one CD, and floppy disk, were releasable, and that the cost was \$626.25. *See* Exhibit C, attached hereto (DOL's Dec. 2, 2004 letter). Plaintiff sent full payment the same day. *See* Exhibit D, attached

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<sup>1</sup> Where the fee is expected to exceed \$250, DOL may not begin work on a FOIA request until the requester satisfactorily assures full payment. 29 C.F.R. § 70.42(c)(1).

hereto (Plaintiff's Dec. 2, 2004 letter). On December 15, 2004, DOL released the material to Plaintiff. *See* Docket No. 13 at Exhibit A-7 (DOL's Dec. 15, 2004 letter).

**D. Defendant's April 1, 2005 Summary Judgment Motion and Plaintiff's Response**

On April 1, 2005, DOL filed a Motion for Summary Judgment explaining why it withheld certain information under FOIA exemptions 2, 3, 4, 5, 7(A), 7(C), and 7(E). *See* Docket No. 13. On April 7, 2005, EBSA concluded its investigation of QPP. *See* Docket No. 19 at 3, and Exhibit A attached thereto.

On April 20, 2005, Plaintiff filed a brief opposing DOL's motion for summary judgment. *See* Docket No. 14. Within that same brief, Plaintiff petitioned for *in camera* review of the approximately 2,300 pages that DOL had withheld. *Id.* at 1. But she only requested *in camera* inspection of the documents Defendant was withholding under Exemption 7(A). *Id.* at 4-7.

Nowhere in her opposition brief did Plaintiff question the propriety of Defendant's determination to withhold any documentation under FOIA Exemption 5, or under FOIA Exemptions 2, 3, 4, 7(C) or 7(E). Rather, she only challenged the propriety of Defendant's withholding of responsive records under FOIA Exemption 7(A). *See* Docket No. 14 at 4-7.

On May 18, 2005, DOL filed a reply brief in support of its motion, stating that, in light of the recent conclusion of EBSA's investigation, Exemption 7(A) no longer applied. *See* Docket No. 19. Defendant acknowledged that Exemption 7(A) is temporal in nature

and is not intended to “endlessly protect material simply because it [is] in an investigatory file.” *Id.* at 3 (quoting *Robbins Tire and Rubber Co.*, 437 U.S. at 230). Defendant stated that it “should now be permitted to review those [former Exemption 7(A)] documents, process them under the FOIA, and release documents in whole or in part (or when appropriate, withhold documents)” under any other applicable FOIA exemption. *Id.* at 4. Defendant moved for leave to process these former Exemption 7(A) documents, Docket No. 20, and this Court granted Defendant’s request. Docket No. 22 (Minute Order filed July 1, 2005).

**E. Summary Judgment Briefing on the Exemption 7(a) Documents**

Following the conclusion of EBSA’s investigation, Defendant reprocessed the documents initially withheld under exemption 7(A). *See* Docket No. 23 at 4 and Supp. Miller Dec. at ¶ 2 and Exhibit 11-A. On June 27, 2005, DOL released 1,402 additional redacted pages. *Id.* at Supp. Miller Dec. at ¶ 3 and Exhibit 11-A.

On July 11, 2005, DOL filed its “Motion for Summary Judgment With Respect to Documents Initially Withheld Under FOIA Exemption 7(A).” *See* Docket No. 23. In the motion, DOL demonstrated that: (1) FOIA exemption 7(A) no longer applied because EBSA had now concluded its investigation; (2) the redactions to the 1,402 released pages were proper under various other FOIA exemptions; and (3) eleven documents withheld in their entirety were privileged and therefore exempt under FOIA Exemption 5 (protecting from disclosure documents normally privileged in civil discovery). *Id.*

On July 29, 2005, Plaintiff responded to DOL's July 11, 2005, motion by asking the Court to conduct *in camera* review of the 200 pages she believed DOL was still withholding. *See* Docket No. 24. In particular, she sought *in camera* inspection for the purpose of determining whether “the papers are properly exempt under either FOIA Exemption 4 or FOIA Exemption 5.”<sup>2</sup> In its August 18, 2005, reply, DOL stated that it was withholding 500 pages. Docket No. 27.

On December 2, 2005, the Court issued an Order granting in part and denying in part DOL's July 11, 2005, Motion for Summary Judgment. *See* Docket No. 28. The Court also granted in part and denied in part Plaintiff's motion for *in camera* review, ordering DOL to submit to the Court *in camera* a total of only 63 pages of material which

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<sup>2</sup> Plaintiff also alleged that DOL had failed to release eleven computer disks maintained by the EBSA investigator. DOL replied that a search of those disks revealed seventeen documents that had not been printed out and included in the investigation file, and therefore promised to process those seventeen documents and release the disclosable portions to Plaintiff. *See* Docket No. 27. Upon review, DOL determined that nine of the seventeen documents post-dated Plaintiff's FOIA request, and were therefore not responsive to the FOIA request. 29 C.F.R. § 70.20(f). DOL released the remaining eight documents, with redactions, to Plaintiff on December 27, 2005. On the same date, DOL disclosed four service contracts previously withheld under FOIA Exemption 4. Before releasing the exemption 4 documents, DOL was required to obtain permission from all of the contracting parties named in the service contracts, which took some time. *See* 5 U.S.C. § 552(b)(4); 29 C.F.R. § 70.26; Executive Order 12600. Of the nine withheld documents, DOL in February of 2006 released to Plaintiff six in their entirety, a seventh in part (with the final paragraph redacted based on attorney-client privilege), and withheld the two remaining documents (which were identical) in their entirety on the grounds of attorney-client privilege. Plaintiff did not dispute DOL's invocation of the attorney-client privilege with respect to the seventh document withheld in part, and the eighth and ninth documents withheld in full.

DOL had withheld under Exemption 5. *Id.* at 20, 22.

The Court stated in its December 2, 2005, Order that Plaintiff's "cumulative evidence shows a disturbing trend of agency behavior." *Id.* at 19. Citing seven acts or omissions by DOL, the Court observed that "[w]hile any one of the[se] instances . . . might be attributable to mistake, oversight or lack of internal agency coordination and communication . . . [together they] suggest[ ] a pattern of obstructing Hull's FOIA request and indicate[ ] that the DOL was not behaving in the spirit of FOIA . . . ." *Id.* The Court cited the following instances:

- (1) "failing to respond to the initial FOIA request in a timely fashion;"
- (2) "issuing a blanket denial of all documents under Exemption 7(A) prior to Hull's filing of a complaint but only disclosing detailed information after Hull initiated her lawsuit;"
- (3) "denying all information under Exemption 7(A) as relevant to a pending investigation and then disclosing substantial information while the investigation was allegedly still pending;"
- (4) "initially withholding some information to protect the identity of an investigator and then providing the name of that investigator in a disclosed document;"
- (5) "ending the Qwest investigation April 7, 2005 but not informing Hull until May 18, 2005, after Hull's attorney had responded to a DOL motion

rendered moot by the end of the investigation;"

- (6) "the absence of any documents in the file disclosed to Hull between May 2004 and April 2005, suggesting that the Qwest investigation in fact ended in May 2004 and that the DOL kept this investigation open for the sole purpose of denying documents as part of an ongoing investigation;" and
- (7) "belatedly discovering 17 documents pertinent to Hull's request only after Hull identified a discrepancy in DOL's *Vaughn* index."

