

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FOREST COUNTY POTAWATOMI  
COMMUNITY,

Plaintiff,

vs.

SALLY JEWELL, Secretary of the Interior, in  
her official capacity; KEVIN WASHBURN,  
Assistant Secretary – Indian Affairs, in his  
official capacity; PAULA HART, Director,  
Office of Indian Gaming, in her official  
capacity; DIANE ROSEN, Regional Director  
for the Midwest Region Bureau of Indian  
Affairs, in her official capacity;  
DEPARTMENT OF THE INTERIOR;  
MIDWEST REGION BUREAU OF INDIAN  
AFFAIRS; OFFICE OF INDIAN GAMING  
and CENTRAL OFFICE BUREAU OF  
INDIAN AFFAIRS,

Defendants

Civil Action No.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**Introduction**

1. For over two years, Plaintiff Forest County Potawatomi Community (the "Community") has attempted to obtain records from Defendants, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 *et seq.*, related to the Secretary of the Interior's reconsideration of the Menominee Tribe of Wisconsin's ("Menominee's") request to acquire land in Kenosha, Wisconsin, into trust for gaming purposes under Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §465, and a request for a Secretarial Determination under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C.

§2719(b)(1)(A) (the "Kenosha Casino Application"). The Community sought the information as part of its effort to meaningfully consult with and provide comments to the Assistant Secretary – Indian Affairs (the "Assistant Secretary") before he made critical decisions on the Kenosha Casino Application. Defendants have improperly withheld the requested records and have repeatedly violated their clear statutory obligations under FOIA. The Community seeks, *inter alia*, a declaratory judgment that Defendants are in violation of FOIA for improperly withholding records and engaging in a pattern and practice of violating FOIA, a finding that the Department of the Interior ("DOI") personnel acted arbitrarily and capriciously and in violation of law in withholding records, and an order requiring Defendants to immediately and fully comply with the FOIA requests set forth herein.

### **Jurisdiction and Venue**

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1331.

3. Venue lies in this district under 5 U.S.C. §552(a)(4)(B).

### **Parties**

4. The Community is a federally recognized Indian tribe located in Crandon, Wisconsin, that operates a gaming facility in Milwaukee, Wisconsin. The Community has trust land over which it exercises governmental jurisdiction in Milwaukee County and operates a casino on one Milwaukee trust land parcel.

5. Defendant Sally Jewell is Secretary of the DOI. She is sued in her official capacity.

6. Defendant Kevin Washburn ("Washburn" or "Assistant Secretary") is Assistant Secretary – Indian Affairs of DOI. He presides over the BIA-Central Office. He is sued in his official capacity.

7. Defendant Paula Hart is the Director of the Office of Indian Gaming ("OIG") of DOI, located in Washington, D.C. She is sued in her official capacity.

8. Defendant Diane Rosen is the Regional Director of the Midwest Regional Office ("BIA-MW") of the Bureau of Indian Affairs ("BIA"), located in Bloomington, Minnesota. She is sued in her official capacity.

9. Defendant DOI is an agency within the meaning of 5 U.S.C. §552(f). DOI is the federal agency with oversight responsibility for BIA-MW, BIA-Central Office, and OIG. DOI is responsible for administrative appeals of FOIA requests submitted to the BIA and to OIG.

10. Defendants BIA-MW, BIA-Central, and OIG are agencies within the meaning of 5 U.S.C. §552(f). BIA-MW, BIA-Central, and OIG are the federal agencies with possession of and control over some of the requested records and are responsible for fulfilling most of the Community's requests.

#### **I. STATEMENT OF FACTS**

11. On July 6, 2004, Menominee submitted to DOI the Kenosha Casino Application, under 25 U.S.C. §2719(b)(1)(A).

12. The Secretary's obligations under 25 U.S.C. §2719(b)(1)(A) have been delegated to the Assistant Secretary, Defendant Washburn.

