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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE
ROBERTS, enrolled Nooksack Tribal members,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR; BUREAU OF INDIAN AFFAIRS;

Defendants.

NO. _____

COMPLAINT FOR INJUNCTIVE
RELIEF

I. INTRODUCTION

1. On March 8, 2013, Plaintiffs submitted a Freedom of Information Act (FOIA) request to Defendant Bureau of Indian Affairs (“BIA”) seeking information pertaining to federal action related to disenrollment proceedings of the Nooksack Indian Tribe, including their own proposed disenrollment.

2. As a matter of federal law, Defendants must carry out the United States’ common law and statutory trust duty to Plaintiffs, as Native Americans and enrolled members of the Nooksack Tribe. *See generally Loudner v. U.S.*, 108 F.3d 896 (8th Cir. 1997).

3. Despite that duty, and the obligations imposed upon Defendant BIA under FOIA – not the least of which is to provide Plaintiffs non-exempt responsive information within twenty days of receipt of their FOIA request pursuant to 5 U.S.C. § 552(a)(6)(C)(I) – Defendants have failed to disclose information to Plaintiffs.

1 fixing of attorneys' fees, by the Nooksack Tribe or Tribal Council;

2 5. The possibility of any amendment, or Secretarial approval of any
3 amendment, to Title 63, the Membership Ordinance of the Nooksack Tribe; or

4 6. The possibility of any Secretarial election concerning any amendment to the
5 Constitution and Bylaws of the Nooksack Indian Tribe of Washington.

6 10. Plaintiffs also sought the information in the subject FOIA request through "the
7 United States' trust responsibility to them both as Nooksack Tribal Members."

8 11. On March 11, 2013, Plaintiffs' received correspondence from Stanley M. Speaks,
9 Regional Director for the Northwest Regional Office of Defendant BIA, acknowledging receipt
10 of Plaintiffs' information request. Director Speaks categorized Plaintiffs as "an 'other use'
11 requester," notwithstanding their status as enrolled Nooksack Tribal members and thus federal
12 Indian trust beneficiaries, and therefore proposed to charge Appellants hourly research rates
13 ranging from \$6.00 to \$15.00 ("minus two hours free"), and copy charges of \$0.15 per page
14 (with the first "100 pages free"). Director Speaks explained that Plaintiffs "did not request a
15 fee waiver and did indicate your willingness to pay [sic] FOIA processing fee."

16 12. On March 15, 2013, Plaintiffs responded to the BIA, explaining, "since we are
17 requesting records on behalf of enrolled Nooksack members and trust beneficiaries, we request
18 a fee waiver." Plaintiffs continued: "Kindly let us know if that is acceptable. In any event,
19 please do not allow these issues to delay your processing of our clients' information request.
20 We need the records within the time period set forth under federal law."

21 13. On March 19, 2013, Marie Howerton, FOIA Coordinator for the Northwest
22 Regional Office of Defendant BIA, emailed indicating that she did not "receive [Appellants']
23 request until 3/11/2013," even though it was emailed and faxed to her on March 8, 2013. Ms.
24 Howerton noted that Appellants "are requesting a fee waiver as . . . enrolled Nooksack
25 members and trust beneficiaries." Then, after Director Speaks had on March 15, 2013,
confirmed Plaintiffs' "willingness to pay [sic] FOIA processing fee," Ms. Howerton

1 misrepresented that Plaintiffs “did not agree to pay fees.” As such, Ms. Howerton indicated the
2 matter of fees and fee waiver “will be forwarded to [her] Solicitor for legal sufficiency.”

3 14. In response, on March 19, 2013, the undersigned counsel emailed Ms. Howerton,
4 explaining that Appellants “Despite how it might seem, I do appreciate your help as do my
5 clients [who] are being threatened with tribal disenrollment . . . so they’d be especially grateful
6 for your timely production of the documents.”

7 15. On March 26, 2013, not having received any further response from Director
8 Speaks or Ms. Howerton, Plaintiffs wrote to her: “Has any decision been made on
9 [Appellants’] request for a fee waiver? Also, with 20 days from March 11 soon to lapse, can
10 we expect to receive documents by then?”

11 16. On March 28, 2013, Plaintiffs received a letter dated March 28, 2013, from
12 Director Speaks, indicating for the first time that Plaintiffs’ information request for six discrete
13 categories of information “generated or dated within the last twelve (12) months,” was being
14 “placed in the complex multi-track process.” As such, Director Speaks indicated the Defendant
15 BIA “may take between twenty-one to sixty days to process [Appellants’] request.” Further,
16 despite confirming Plaintiffs’ “willingness to pay [sic] FOIA processing fee” on March 15,
17 2013, Director Speaks reversed course to suggest that Appellants “did not indicate any
18 willingness to pay [sic] FIA processing fee.” Director Speaks indicated that Plaintiffs’ request
19 would not “be processed until this clarification is provided.”