*Id.* at 18. Citing *Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 546-47 (10<sup>th</sup> Cir. 2001), this Court emphasized the "very high threshold for a finding of bad faith," and declined to make a determination on whether DOL had acted in bad faith in responding to Plaintiff's FOIA request. *Id.* at 19. The Court did, however, find that these instances "strengthen[ ] my conclusion that these documents [consisting of 63 pages] should be submitted for *in camera* review." *Id.* at 20.

On January 13, 2006, the Court issued an order requiring DOL to disclose nine of the 63 pages it reviewed *in camera*. Docket Entry No. 32. As described by the Court in its January 13, 2006, Order, the documents at issue were as follows:

a case file describing the status of investigations into the U.S. West Pension Plans prior to the investigation at issue in this FOIA request. It does not contain any substantive information regarding the current investigation. It describes the status and results of an investigation that the documents describe as closed as of February 28, 2000.

Docket Entry No. 32 at 4. The Court found that DOL could not withhold the nine pages

under Exemption 5 because they "report on agency actions already taken, and so are not part of an agency deliberative process." *Id.* DOL released these nine pages to Plaintiff on January 23, 2006.

## II. ARGUMENT

### A. Plaintiff Is Not Entitled to an Award of Attorney Fees and Costs

FOIA provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Courts applying this fee-shifting provision engage in a two-step analysis: (i) is the plaintiff eligible for an award of fees and/or costs, and, if so, (ii) is the plaintiff entitled to the award. *See Anderson v. Dept. of Health and Human Services*, 80 F.3d 1500, 1504 (10<sup>th</sup> Cir. 1996).

To be eligible for an award, the plaintiff must "substantially prevail," *i.e.*, obtain a judicially sanctioned "alteration in the legal relationship of the parties." *See Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001) (interpreting the phrase "prevailing party" in the Fair Housing Amendments Act and the Americans With Disabilities Act); *see also Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 455-56 (D.C. Cir. 2002) (applying *Buckhannon* to phrase "substantially prevailed" in FOIA fee-shifting provision). This Court recognized the applicability of *Buckhannon* to FOIA cases – and

applied it – in its December 21, 2005, Order. *See* Docket Entry No. 28 at 20-21. DOL acknowledges that, in light of the Court's January 13, 2006, Order requiring DOL to release nine pages to the Plaintiff, Ms. Hull has obtained a judicially sanctioned "alteration in the legal relationship of the parties," and, therefore, has "substantially prevailed" as that term has been defined and applied in *Buckhannon*. Consequently, Plaintiff is *eligible* for an award of attorney's fees and costs.

Plaintiff must also show, however, that she is *entitled* to a fee award. In determining whether a FOIA plaintiff is entitled to a fee award, courts consider four factors:

- 1) the benefit to the public, if any, derived from the case;
- 2) the commercial benefit to the complainant;
- 3) the nature of the complainant's interest in the records sought; and
- 4) whether the government's withholding of the records had a reasonable basis in the law.

*Anderson*, 80 F.3d at 1504. Plaintiff here fails on all four counts.

**1. Plaintiff's FOIA Action Provides Minimal, If Any, Benefit to the Public**

The test for determining whether a FOIA action benefits the public is "whether the disclosure will assist the citizenry generally in making an informed judgment as to governmental operations." *Aviation Data Service v. FAA*, 687 F.2d 1319, 1323 (10<sup>th</sup> Cir. 1982). "Minimal, incidental and speculative public benefit will not suffice." *Id.*

Plaintiff's FOIA action was not useful to the public at large in making any judgments regarding governmental operations. Rather, the action was useful to QPP participants, a narrow subset of the public at large. *See* Plaintiff's Motion at 1, n.1. As she admits in her Motion, Plaintiff "commenced her FOIA request as part of her duties to help the retiree organization police the pension plan. . . ." *Id.* Additionally, the action was not relevant to "governmental operations," but, rather, to the actions of QPP, a private entity. Plaintiff as the president of AUSWR sought documents under the FOIA for the purpose of determining if Qwest was properly administering the pension plan. *Id.* Because Plaintiff's FOIA request was not for the purpose of "assist[ing] the citizenry generally in making an informed judgment as to governmental operations," Plaintiff fails to satisfy the first factor of the four-part test.

## **2. Plaintiff's FOIA Action Serves Private Commercial Interests**

The second factor (the commercial benefit to the plaintiff) and the third factor (the nature of the plaintiff's interest in the records sought) are closely related and often considered together. *Aviation Data Service*, 687 F.2d at 1322. These factors require an examination of whether the plaintiff had an adequate private or commercial incentive to litigate her FOIA demand even in the absence of an award of attorney's fees. *Id.* at 1321-22. The purpose of FOIA fee awards is to encourage plaintiffs who lack substantial private or pecuniary incentives to pursue their claims. *Lovell v. Alderete*, 630 F.2d 428, 433 n. 6 (5<sup>th</sup> Cir. 1980). A court generally should not award attorney's fees where the

plaintiff's "self-interest was the primary factor in bringing the suit." *Anderson*, 80 F.3d at 1505 (quoting *Aviation Data*, 687 F.2d at 1322). Under the second and third factors, a motive need not be strictly commercial; any private interest will do. *Tax Analysts v. United States Dep't of Justice*, 965 F.2d 1092, 1095 (D.C. Cir. 1992).