13. The Assistant Secretary initially denied the Kenosha Casino Application. Menominee sued DOI (*Menominee Indian Tribe of Wisconsin v. United States Dept. of Interior*, No. 09-CV-496-WCG (ED. Wis. filed May 15, 2009) ("*Menominee v. Salazar*"). On August 16, 2011, DOI agreed to withdraw the denial and reconsider the Kenosha Casino Application "in accordance with existing law." Final Settlement Agreement between DOI and Menominee, dated August 16, 2011, at ¶1. The reconsideration was to be based on the

record existing at the time of the denial, supplemented by additional information requested, received or developed by DOI, and additional submitted by Menominee. *Id.*

14. On October 17, 2011, BIA-MW sent a letter to Menominee requesting additional or updated material from it in support of the Kenosha Casino Application ("October 17, 2011 Letter").

15. In March, 2012, Menominee submitted materials to the BIA-MW in response to the October 17, 2011 Letter (the "March 2012 Update"). The March 2012 Update was divided into three parts: Part A supplemented the Kenosha Casino Application regarding the request for a Part 292 Secretarial Determination; Part B supplemented the Kenosha Casino Application regarding the Part 151 Trust Application; and Part C contained additional information which Menominee decided to submit to the BIA. Each part of the March 2012 Update begins with a narrative responding to the specific request in the BIA October 17, 2011 Letter. In addition to the narrative response, Part A, Part B, and Part C included a number of separate exhibits.

16. An Indian tribe cannot conduct gaming on lands acquired after October 17, 1988 (so-called "after-acquired lands"), unless a statutory exception applies. 25 U.S.C. §2719. The only exception applicable to the Kenosha Casino Application provides that an Indian tribe may conduct gaming on after-acquired lands only if the

Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community,

provided that the Governor of the State concurs. 25 U.S.C. §2719(b)(1)(A). This section of the U.S. Code is known as "Section 20."

17. The Secretary's determination pursuant to Section 20 is known as a Secretarial Determination. The relevant regulations are found at 25 C.F.R. Part 292.

18. When a tribe requests the United States to acquire land in trust for it, for gaming purposes or otherwise, the Secretary makes a separate decision pursuant to the IRA and its implementing regulations, found at 25 C.F.R. Part 151.

19. Thus, pursuant to IGRA, the Assistant Secretary was required to consult local officials, including officials of other nearby Indian tribes, regarding whether the proposed Kenosha Casino would be in the best interest of Menominee and its members and would not be detrimental to the surrounding community, and was required to prepare an environmental impact statement describing the environmental impacts of the proposed off-reservation casino pursuant to the National Environmental Policy Act, 42 U.S.C. §4321 ("NEPA"). 25 C.F.R. §292.18(a) and 25 U.S.C. §2719(b)(1)(A).

20. On August 23, 2013, the Assistant Secretary issued a determination that the proposed Kenosha Casino was in the best interest of Menominee and its members and would not be detrimental to the surrounding community ("Two-Part Determination") under the Indian Gaming Regulatory Act, 25 U.S.C. §2719(b)(1)(A).

21. Wisconsin Governor Scott Walker has until February 19, 2015, to decide whether to concur with the Two-Part Determination. If Governor Walker concurs, DOI will immediately consider Menominee's request to take the land into trust under the IRA and 25 C.F.R. Part 151.

## **II. FOIA STATUTORY FRAMEWORK**

22. FOIA and its implementing regulations, 43 C.F.R. Part 2, require federal agencies to release requested records to the public unless a statutory exemptions applies.

23. Once a federal agency receives a FOIA request, the agency must respond to the requesting party within 20 working days. 5 U.S.C. §552(a)(6)(A)(i), 43 C.F.R. §2.12 (2011), 43 C.F.R. §2.16 (2013). The response must contain, at the least, the agency's determination of whether to fulfill the request or to decline to release the records under a

specific exemption, and notice of the requester's right to appeal the agency's determination.

*Id.*

24. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination either to uphold the denial or to release the withheld records. 5 U.S.C. §552(a)(6)(A)(ii), 43 C.F.R. §2.32(a) (2011), 43 C.F.R. §2.62 (2013).

25. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide "the date on which a determination is expected to be dispatched." 5 U.S.C. §552(a)(6)(B), 43 C.F.R. 2.62 (2013).

26. This Court has jurisdiction, upon receiving a complaint, to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. §552(a)(4)(B).

### **III. FOIA REQUESTS AND ADMINISTRATIVE APPEALS**

#### **A. FOIA Request Submitted to BIA-MW on February 3, 2012 (BIA-2012-00592) (Request No. 1)**

27. All of the FOIA requests described herein and all correspondence regarding these requests were made at the direction of and on behalf of the Community by attorneys in the law firm of Rothstein, Donatelli, Hughes, Dahlstrom & Schoenburg, LLP (the "Rothstein Law Firm"). On or about February 5, 2014, the Rothstein Law Firm assigned any and all claims it had or may have had under FOIA arising from the FOIA requests described herein, in their entirety, to the Community. Accordingly, references to correspondence between Defendants and the Community with regard to the FOIA requests should be understood to refer to correspondence between Defendants and attorneys acting at the direction of and on behalf of the Community.

28. On February 3, 2012, the Community requested the following records and documents from BIA-MW pursuant to FOIA ("Request No. 1"):

all records created or obtained by your office and agency since September 9, 2009 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire land in trust in Kenosha, Wisconsin for gaming purposes.

29. The Community sought the foregoing records and documents to enable the Community to consult with the BIA under Section 20 regarding the Kenosha Casino Application, including consultation concerning the Environmental Impact Statement required by NEPA, which required that the Community review the materials submitted by Menominee, and other related materials.

30. By letter dated February 8, 2012, BIA-MW acknowledged receipt of Request No. 1, assigned control number BIA-2012-00592, and requested clarification of the fee category of the request. On February 10, 2012, the Community sent a letter to BIA-MW clarifying the fee category. By letter dated March 12, 2012, BIA-MW notified the Community that it was invoking a 10-day extension under 43 C.F.R. §2.13 (2011) to process the request due to consultation with the submitter of the documents, and that it had placed the request in the "complex processing track," due to the consultation. As a result of the extension, BIA-MW's response to the request was due no later than March 26, 2012.

31. By letter dated March 30, 2012, BIA-MW informed the Community that it was unable to meet the 30-workday statutory limit to respond and release documents because of the aforementioned consultation and because there were three requests ahead of the Community's pending in the complex processing track. The March 30, 2012 letter also stated that the Community would not receive a final response until the Office of the Field Solicitor had completed a final review of the documents, and that the Community could treat the delay as a denial of the request for appeal purposes.

32. In response, the Community requested that the BIA release the documents responsive to the request that had already been reviewed or did not need to be reviewed by

the Solicitor. On April 4, 2012, the BIA-MW informed the Community that it anticipated providing a partial release of records within the following week.

33. The Community contacted BIA-MW several times to follow up on the promised partial release of records. In mid-April, 2012, BIA-MW informed the Community that it did not know when it would send a partial response. In late April 2012, the Community again contacted BIA-MW. At that time, BIA-MW informed the Community that it had not had time to work on a partial response, and that if the Community appealed the delay, BIA-MW would stop processing the FOIA request in order to address the FOIA appeal.

34. Meanwhile, on April 27, 2012, Defendant Rosen, BIA-MW Director sent a letter to Harold Frank, Chairman of the Community, seeking the Community's "position" on "whether the gaming establishment would not be detrimental to the surrounding community," and specifically asked for comments regarding factors regarding detrimental impacts to the surrounding community that are set forth at 25 C.F.R. §292.18 ("Detrimental Impact Factors"). Letter from Diane Rosen to Chairman Harold Frank, dated April 27, 2012, at 1. Ms. Rosen initially established a deadline of sixty days for the Community to respond, but extended that deadline one time by an additional thirty days.