20 17. In turn, later in the day on March 28, 2013, Plaintiffs wrote to Ms. Howerton in
21 reference to Director Speaks’ March 28, 2013 letter:

22 In the interest of time, with time being of the essence for our clients as I
23 previously indicated, we hereby abandon our request for fee waiver and agree to
24 incur the expense associated with your agency's FOIA production efforts. We
25 do so without waiver of our position that our clients are Nooksack tribal
members and Indian trust beneficiaries who should not be charged for the
records sought.

We look forward to receipt of all responsive documents within 20 days of your
acknowledged receipt of our FOIA request, as is required by federal law. If we
do not receive all such documents by then, please be further advised that we will

1 promptly appeal your agency's inaction to the Interior FOIA Appeals Office, of
2 course copying you.

3 Please appreciate that our clients simply cannot afford any undue delay in this
4 regard. Thank you.

5 18. On May 7, 2013, almost two months to the day after Plaintiffs' initiated their
6 information request, Director Speaks wrote Plaintiffs, requesting advance payment of
7 \$2,302.20, for 868 pages of responsive information.

8 19. On May 23, 2013, Plaintiffs and Defendant BIA agreed that Plaintiffs would pay
9 Defendant Interior \$1,1501.10 for those 868 pages of responsive information, provided those
10 documents be produced to Plaintiffs by early the week of May 27, 2012.

11 20. On May 24, 2013, Plaintiffs issued Defendant Interior a check in the amount of
12 \$1,1501.10.

13 21. Meanwhile, on April 24, 2013, Plaintiffs initiated an administrative appeal of the
14 BIA's inaction as of that date, to Defendant Interior's FOIA Appeals Office in Washington,
15 DC. In violation of Defendant Interior's own FOIA administrative appeal regulations,
16 Defendant Interior has not accepted or denied, or even acknowledged receipt of, Plaintiffs'
17 administrative appeal.

18 22. As of today, now nearly three months after initiating their information request to
19 Defendant BIA, Plaintiffs have yet to receive one page of responsive information.

20 23. In addition to violating FOIA itself, Defendant BIA's refusal to apply information
21 violates President Obama's Memorandum regarding FOIA, which provides in pertinent part:

22 The Government should not keep information confidential merely because
23 public officials might be embarrassed by disclosure, because errors and failures
24 might be revealed, or because of speculative or abstract fears. Nondisclosure
25 should never be based on an effort to protect the personal interests of
Government officials at the expense of those they are supposed to serve. In
responding to requests under the FOIA, executive branch agencies (agencies)
should act promptly and in a spirit of cooperation, recognizing that such
agencies are servants of the public.

President Barack Obama, Memorandum for the Heads of Executive Departments and
Agencies, 74 Fed. Reg. 4693 (Jan. 21, 2009) (emphasis added); *see also George v. C.I.R.*, T.C.

1 Memo. 2006-121, 2006 WL 1627980, at *2 (U.S. Tax Ct. Jun. 13, 2006) (“The fundamental
2 principles of the Executive order are to continue to recognize the Indian tribes as domestic
3 dependent nations under the protection of the United States, work with the Indian tribes on a
4 government-to-government basis, and recognize the right of Indian tribes to self-government
5 and support tribal sovereignty and self-determination.”).

6
7 24. Defendant BIA has acted neither promptly, nor in a spirit of cooperation with
8 Appellants. Instead, Defendant BIA has created confusion (e.g., the fee/waiver issue); extra
9 process (i.e., a “multi-track process”); and delay (“between twenty-one to sixty days,” now
10 going on ninety days). Defendant BIA has patently violated FOIA.

11 25. In addition to violating FOIA, Defendant BIA has and continues to violate its
12 trust and fiduciary duties to Plaintiffs, as enrolled Nooksack Tribal members, by failing to
13 provide responsive information.
14

15 **V. CAUSE OF ACTION**

16 26. Plaintiffs hereby incorporate and reallege the foregoing Paragraphs.

17 27. Defendants’ refusal and failure to provide the requested documents, and their
18 current withholding of such documents, violates FOIA.

19 28. Defendants’ failure to answer Plaintiffs’ requests and subsequent appeal of that
20 inaction violated FOIA.

21 **V. RELIEF**

22 WHEREFORE, Plaintiffs prays that the Court:

23 A. Order Defendants to disclose the requested records in their entirety and make
24 copies available to Plaintiffs;

25 B. Preliminarily and finally enjoin Defendants from withholding from Plaintiffs the
records requested;

1 B. Award costs and attorneys fees, pursuant to 5 U.S.C. § 552(a)(4)(E);

2 C. Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the
3 circumstances surrounding the withholding – particularly the breach of Defendants’ trust
4 obligations owed to Plaintiffs – was an arbitrary and capricious act having no basis in law; and,

5 D. Grant Plaintiffs such other and further relief as the Court deems just and proper.

6 Plaintiffs reserve the right to amend this Complaint to plead new parties, claims and/or
7 allegations.
8

9 DATED this 31st day of May, 2013.

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