As noted above, Plaintiff stated that she "commenced her FOIA request as part of her duties to help the retiree organization police the pension plan, now called the Qwest Pension Plan." Plaintiff's Motion at 1, n.1. Further, Plaintiff stated that AUSWR was formed when U S West retirees "learned that U S West had improperly charged millions of dollars of expenses to U S West Pension Plan and was moving towards renegeing on a lifetime promise of health care benefits." *Id.* Thus, Plaintiff's FOIA action was part of an effort to "preserve and protect those benefits that we worked so hard to earn and that were promised to us." AUSWR Mission Statement, *supra*.<sup>3</sup>

But using FOIA as a substitute for discovery has routinely been found to constitute the pursuit of a private, non-compensable interest. *See, e.g., Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 712 (D.C. Cir. 1977); *see also Ellis v. United States*, 941 F. Supp. 1068, 1079 (D. Utah 1996) (compiling cases). The same reasoning applies to using FOIA to determine whether a cause of action against a private

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<sup>3</sup> ERISA recognizes that interest by including plan participants among those who have a right to sue for breach of fiduciary duties. 29 U.S.C. § 1132. And DOL notes that AUSWR has sued Qwest under ERISA for a breach of fiduciary duties. *Kerber, et al. v. Qwest Pension Plan, et al.*, No. 05-cv-00478-MSK (D. Colo).

party exists. Thus, Plaintiff's interest in this FOIA action is a private commercial one. Plaintiff fails to satisfy the second and third factors of the four-part test.

**3. DOL's Withholding of Information Had a Reasonable Basis in Law**

To satisfy the fourth factor in the test, the reasonable basis requirement, the agency must show that there was a reasonable or colorable basis for its withholding. *Aviation Data*, 687 F.2d at 1323. The fact that the agency complies with an order, rather than appeals it, does not preclude a finding that the agency had a colorable basis in law for invoking the exemption. *Cotton v. Heyman*, 63 F.3d 1115, 1119 (D.C. Cir. 1995). Both DOL's withholding of the nine pages that the Court ordered it to release, and DOL's withholding of 5,500 pages prior to voluntarily releasing them, had a reasonable basis in the law.

**a. DOL Had a Reasonable Basis in Law for Withholding, under FOIA Exemption 5, the Nine Pages That the Court Ordered it to Release**

The deliberative process privilege protects documents that are predecisional and deliberative. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). DOL relied on FOIA exemption 5's deliberative process privilege with respect to the nine pages that the Court ordered DOL to disclose, specifically, Bates Numbers 750-758. Those nine pages concerned a prior, closed EBSA investigation of QPP.

This Court ordered in its Order filed January 13, 2006, that the nine pages of material are not covered by Exemption 5. *See* Docket No. 32. The Court stated that the

document

does not contain any substantive information regarding the current investigation. It describes the status and results of an investigation that the documents describe as closed as of February 28, 2000. These documents report on agency action already taken, and so are not part of an agency deliberative process.

Docket No. 32 at 4.

But simply because a prior investigation is closed does not mean that deliberative documents related to it then become releasable. The deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Casad v. United States Dep't of Health and Human Services*, 301 F.3d 1247, 1251 (10<sup>th</sup> Cir. 2002) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)).

Moreover, DOL had a colorable basis for asserting that the nine-page document was deliberative in nature. A document is deliberative if it makes recommendations or expresses opinions on legal or policy matters. *Vaughn*, 523 F.2d at 1143-44. Here, the nine page document stated that the "scope of the investigation will be limited to pension plans sponsored, unless facts are developed indicating a subsequent review of welfare plans is warranted. See Exhibit E, attached hereto (Bates Nos. 750-758) at Bates No. 751. The document thus expressed an opinion on a legal matter, namely, the nature and scope of the investigation that had been initiated.

In short, DOL had a reasonable basis in law for withholding, under FOIA exemption 5, the nine pages of material. Disclosure of such documents would inhibit open and frank discussion among government officials in the future.

**b. DOL's Delay in Voluntarily Releasing 5,500 Pages to Plaintiff Did Not Constitute Obdurate Behavior or Bad Faith**

Where, as here, the plaintiff claims that the government did not have a reasonable basis in law for withholding "thousands of pages of responsive documents" until after plaintiff filed suit, the delay does not favor an award unless the government has engaged in obdurate behavior or bad faith. *Ellis*, 941 F. Supp. at 1080; *see Frydman v. Dep't of Justice*, 852 F. Supp. 1497, 1512 (D. Kan. 1994) (finding that although eight month delay in disclosing document after it was discovered demonstrated some sluggishness by agency, it did not show bad faith), *aff'd*, 57 F.3d 1080 (10<sup>th</sup> Cir. 1995) (table). Citing *Rugiero*, 257 F.3d at 546-47, the Court recognized that "[t]he standard for a finding of bad faith is 'very high' and usually requires 'strong evidence.'" Docket Entry No. 28 at 17. In *Rugiero*, the Tenth Circuit posited the withholding of information that would embarrass the agency, or show it engaged in a cover-up, as examples of bad faith. 257 F.3d at 546. This Court recognized that "mistake, oversight, or lack of internal agency coordination or communication" do not ordinarily suffice to establish bad faith. Docket No. 28 at 19.

The seven factors the Court cited as demonstrating "a disturbing trend of agency behavior" contravening "the spirit of FOIA," Docket No. 28 at 19, do not add up to

obdurate behavior or bad faith, but at most only mistake, oversight, or lack of internal agency coordination and communication. First, the Court cited DOL's failure to respond to the initial FOIA request in a timely fashion. DOL responded, however, to Plaintiff's March 3, 2004, FOIA request on March 4, 2004. The one-day response was timely. Therefore, it appears that it was not the timeliness of DOL's *response* that troubled the Court, but, rather, the timeliness of DOL's *disclosures*. The timeliness of DOL's disclosures is implicated by the second factor cited by the Court, discussed below.

The second factor cited by the Court was DOL's "issuing a blanket denial of all documents under Exemption 7(A) prior to Hull's filing of a complaint but only disclosing detailed information after Hull initiated her lawsuit." DOL's initial blanket denial was consistent with the Supreme Court's holding that an agency need not make its Exemption 7(A) determination on a document-by-document basis; rather, the agency may make the Exemption 7(A) determination generically, based on the types of records involved. *Robbins Tire*, 437 U.S. at 236. The Department of Labor Solicitor's affirmance on appeal of EBSA's initial blanket denial explains that this was precisely the reason for the blanket denial.

Exemption 7(A) is temporal, however; it does not "endlessly protect material simply because it [is] in an investigatory file." *Robbins Tire*, 437 U.S. at 230. Thus, as an investigation progresses, an agency may obtain a clearer understanding of whether the release of certain records is reasonably likely to impede the investigation or an

enforcement proceeding. DOL's decision on October 19, 2004, to release disclosable documents to the Plaintiff was entirely consistent with this principle, and did not conflict with its earlier decision to withhold all material. Moreover, as a practical matter, it is not unreasonable that a request for 6,587 pages would engender some delay. Here it took DOL approximately seven weeks, from Plaintiff's October 25, 2004, assurance that she would fully pay the cost of her FOIA request, until DOL's December 15, 2004, release of 4,275 pages, a CD, and a floppy disk. Then, following EBSA's April 7, 2005, closure of the investigation, EBSA had to undertake a second review of its entire file to determine what could be released in light of the expiration of Exemption 7(A)'s applicability. Approximately two-and-a-half months later, DOL released an additional 1,400 pages to Plaintiff on June 27, 2005.