35. On May 9, 2012, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's Office of the Solicitor from BIA-MW's failure to comply with FOIA with regard to Request No. 1. On May 24, 2012, the Appeals Officer sent the Community a letter stating that the appeal had been assigned Appeal Number 2012-104, and that he would "make every effort" to decide the appeal within the 20 days required by FOIA. The Community received nothing further from the Appeals Officer regarding this appeal.



36. On May 22, 2012, BIA-MW sent the Community a first partial response to Request No. 1. BIA-MW provided a copy of Menominee's 2004 Kenosha Casino Application to the Assistant Secretary, which was, on its face, not responsive to Request No. 1, which asked for records created or obtained after September 9, 2009. BIA-MW acknowledged that Menominee had "recently" submitted additional documents in support of its Kenosha Casino Application and informed the Community that it had redacted or withheld documents pursuant to Exemption 4 due to the commercial and/or financial nature of documents. BIA-MW failed to identify the documents to which it claimed the exemption applied.

37. On June 5, 2012, the Community sent BIA-MW a follow-up letter to Request No. 1, reiterating that the Community was only interested in obtaining updated information created or obtained after September 9, 2009, regarding the BIA's 2011 reconsideration of Menominee's 2004 Kenosha Casino Application and the 2005 Draft Environmental Impact Statement.

38. In June of 2012, the Community corresponded via phone and email with attorneys from the DOI Office of the Solicitor in Washington, D.C., in an effort to obtain a response to Request No. 1. The Community also scheduled an in-person review of the documents responsive to the Request No. 1 at the BIA-MW Minneapolis office, but that review was cancelled because BIA-MW informed the Community that it would not have the documents ready by the scheduled date.

39. On June 21, 2012, BIA-MW sent what it said was a second partial response to Request No. 1, which, despite the Community's repeated requests for updated information only, was comprised of a redacted version of the administrative record in *Menominee v. Salazar* ("Administrative Record"), which the Community already possessed. In its cover letter, BIA-MW stated that "[s]everal of the documents have been redacted and withheld in

their entirety under FOIA Exemption 4 — Trade Secrets, Commercial or Financial Information (Confidential Business Information)," and referred to an enclosed index. Other than the quoted language, the BIA-MW letter provided no information on why the redacted or withheld material was exempt from disclosure under Exemption 4. The June 21, 2012 letter stated that BIA-MW "continues to process your request."

40. On September 5, 2012, the Community contacted BIA-MW again, in an effort to obtain a final response to Request No. 1. On October 9, 2012, BIA-MW sent what it called a third partial response ("Third Partial Response"), comprised of Menominee's March 8, 2005 supplement to the Kenosha Casino Application ("2005 Supplement") and a folder labeled "Menominee Update 2011." In its cover letter, BIA-MW stated that it released and redacted the 2005 Supplement in the same manner as the Administrative Record, however, in the Third Partial Response, BIA-MW withheld certain exhibits to the 2005 Supplement that were, in fact, *not* redacted from the Administrative Record.

41. BIA-MW also stated in its Third Partial Response that "[t]he Business Plan, Exhibit K, contains Commercial/Financial Information (Confidential Business Information) which was redacted from pages 2 and 5; Sections 6-8, pages 67-106 are withheld in their entirety; and Appendix A withheld in the entirety under FOIA Exemption 4 — Trade Secrets, Commercial or Financial Information (Confidential Business Information)," but it failed to elaborate on why the documents were exempt from disclosure under Exemption 4.

42. The folder labeled "Menominee Update 2011" did not contain any new records regarding the Kenosha Casino Application, despite the Community's request for records "created or obtained . . . since September 9, 2009 to the present." The Menominee Update 2011 consisted of ten pages of maps, two historical reports (dated 1993 and 2004, respectively), two Excel spreadsheets with names and addresses of local governments within a 10-25 mile radius of the Dairyland Dog Park, and a one-page cover letter from Menominee,

dated January 10, 2012, but transmitting only the Kenosha Casino Application and the 2005 Supplement.

43. On April 24, 2014, the Community received a call from BIA-MW inquiring as to whether it still wanted a response to Request No. 1. The Community confirmed that it did want a final response and specifically requested the October 17, 2011 Letter and a list of documents that had been previously withheld or redacted. The Community has received no further response from BIA-MW to Request No. 1.

44. The Community believes that the BIA is improperly withholding documents responsive to Request No. 1. For example, BIA sent Menominee the October 17, 2011 Letter, requesting additional or updated material in support of its Kenosha Casino Application. BIA-MW failed to provide the letter, but never identified it as a responsive document or explained why it was withheld.

**B. FOIA Request Submitted to BIA-MW on June 4, 2012 (2012-01175) (Request No. 2).**

45. On June 4, 2012, the Community, which was preparing comments on the Detrimental Impact Factors, requested the following documents and records from the BIA-MW pursuant to FOIA ("Request No. 2"):

all records created, sent or obtained by your office and agency since February 3, 2012 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire land in trust in Kenosha, Wisconsin for gaming purposes. This request includes, but is not limited to, any records provided to your agency by Menominee Tribal Chairman Craig Corn on or about March 23, 2012.

46. BIA-MW assigned control number 2012-01175 to Request No. 2. On June 19, 2012, and July 3, 2012, BIA-MW provided two partial responses to the request, and, on July 30, 2012, a final response ("July 30, 2012 Final Response"). The Community's comments on the Detrimental Impact Factors were due (and submitted) to Defendant Rosen on July 30, 2012.

47. In its July 30, 2012 Final Response, the BIA-MW redacted or withheld information from thirteen documents, and completely withheld nine documents contained in Menominee's March 2012 update to the 2004 Kenosha Casino Application (the "March 2012 Update"), which were materials submitted by Menominee in response to the October 17, 2011 Letter. BIA-MW asserted that Exemption 4 applied to some of the redacted/withheld information/documents, and Exemption 5 applied to others, but did not explain the basis for these assertions.

48. In its July 30, 2012 Final Response, BIA-MW did not identify the records or portions of the records to which Exemptions 4 and 5 applied. Instead, BIA-MW made handwritten notes on the cover pages of documents. Exemption 4 does not apply to documents that comprise the March 2012 Update because the withheld documents do not contain trade secrets or confidential commercial or financial information under the applicable tests. The redacted or withheld information and documents from the March 2012 Update do not constitute inter-agency or intra-agency records subject to Exemption 5, because the March 2012 Update was not a communication between the BIA and another agency, nor does Menominee qualify as a consultant to the BIA in this circumstance.

49. With respect to its redaction from the March 2012 Update of pages 2, 3 and 4 of Menominee's Responses to 25 C.F.R. Part 292, the BIA-MW wrote "Redactions –Ex 5" on the cover page of the document. This note apparently related to the BIA-MW's redaction of financial projections, amount of revenue needed to hire tribal employees and amount of revenue that Menominee's Education Department would receive from the proposed Kenosha Casino. Exemption 5 does not apply to the redacted information because it was not produced during agency deliberations nor would it otherwise qualify under a privilege from discovery in civil litigation with the agency.

50. BIA-MW completely withheld a report authored by KlasRobinson QED (the "KRR 2012"), which is identified an exhibit to the March 2012 Update, claiming the KRR 2012 came within Exemption 4. BIA-MW did not disclose the factual basis for withholding or redacting the KRR 2012 and provided no further explanation for its conclusion that Exemption 4 applied to it. Exemption 4 does not apply to KKR 2012 because it most likely does not contain any confidential commercial or financial information about Menominee itself or any of its commercial ventures, but rather more likely contains projections related to the Kenosha Casino Project.

51. BIA-MW also withheld entire documents pursuant to Exemption 4 without describing the documents except with a label such as "property title information." Thus, BIA-MW failed to provide sufficient information to enable anyone to determine if Exemption 4 applies to those documents.

52. On September 5, 2012, the Community sought clarification from BIA-MW regarding the handwritten notes on the cover sheets that appeared to claim exemptions under FOIA.