Given the scope of Plaintiff's request, some delay was unavoidable. *Ellis*, 941 F. Supp. at 1080; *Frydman*, 852 F. Supp. at 1508; *Republic of New Afrika v. FBI*, 645 F. Supp. 117, 122 (D.D.C. 1986) (stating that plaintiff must show that government purposely withheld documents, not that it merely delayed in producing them); *Simon v. United States*, 587 F. Supp. 1029, 1032 (D.D.C. 1984) (declining to award attorney's fees for sluggish agency response, stating that an agency's failure to meet FOIA deadlines does not warrant an award of fees without evidence of bad faith); *Guam Contractors' Ass'n v. United States Dep't of Labor*, 570 F. Supp. 163, 170 (N.D. Cal. 1983) (declining to award fees where FOIA request was met with some "foot-dragging" and lack of cooperation, but

there was no factual basis to justify a finding of bad faith). "Delay due to bureaucratic ineptitude alone is not sufficient to weigh in favor of an award of attorney's fees." *Read v. FAA*, 252 F. Supp. 1108, 1112 (W.D. Washington 2003). No facts here indicate that DOL purposely delayed its FOIA response to prevent government embarrassment or to thwart the requester.

The third factor cited by the Court was DOL's "denying all information under Exemption 7(A) as relevant to a pending investigation and then disclosing substantial information while the investigation was allegedly still pending." The fact that DOL initially denied the FOIA request, then released over 4,000 pages nine months later, and another 1,400 pages six months after that, evidences an agency carefully balancing its FOIA obligations with its statutory mission of enforcing ERISA. To the extent DOL's delayed releases may have been the product of earlier errors, DOL should not be punished for correcting its errors. Rather, such corrective action demonstrates DOL's good faith.

The fourth factor cited by the Court was DOL's "initially withholding some information to protect the identity of an investigator and then providing the name of that investigator in a disclosed document." DOL routinely withholds information that would reveal an investigator's identity.<sup>4</sup> DOL intended to do so here, but inadvertently released

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<sup>4</sup> Public disclosure of an investigator's identity while an investigation is pending could compromise the integrity of the investigation by exposing internal, non-public agency information to members of the general public, who could misuse the information to hinder the investigation.

the investigator's name. An error committed by DOL in Plaintiff's favor does not evidence bad faith.

The fifth factor cited by the Court was DOL's "ending the Qwest investigation April 7, 2005 but not informing Hull until May 18, 2005, after Hull's attorney had responded to a DOL motion rendered moot by the end of the investigation." DOL admits that it should have informed Plaintiff as soon as EBSA's investigation of QPP concluded. Its failure to do so until May 18, 2005, however, resulted from a failure of communications between various DOL components. Had DOL's attorneys known that EBSA was on the verge of concluding its investigation, they certainly would not have expended time on a Motion for Summary Judgment, based in large part on FOIA exemption 7(A), that would become moot six days after its April 1, 2005, filing. As discussed above, bureaucratic miscommunication is not a proper basis for an award of attorney's fees and costs. DOL, however, apologizes to the Court, Plaintiff, and Plaintiff's counsel, for the inconvenience caused by this miscommunication.

The sixth factor cited by the Court was "the absence of any documents in the file disclosed to Hull between May 2004 and April 2005, suggesting that the Qwest investigation in fact ended in May 2004 and that the DOL kept this investigation open for the sole purpose of denying documents as part of an ongoing investigation." The absence of any documents in the file disclosed to Plaintiff between May 2004 and April 2005 reflects the principle that documents created after submission of a FOIA request are not

within the scope of the request. 29 C.F.R. § 70.20(f). The Court questioned the credibility of this explanation, noting that DOL had released three documents post-dating Plaintiff's FOIA request. Docket Entry No. 28 at 19. Since then, however, DOL has released numerous additional documents post-dating Plaintiff's FOIA request, *i.e.*, the seven documents released to Plaintiff in February 2006. DOL released those documents to Plaintiff not because it believed it was obligated to do so, but, rather, in a good faith effort to resolve the only outstanding substantive issue remaining in this litigation. Thus, the fact that DOL ultimately disclosed several documents post-dating Plaintiff's FOIA request reflects DOL's good faith in this matter. Regardless, DOL's release of these additional documents, one of which was dated March 7, 2005, proves that the investigation remained open between May 2004 and April 2005.

The seventh and final factor cited by the Court was DOL's "belatedly discovering 17 documents pertinent to Hull's request only after Hull identified a discrepancy in DOL's *Vaughn* index." DOL's admission that it had neglected to consider 17 documents, and its subsequent production of 15 of them, evidences DOL's good faith in this matter. DOL should not be punished for candidly admitting – and correcting – its mistakes.

In sum, the seven incidents listed in the Court's December 2, 2005 Order show nothing more than the delay inherent in, and the bureaucratic mistakes attendant to, an agency's processing of a FOIA request of this magnitude. There is no evidence that DOL engaged in obdurate behavior or bad faith, or had any intent to withhold documents that

might embarrass it, or to thwart the Plaintiff. If that was DOL's intent, it would not have released 5,500 pages. If, as Plaintiff alleges, DOL's intent was to avoid paying Plaintiff's attorney fees and costs, it could have done so far more simply by complying with Plaintiff's request before litigation began (which would have allowed DOL to avoid expenditure of its own attorneys' resources as well). To the contrary, there is significant evidence of DOL's good faith: the Solicitor's specific answer, in his FOIA appeal decision, to Plaintiff's question regarding why documents submitted by QPP to EBSA could not be released under FOIA; DOL's correction of its errors; DOL's admission that 500 pages remained in dispute when Plaintiff erroneously stated that 200 pages remained in dispute; DOL's re-evaluation of the applicability of the 7(A) exemption as the investigation progressed; and DOL's concession to release documents post-dating Plaintiff's FOIA request for the purpose of amicably resolving the only remaining document dispute. Accordingly, Plaintiff is not entitled to an award of attorney fees and costs.

**B. Sanctions Against DOL Under 5 U.S.C. § 552(a)(4)(F) or 28 U.S.C. § 1927 Are Not Warranted**

Plaintiff seeks sanctions against DOL under 5 U.S.C. § 552(a)(4)(F) and 28 U.S.C. § 1927. Both claims lack merit.

**1. Sanctions Are Not Appropriate Under § 552(a)(4)(F) Because DOL Did Not Act Arbitrarily and Capriciously**

Section 552(a)(4)(F) of the FOIA provides as follows:

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.