53. On September 10, 2012, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's Office of the Solicitor, challenging the BIA-MW's decision to redact or withhold information or entire documents in response to Request No. 2 under Exemptions 4 and 5 of FOIA. That same day, the Community received an email from BIA-MW stating that, for some of the documents that were withheld, the handwritten notes incorrectly identified the exemption under FOIA as "Ex 5," when they should have identified the exemption as "Ex 4." BIA-MW did not explain why it claimed the documents could be withheld under Exemption 4.

54. The Community received a letter dated December 10, 2012, from the Appeals Officer, assigning number Appeal Number 2012-179 to the appeal, and stating that he could

not make a decision on the appeal within the 20-day period required by FOIA, but that he would attempt to make a decision within three weeks from the date of the letter. The Appeals Officer also informed the Community of its appeal rights, but added that he hoped that the Community would delay filing a lawsuit "so that the Department can thoroughly review the issues in [the] appeal and make a determination." The Community has received nothing further from the Appeals Officer regarding this appeal regarding Request No. 2.

**C. FOIA Request Submitted to BIA-MW on October 16, 2012 (2013-00101) (Request No. 3)**

55. On October 16, 2012, the Community requested the following documents and records from the BIA-MW pursuant to FOIA ("Request No. 3"):

all records obtained, created, received, or sent by your office from June 4, 2012, to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes and/or the Menominee Tribe's efforts to put a casino in Kenosha, Wisconsin. This request includes, but is not limited to, all communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the Bureau of Indian Affairs ("BIA") and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity. This request also includes any records related to the Final Environmental Impact Statement ("FEIS") for the "Menominee Casino-Hotel 223-Acre Fee-To-Trust Transfer and Casino Project" from June 4, 2012, to the present.

56. By letter dated November 15, 2012, BIA-MW informed the Community that it had assigned control number 2013-00101 to Request No. 3, had determined that a 10-workday extension was necessary to consult with the submitter of the documents, and had placed the request in the complex processing track. BIA-MW never informed the Community of the date that it received the request, nor does the Request No. 3 show up on the "Track Your FOIA Request" application on the DOI website ("FOIA Tracker Application"), so the Community does not know when BIA-MW received the request. It

seems unlikely that it took a month from the date the Community sent Request No. 3 for BIA-MW to receive it.

57. BIA-MW provided partial responses on November 19, 2012, and December 6, 2012 to Request No. 3, and a final response on December 7, 2012 ("December 7, 2012 Final Response"). In its November 19, 2012 partial response, BIA-MW stated that it redacted only pages that were unrelated or nonresponsive to the request. In fact, a number of pages were redacted from two historical reports, "Archaeological and Historical Resource Investigations at Dairyland Greyhound Park" and "Great Lakes Archeological Research Center, Reports of Investigation No. 331, Archaeological Survey of the Proposed Kenosha Casino Development Site" that are responsive to the Community's request. BIA-MW failed to explain why either report was redacted.

58. On December 6, 2012, BIA-MW provided a second partial response to Request No. 3, including a document titled "Menominee Indian Tribe of Wisconsin's response to Forest County Potawatomi Community's comments" (the "Menominee Response"). BIA-MW redacted the Menominee Response and withheld seventeen of its pages, asserting as grounds the need for consultation.

59. The BIA-MW's December 7, 2012 Final Response disclosed six of the seventeen pages that it previously withheld from the Menominee Response, and stated that it withheld the remaining eleven pages under Exemptions 6 and 7 because those pages contained "historical site" information. BIA-MW further asserted that "public release of this information would cause potential harm to [Menominee's] competitive position in the marketplace. It would also make it more difficult for the Department to receive this type of information in the future." BIA-MW's assertion regarding "potential harm to [Menominee's] competitive position in the marketplace" suggests that the eleven pages that were entirely

withheld from the Menominee Response were not related solely to "historical site" information.