5 U.S.C. § 552(a)(4)(F). Thus, before a court may even consider issuing a finding against an agency under this provision, there must be both a court order requiring an agency to produce records and an award of attorney fees and costs. DOL acknowledges that there is the requisite court order, *i.e.*, the Court's January 13, 2006 Order requiring DOL to produce nine pages. Docket Entry No. 32. The Court may not, however, consider a finding against DOL under this provision if it denies attorney fees and costs. Even if the Court awards attorney fees and costs, a finding that the circumstances suggest DOL acted arbitrarily and capriciously is unwarranted for all the reasons advanced in Part A, above.

**2. Sanctions Are Not Appropriate Under § 1927 Because Plaintiff Admits That DOL's Attorney Is Not Responsible for the Behavior on Which the Request for Sanctions Is Based**

Plaintiff's motion for sanctions under 28 U.S.C. § 1927 also lacks merit. That section provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Plaintiff defeats her own case by conceding that she is "not placing the

blame personally on [the] United States Assistant Attorney" who represented DOL. Plaintiff's Motion at 4. Rather, Plaintiff contends that "DOL's actions were calculated to cause Hull to incur a lot of trouble before the federal agency would perform its duty under FOIA." *Id.* The statute, however, permits imposition of sanctions only upon an "attorney or other person admitted to conduct cases in any court . . . ." 28 U.S.C. § 1927. The statute nowhere mentions federal agencies as being subject to sanctions. Regardless, for the reasons discussed in Part A, above, neither DOL nor its counsel has done anything in this case that warrants sanctions under this provision.

**C. Even if Plaintiff Is Entitled to Attorney Fees and Costs, Plaintiff Has Not Properly Demonstrated that She is Entitled to Fees at Counsel's Rate of \$300 Per Hour**

The FOIA fee provision provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E).

A reasonable hourly rate is initially calculated by considering the "prevailing market rate in the relevant community" for similar services by lawyers of comparable skill, experience and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). *See also National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1323 (D.C. Cir. 1982) (*en banc*) (citing *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir.1980) (*Copeland III*) (finding that a reasonable hourly rate was the rate "prevailing in

the community for similar work”). As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is “inherently difficult.” 465 U.S. at 895, n. 11. In light of this difficulty, the Court gave broad discretion to the lower courts to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id.* The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id.*

In this case, Plaintiff has failed to demonstrate that the \$300 rate claimed is appropriate. Plaintiff’s counsel asserts only that his “customary hourly rate” is \$300.00. Plaintiff’s Motion at Exhibit 1, ¶ 2. Plaintiff fails to provide any evidence as to the prevailing market rate in the “relevant community” with respect to FOIA cases, and particularly with respect to the individual circumstances of this case.

Therefore, this Court should not award fees to Plaintiff at the rate of \$300 per hour, assuming that the Court determines that an award of fees is appropriate.

**D. Even If Plaintiff Is Entitled to Attorney Fees and Costs, the Amount Awarded Should Be Commensurate with the Degree to Which Plaintiff Prevailed**

**1. Attorney’s Fees**

Plaintiff “substantially prevailed” in this case by persuading the Court to order DOL to produce nine pages it had withheld. *See Buckhannon*, 532 U.S. at 605; *Oil, Chemical & Atomic Workers*, 288 F.3d at 455-56. Therefore, if Plaintiff is entitled to attorney fees and costs, the amount awarded should be for the work Plaintiff’s counsel did to obtain those nine pages. *See Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983)

(where plaintiff prevailed only partially, the court may reduce the amount of attorney fees award to account for the limited success); *Anderson*, 80 F.3d at 1506 (court may reduce FOIA attorney fees where attorney claimed time spent on issues on which plaintiff did not prevail). Where the plaintiff's claims are so intertwined as to provide no principled basis for eliminating specific hours from the fee award, courts have awarded a percentage of the fees claimed commensurate with the estimated degree to which the plaintiff prevailed. *E.g.*, *Mims v. Schapp*, 744 F.2d 946, 955 (3d Cir. 1984) (reduction of 50%); *see also McDonnell v. United States*, 870 F. Supp. 576, 588-89 (D. N.J. 1994) (cases collected).

The proper percentage to apply here would be two percent. Plaintiff initially sought 6,587 pages and "substantially prevailed" with respect to just nine. However, the parties had narrowed the dispute to 500 pages, for which Plaintiff sought *in camera* review. Rejecting Plaintiff's motion for *in camera* review of all 500 pages, the Court agreed to review only 63 pages *in camera*, and found that DOL was required to release only nine of them. Nine out of 500 is approximately two percent. Plaintiff claims \$27,000 for attorney fees and \$570 for costs. Two percent of \$27,570 is \$551. Accordingly, if the Court finds Plaintiff entitled to attorney fees and costs, it should award that amount.

Alternatively, if the Court is disinclined to apply a "percentage" approach in calculating a fees and costs award, Plaintiff should only be awarded fees and costs for that work which Plaintiff's counsel performed on Plaintiff's second petition for *in camera*

review, which Plaintiff filed on July 29, 2005, *see* Docket No. 24, but only to the extent that this Court granted Plaintiff's request for such review. According to Plaintiff's counsel's declaration, attached to Plaintiff's Motion, counsel worked on this second *in camera* petition on July 25, 2005 for 0.8 hours; on July 28, 2005 for 5.1 hours (although some of that time was also spent on drafting Plaintiff's opposition to DOL's motion for summary judgment); and on July 29, 2005 for 4.0 hours (although again some of that time was spent drafting Plaintiff's opposition to DOL's summary judgment motion). At most, Plaintiff's counsel spent approximately ten hours drafting Plaintiff's opposition brief and Plaintiff's second *in camera* petition. Plaintiff seeks an award at her counsel's hourly rate of \$300 per hour. *See* Plaintiff's Motion at Exhibit 1, ¶ 2.

Plaintiff sought *in camera* review of the documents Defendant was withholding at that time, a total of approximately 500 documents. *See* Docket No. 27 at 3, n.2. But this Court granted *in camera* review of only 63 documents, approximately 12.5% of the total number of documents (500) withheld.

Plaintiff's counsel's time spent on her second *in camera* petition, somewhat less than ten hours at \$300 per hour, is somewhat less than \$3,000. Twelve and a half percent of \$3,000 (given that Plaintiff only obtained *in camera* review of approximately 12.5% of the documents withheld), yields an award of fees and costs of only approximately \$375.

Therefore, if this Court finds that Plaintiff is both entitled to and eligible for an award of fees and costs, and the Court determines that the award should be based on the

work Plaintiff's counsel performed on the second *in camera* petition, Plaintiff should only be awarded approximately \$375.