60. In the December 7, 2012 Final Response to Request No. 3, BIA-MW also asserted that "[d]ocuments have been redacted which contain confidential, commercial and financial information and are being withheld under Exemption 4 of the FOIA." The BIA failed to identify the documents or information that it redacted or withheld pursuant to Exemption 4.

61. On January 22, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in the DOI's Office of the Solicitor, challenging the BIA-MW's failure to explain why responsive documents were withheld, failure to identify which documents were redacted or withheld under Exemption 4, and failure to sufficiently describe the nature of the redacted or withheld information to demonstrate that an exemption applies.

62. The Appeals Officer sent a letter to the Community on March 20, 2013, assigning Appeal Number 2013-040 to the appeal, and explaining that he did not respond to the appeal on time because of "an extraordinarily large number of appeals pending in the Department ahead of yours, the need to fully review the issues you presented in your appeal, and other unforeseen circumstances." The Appeals Officer informed the Community of its appeals rights, but as he did in regard to Appeal Number 2012-179 (relating to Request No. 2), the Appeals Officer stated that he hoped that the Community would delay filing a lawsuit "so that the Department can thoroughly review the issues in [the] appeal and make a determination." The Appeals Officer concluded the letter by assuring the Community that DOI would "make every effort" to decide the appeal "as soon as possible." The Community has received nothing further regarding the appeal.



**D. FOIA Request Submitted to OIG on October 16, 2012 (2013-00108) (Request No. 4)**

63. On October 16, 2012, the Community requested the following documents and records from OIG pursuant to FOIA ("Request No. 4"):

copies of all records obtained, created, received, or sent by the Office of Indian Gaming from September 9, 2009 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes and/or for a Secretarial Determination. This request covers all efforts by the Menominee Tribe to put a casino in Kenosha, Wisconsin. This request includes, but is not limited to, all communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the Bureau of Indian Affairs ("BIA") and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity.

64. The request clarified that the Community sought documents from OIG located in Washington, D.C., not records held by BIA-MW. (On February 3, 2012 and in July, 2010, the Community sent FOIA requests to OIG, to which OIG never responded. The Community was told by the FOIA Officer for BIA-Central that these previous requests might have been forwarded to BIA-MW. Thus, the Community believed it was necessary to make the foregoing clarification.)

65. OIG received the Request No. 4 on October 24, 2012, and assigned it to the "normal" processing track. By letter dated October 24, 2012, OIG informed the Community that it had assigned control number 2013-00108 to the request. According to the FOIA Tracker Application, OIG's response was due by November 23, 2012.

66. On December 13, 2012, the Community received a phone call from Nancy Pierskalla from OIG. Ms. Pierskalla stated that OIG was waiting to hear back from the Solicitor's Office in order to respond to Request No. 4. During subsequent telephone conversations in December, 2012, January, 2013, and March, 2013, OIG continued to assert that it was still waiting to hear back from the Solicitor's Office.

67. On March 20, 2013, after another follow up call from the Community, Ms. Pierskalla sent an email advising that OIG "will be reviewing [its] records for the documents you are seeking in FOIA00108 [Request No. 4] asap." On April 16, 2013, Ms. Pierskalla responded to another follow up email by stating: "I am working on it, will give you an update by the end of the week." On April 22, 2013, Ms. Pierskalla advised the Community, via email, that she was still working on Request No. 4.

68. On May 20, 2013, the Community received a letter from Ms. Pierskalla advising it of the fee for processing the request. The Community promptly sent a check for the full amount, along with a letter requesting immediate disclosure of the requested records due to the long delay in responding to Request No. 4. By email dated June 6, 2013, OIG acknowledged receipt of payment. In that email, Debra Deleon from OIG also advised that a "partial release package had been sent to the SOL for review." On June 21, 2013, Ms. Deleon advised the Community via email that the Solicitor's Office review should be done in "approximately 2 weeks." On July 15, 2013, Ms. Deleon advised the Community that the documents were still at the Solicitor's Office for review and that she would "try to get the material back [that] week."