**2. Costs**

Plaintiff seeks costs of \$570.00 as follows: (1) \$150 in costs for filing the Complaint, and (2) \$420 for copying approximately 6,000 pages of material at seven cents per page. *See* Plaintiff's Motion at Exhibit 1, ¶ 13. Defendant does not dispute that, if Plaintiff is deemed eligible for and entitled to fees and costs, Plaintiff may properly be awarded \$150 in costs for the filing of her Complaint. But Plaintiff should not be awarded \$420 in costs. As Defendant noted above, Plaintiff only "substantially prevailed" in this case with respect to nine pages of material that this Court ordered Defendant to release to Plaintiff. Plaintiff did not "substantially prevail" with respect to her request for the 6,000 pages of material. *See Buckhannon*, 532 U.S. at 605; *Oil, Chemical & Atomic Workers*, 288 F.3d at 455-56. Therefore, Plaintiff cannot be awarded costs for copying these 6,000 pages of material.

///

///

### III. CONCLUSION

WHEREFORE, the Defendant respectfully requests that the Court deny Plaintiff's Motion for Judicial Decree and Award of Attorney's Fees and Reimbursement of Expenses.

Dated this 2<sup>nd</sup> day of May, 2006.

WILLIAM J. LEONE  
United States Attorney

s/ Michael C. Johnson  
Assistant United States Attorney  
1225 Seventeenth Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 454-0134  
FAX: (303) 454-0408  
E-mail: [michael.johnson2@usdoj.gov](mailto:michael.johnson2@usdoj.gov)  
Counsel for Defendant

Of Counsel:

Edward Waldman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of May, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant:

Counsel for Plaintiff:

Curtis L. Kennedy  
8405 E. Princeton Avenue  
Denver, Colorado 80237-1741

s/ Michael C. Johnson  
Assistant United States Attorney  
1225 Seventeenth Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 454-0134  
FAX: (303) 454-0408  
E-mail: [michael.johnson2@usdoj.gov](mailto:michael.johnson2@usdoj.gov)  
Counsel for Defendant

U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210



October 19, 2004

Curtis L. Kennedy  
8405 E. Princeton Avenue  
Denver, Colorado 80237

Re: Hull v. U.S. Department of Labor, No.  
04-B-1264 (OES) (D. Colo.)

Dear Mr. Kennedy:

The Department of Labor is prepared to release the disclosable records from the ongoing investigation of the Qwest Pension Plan, which are the subject of the captioned case brought under the Freedom of Information Act (FOIA). However, pursuant to the Department's FOIA regulations, 29 C.F.R. § 70.42(c), you must be notified that the likely cost of the disclosure will be approximately \$750.00. Accordingly, we need "satisfactory assurance of full payment" before we duplicate the disclosable records and mail them to you.

In light of the requirements of section 70.42(c), you should fax your written assurance of full payment of the FOIA fees in this case to me at 202-693-5538. If you have any questions about this matter, please contact Jennifer Toth at 202-693-5513.

Sincerely,

*Miriam McD. Miller*  
Miriam McD. Miller  
Co-Counsel for Administrative Law

EXHIBIT A

cc: Michael C. Johnson, AUSA

**CURTIS L. KENNEDY**  
**ATTORNEY AT LAW**

8405 E. PRINCETON AVE.  
DENVER, CO 80237-1741  
CurtisLKennedy@aol.com

TELEPHONE (303) 770-0440

FAX (303) 843-0360

ALSO ADMITTED IN:  
UNITED STATES SUPREME COURT  
STATE OF ARIZONA  
STATE OF OKLAHOMA  
STATE OF TEXAS  
WASHINGTON, D.C.

October 25, 2004

Miriam McD. Miller, Esq.  
Office of the Solicitor  
DEPARTMENT OF LABOR  
200 Constitution Ave. NW, Room N2824  
Washington, D.C. 20210  
Tele: 202-693-5513 (Jennifer Toth)  
Fax: 202-693-5538

(Via Fax)

Michael C. Johnson, Esq.  
Assistant United States Attorney  
UNITED STATES ATTORNEY'S OFFICE  
1225 17<sup>th</sup> Street, 7<sup>th</sup> Floor  
Denver, CO 80202  
Tele: 303-454-0134  
Fax: 303-454-0404

Re: *Hull v. Department of Labor* (FOIA matter), Case No. 04-B-1254 (OES)  
Payment for FOIA Disclosures

Dear Counsel:

I received Ms. Miller's October 19, 2004, letter stating the DOL is, now, prepared to release the disclosable records and anticipates the charges will be near \$750. As I told Ms. Toth today, I will promptly send full payment when you are ready to bill me.

Please advise whether you can send to me any of the responsive materials in electronic computerized format. Also, please advise whether any documents are being withheld and, if so, whether you will be providing a Vaughn Index concerning any withheld documents. Since the DOL is complying after defending the FOIA lawsuit, we request the DOL's agreement to pay reasonable attorney's fees and costs.

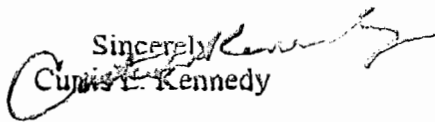
Sincerely,  
  
Curtis L. Kennedy

EXHIBIT B

c: Mimi Hull

U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210



December 2, 2004

Curtis L. Kennedy  
8405 E. Princeton Avenue  
Denver, Colorado 80237

Re: Hull v. U.S. Department of Labor, No.  
04-B-1264(OES)(D. Colo.)

Dear Mr. Kennedy:

This responds to your letter dated December 1, 2004. Pursuant to your Freedom of Information Act (FOIA) request dated March 3, 2004, the Department of Labor is preparing to release one CD, one floppy disk, and 4,275 pages of disclosable information from the ongoing investigation of the Qwest Pension Plan. The cost of copying this material at .15 per page is \$626.25. Please make your check for this amount payable to the "U.S. Treasury." If you have any questions about this matter, please contact Jennifer Toth at 202-693-5513.

Sincerely,

Miriam McD. Miller  
Co-Counsel for Administrative Law

cc: Michael C. Johnson, AUSA

EXHIBIT C

**CURTIS L. KENNEDY**  
ATTORNEY AT LAW  
8405 E. PRINCETON AVE.  
DENVER, CO 80237-1741  
CurtisLKennedy@aol.com

TELEPHONE (303) 770-0440

FAX (303) 843-0300

ALSO ADMITTED IN:

UNITED STATES SUPREME COURT  
STATE OF ARIZONA  
STATE OF OKLAHOMA  
STATE OF TEXAS  
WASHINGTON, D.C.

December 2, 2004

Miriam McD. Miller, Esq.  
Office of the Solicitor  
DEPARTMENT OF LABOR  
200 Constitution Ave. NW, Room N2824  
Washington, D.C. 20210  
Tele: 202-693-5513 (Jennifer Toth)  
Fax: 202-693-5538

(Via Fax)

Michael C. Johnson, Esq.  
Assistant United States Attorney  
UNITED STATES ATTORNEY'S OFFICE  
1225 17<sup>th</sup> Street, 7<sup>th</sup> Floor  
Denver, CO 80202  
Tele: 303-454-0134  
Fax: 303-454-0404

Re: *Hull v Department of Labor* (FOIA matter), Case No. 04-B-1254 (OES)  
Payment for FOIA Disclosures

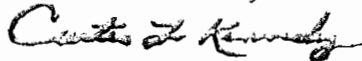
Dear Counsel:

I received Ms. Miller's December 2, 2004, letter stating the DOL is preparing to send me one CD, one floppy disk and 4,275 pages of disclosable information.

Today, I have mailed to Ms. Miller's office my check No. 4167 payable to the "U.S. Treasury" in the amount of \$626.25 (See copy attached hereto).

Mr. Johnson, please advised of the DOL's response to my November 16, 2004, request for payment of fees, which request was faxed and mailed to you. Thank you.

Sincerely



Curtis L. Kennedy

c/ Mimi Hull  
Attachment (Check No. 4167)

EXHIBIT D

CURTIS L. KENNEDY LAW OFFICES  
OPERATING ACCOUNT  
8405 E. PRINCETON AVE. 303-770-0440  
DENVER, CO 80237-1741

4167

*December 2, 2005*  
Date 23-82/1020

Pay to the Order of U.S. Treasury \$ 626.25

*Six Hundred Twenty Six and 25/100* Dollars    
\$ 626.25



**BANK OF DENVER**  
1334 California St. 303-733-2300 Cash Serv. 303-678-3434  
Spendable Branch (inside Club Front) 4500 E. University Dr.  
800 E. 17th Ave. • Denver, Colorado 80202  
Add Bk. No. 008 W. Code. • Denver, Colorado 80202

For Walter D. K. *Curtis L. Kennedy*

⑆ 1020009261⑆ 01 8805 8⑈ 4167

04/25/2001  
06:22:09

U.S. Department of Labor  
Pension and Welfare Benefits Administration

Case Number 60-009088 (48 ) Form TAB 205  
Case Name Us West Pension Plan

Date Open 01/10/1995  
Investigator Clark, Anita R

Characteristics of Case

Source Referral from the IRS via Form 6212B

NO Project Not a Project Case

RO Project

Report No.

SCD 07/31/2000

Statute Cont. NO

EIN/PN 840926774 / 005 Status CLOSED

Subject of Case

Name Us West Pension Plan

Address 7800 EAST ORCHARD ROAD

p code 80111

SMSA

City ENGLEWOOD

State CO

Characteristics of Subject

Type of Subject Plan

Prov. Relation

Type of Plan Single Employer or Controlled

Other Feature

Type of Benefit

1. All Other Defined Benefit

2.

3.

Characteristics of Plan

Participants Contributions

Business Code 4825

Plan Month Dec

Plan Year 1993

Participants

Total Assets

Contributions

109,264

9,249,144,000

0

LM Numbers 1.

2.

3.

Staff Assignment/Approval

Investigator Clark, Anita R

Supervisor O'Brien, John W

Approved

By Cms, Conversion

Date 01/10/1995

750

04/25/2001  
06:22:14

U.S. Department of Labor  
Pension and Welfare Benefits Administration

Case Number 60-009088 (48 ) Form TAB 205  
Case Name Us West Pension Plan

Date Open 01/10/1995  
Investigator Clark, Anita R

Opening Narrative

CASE OPENING BASED ON IRS REFERRAL. REVIEW OF INDICES REVEALED PRIOR CASE 60-8879(53), WHICH WAS CLOSED 3-31-94. REVIEW OF THIS CASE FILE REVEALED THE PRIOR INVESTIGATION INVOLVED CERTAIN WELFARE BENEFIT PLANS ONLY. THE SCOPE OF THIS INVESTIGATION WILL BE LIMITED TO PENSION PLANS SPONSORED, UNLESS FACTS ARE DEVELOPED INDICATING A SUBSEQUENT REVIEW OF WELFARE PLANS IS WARRANTED. SEVERAL REFERENCES TO SPONSOR WERE ALSO NOTED IN ZERO FILES, WHICH WILL BE REVIEWED AND INCORPORATED IN THE INVESTIGATIVE PLAN AS WARRANTED.

REVIEW OF NATIONAL OFFICE OED EXEMPTION REQUESTS REVEALED TWO OPEN REQUESTS, ONE OPEN REQUEST WHICH HAS BEEN TENTATIVELY DENIED, AND ONE CLOSED REQUEST WHICH WAS DENIED BY RULING.

REVIEW OF DRC OPEN CASE REVEALED NO REFERENCES TO SPONSOR.

ON-SITE INVESTIGATION TO DATE REVEALED THE PAYMENT OF ADMINISTRATIVE EXPENSES TO THE PLAN SPONSOR, AND THAT THE PLAN DOCUMENTS FOR PLANS 005 AND 006, WHICH WERE MERGED IN 1993, WERE PROACTIVELY AMENDED TO PROVIDE FOR SUCH PAYMENTS.

CASE CONVERTED TO A PROGRAM 48 AND ADDITIONAL INVESTIGATION WILL BE CONDUCTED TO DETERMINE WHETHER VIOLATION OF SECTIONS 404 AND 406 OCCURRED.

751

04/25/2001

06:22:12

**U.S. Department of Labor**  
**Pension and Welfare Benefits Administration**  
**EMS Primary Issues**

**Case Number** 60-009088(48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995

**Investigator** Clark, Anita R

---

**Issue 1** Prohibited use of assets

04/25/2001

**U.S. Department of Labor**

06:23:14

**Pension and Welfare Benefits Administration**

**EMS 215A**

**Case Number** 60-009088 (48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995

**Investigator** Clark, Anita R

---

**Closing Date** 02/28/2000

**Reason for Closing** Closed with results

**Effects of Results**

**No. of Plans Affected**

1

**No. of Participants Affected**

109,264

04/25/2001

06:23:15

**U.S. Department of Labor**

**Pension and Welfare Benefits Administration**

**EMS 215A Monetary Results**

**Case Number** 60-009088 (48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995 **Investigator** Clark, Anita R

<b>Result Date</b>	<b>Amount</b>	<b>Approval Status</b>
<b>Source</b>		<b>Approved by</b>
<b>Code</b>		<b>Approved Date</b>
02/11/2000	\$1,482,946	Approved
Voluntary compliance - PWBA		Levitas, Alan H
PAR		03/31/2000

<b>Total of Records</b>	1	<b>Assets Restored Total</b>	\$1,482,946
		<b>Prohibited Total</b>	\$0
		<b>Total</b>	\$1,482,946

04/25/2001

**U.S. Department of Labor**

06:23:16

**Pension and Welfare Benefits Administration**

**EMS - Violations**

**Case Number** 60-009088 (48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995 **Investigator** Clark, Anita R

---

**Violation**

- 1 404(a)(1)(B).1.o - Other substantive imprudence
- 2 406(a)(1)(D).1 - Transfer of Property or Assets
- 3 406(b)(2).2 - Other 406(b)(2)

04/25/2001

06:23:21

**U.S. Department of Labor**

**Pension and Welfare Benefits Administration**

**EMS 213A Civil Voluntary Compliance Letters**

**Case Number** 60-009088(48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995

**Investigator** Clark, Anita R

---

<b>Event Date</b>	<b>Event Description</b>
11/08/1995	VC Letter Issued
09/29/1997	VC Response Received

---

04/25/2001

**U.S. Department of Labor**

06:23:38

**Pension and Welfare Benefits Administration**

**EMS 213A Civil Voluntary Compliance Letters**

**Case Number** 60-009088 (48)

**Case Name** Us West Pension Plan

**Date Open** 01/10/1995

**Investigator** Clark, Anita R

---

<b>Event Date</b>	<b>Event Description</b>
11/08/1995	VC Letter Issued
09/29/1997	VC Response Received

---

U.S. DEPARTMENT OF LABOR  
 PENSION AND WELFARE BENEFITS ADMINISTRATION  
 OFFICE OF EXEMPTIONS AND DETERMINATIONS

CONTROL ID	SEC	AN	EXEM TYPE	PLAN NAME	ST	ZIP	GRANT NO	EIN/PN	TRANS TYPE	STAT	DATE RECD	DATE CLOSED
D092229	6	KU	I	UROLOGYSPECIALISTPS	SD			/		C2D	10/16/92	12/08/93
D03696	2	LH	I	US BOSTONCORMPMP	MA			/		C2E	08/20/82	03/01/83
D03695	2	LH	I	US BOSTONCORPPSP	MA			/		C2E	08/20/82	03/01/83
L00008	2	GL	I	US INDUS	NY			/		C2A	11/25/74	08/20/80
D10443	2	GL	I	US STEEL CORP EMP PEN BEN(INDUS BK	NY	10020	1997-40	250996816/001		C1B	03/31/97	07/31/97
D00763	3	***	I	US TRADI	DC			/		C2A	04/25/77	07/14/78
L09583	3	AB	I	US WESTINGC	DC	00000	1998-51	/		C1B	11/16/93	11/09/98
D09083	2	RW	I	US WESTMANAGEMENTPP	DC	00000		/	I	C1B	05/11/92	05/06/96
D09082	2	RW	I	US WESTPENSIONPLAN	DC	00000		/	I	C2E	05/11/92	05/06/96
L09588	6	AB	I	US WESTRETIREHEALT	DC			/		C4	11/23/93	02/16/94
D00779	6	***	I	USAA INV	DC			/		C2C	06/09/77	01/06/78
D04551	3	DC	I	USAA LT DISABINCPPL	TX			/		C4	06/13/83	11/29/83
D04550	3	DC	I	USAA MED&DENTAL PL	TX			/		C4	06/13/83	11/29/83
D04548	3	DC	I	USAA RETIREMENT PL	TX			/		C4	06/13/83	11/29/83
D04549	3	DC	I	USAA SAV&INVEST PL	TX			/		C4	06/13/83	11/29/83
D05457	3	MJ	I	USADMINISTRATORS	CA			/		C2B	05/22/84	07/26/84
D03744	3	SM	I	USFIDELITYGUARCO	MD			/		C4	09/09/82	01/03/83
D04996	3	PA	I	USGA, INC	NY		1984-150	/		C1B	11/18/83	10/12/84
D14008	3	JB	I	USI INSURANCE SERVICES CORP 401 (K)	PA	19341		232806586/001		C2B	01/28/97	05/21/97
D14991	3	JB	I	USI INSURANCE SERVICES CORP 401 (K)	PA	19341		232806586/001		C3	08/12/97	07/01/98
D07616	2	CB	I	USLEAGUESAVINGSASS	OK			/		C2D	05/16/88	06/09/88
D02875	5	S	C	USLEAGUESVGSASSOC	IL			/		C1A	09/15/81	06/01/82
D08732	6	AB	I	USNATLBANKPENPLAN	PA			/		C1B	05/21/91	07/07/92
D08671	6	PW	I	USPCI, INCSAVPL	PA			/		C1B	03/13/91	10/11/91
D08687	3	EB	I	USTRUSTCONYPOOLPPS	NY		1991-61	/	B	C1B	03/29/91	04/24/92
D01455	3	HG	I	UT AUTOMOBILEDLR	NY	00000	1992-30	/		C2D	07/17/79	09/21/79
L00894	3	RA	I	UT LABRVF	UT			/		C1B	09/07/77	02/12/80
D00738	3	HG	I	UT PIPETRADES	UT		1980-06	/		C2A	03/07/77	06/15/79
D00442	2	***	I	UT VALLEYRADIOLOG	UT			/		C2C	03/24/76	06/22/77
D02152	2	JB	I	UTAHCARP&CEMENTMAS	UT		1981-42	/		C1B	09/23/80	06/02/81
D02627	2	JB	I	UTAHPIPETRADESVA	UT		1981-110	/		C1B	06/09/81	11/20/81
D08466	2	GL	I	UTICACUTLERYCOPP	NY		1991-36	/		C1B	07/20/90	06/18/91
D08467	2	GL	I	UTICACUTLERYCOPP	NY		1991-36	/		C1B	07/20/90	06/18/91
D023361	3	PA	I	UTILLITYCONCRETEPRO	IL			/		C2E	01/21/81	03/05/81
D00731	4	CH	I	UTILLTRAILER				/		C2B	04/13/77	12/17/80
D00423	4	***	I	UTILLTRAILERSLS				/		C2C	02/25/76	06/01/77
L00732	3	***	I	UTILLTRAILERSLS				/		C3	03/01/77	08/04/77
D02440	3	SM	I	UTZPOTATOCCHIPCOINC	PA			/		C2B	02/27/81	04/07/81
D01270	3	DS	I	VA MTG	FL			/		C2A	12/27/78	03/18/80
L06439	3	MF	I	VA TEAMSTERS#83H&W	VA			/		C2E	10/30/85	03/26/86
L06646	3	MF	I	VA TEAMSTERS#83H&W	VA		1986-110	/		C1B	03/21/86	09/05/86

08/11/99

10828 Pension/Welfare/Thrift/ExPRO - All cases

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