69. On July 24, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's Office of the Solicitor, challenging OIG's delay in responding to Request No. 4. The Community received no formal response to the appeal.

70. On March 3, 2014, the Community received a "partial response" to Request No. 4 from Defendant Paula Hart, dated February 24, 2014. None of the documents appear to be dated later than June, 2012, indicating that OIG did not look for documents dated after the date of Request No. 4, even though the response was overdue by a year and a half. The response letter also provided that OIG "will supplement this

response with additional material responsive to your request in the near future." The Community has not received any additional material.

71. On April 14, 2014, the Community sent a letter to OIG seeking clarification of the March 3, 2014 response and to inquire when additional material may be received. On July 18 2014, the Community received a response letter from OIG. Even though the Community's April 14, 2014 letter sought clarification only as to Request No. 4, the OIG letter addressed both Request No. 4 and Request No. 9 (see below, ¶¶96-104).

72. In the July 18, 2014 letter, OIG informed the Community that the scope of Request No. 4 "need[s] [to] be narrowed and clarified in order for the records to be located, processed, and released." Thus, the BIA waited nineteen (19) months after the Community made Request No. 4 to provide notice of the purported need to narrow and clarify the request. And as noted above, on May 20, 2013, the Community paid the BIA for the costs of processing Request No. 4.

73. OIG's July 18, 2014 letter further informed the Community that it would not further process Request No. 4 or Request No. 9 until it received clarification and that, "if we do not hear from you within 20 workdays of the date of this letter, we will assume you are no longer interested and close the file." The Community responded to OIG by letter dated August 5, 2014, narrowing its request to:

Copies of all correspondence including, but not limited to, letters and emails that were sent, received, or obtained by the Office of Indian Gaming in Washington D.C. between September 9, 2009 and the present, regarding the Menominee Tribe's application to the United States to acquire Dairyland Greyhound Park in Kenosha, Wisconsin. This request does not include copies of the Menominee Tribe's application itself or the Draft or Final Environmental Impact Statement or any exhibits attachments thereto.

74. On December 2, 2014, more than two years after submitting Request No. 4, the Community received a letter from OIG and 2,525 pages of documents purportedly

responsive to Request Nos. 4 and 9. Approximately 2,400 of those documents are form mailers received by BIA in support of the Kenosha Casino Project. Of the other 125 pages, 24 are correspondence (including previous FOIA requests submitted by the Community), and 101 are a petition signed by the workers at Dairyland Dog Park. The October 17, 2011 Letter was not produced.

**E. FOIA Requests Submitted to BIA-Central on October 16, 2012 (2013-00109), and May 1, 2013 (no control number assigned) (Request Nos. 5 and 6)**

75. On October 16, 2012, the Community requested the following documents and records from the BIA-Central Office pursuant to FOIA ("Request No. 5"):

all records obtained, created, received, or sent by the Bureau of Indian Affairs ("BIA") Central Office from September 9, 2009 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes and/or for a Secretarial Determination. This request covers all efforts by the Menominee Tribe to put a casino in Kenosha, Wisconsin. This request includes, but is not limited to, all communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the BIA and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity.

76. In the request, the Community stated that it sought documents from BIA-Central located in Washington, D.C., not records held by BIA-MW. The Community received a letter dated October 24, 2012, from the BIA FOIA Officer, informing it that control number 2013-00109 had been assigned to the request and that the request had been assigned to the "complex processing track." The BIA FOIA Officer also invoked a 10-day extension. According to the FOIA Tracker Application, BIA-Central's response was due November 23, 2012.

77. When the Community had not received a response to Request No. 5 by May 1, 2013, on that date it made an additional FOIA request to BIA-Central, pursuant to FOIA ("Request No. 6") for:

[A]11 records obtained, created, received, or sent by the Bureau of Indian Affairs ("BIA") Central Office from October 16, 2012 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes and/or for a Secretarial Determination. This request covers all records concerning efforts by the Menominee Tribe to put a casino in Kenosha, Wisconsin. This request includes, but is not limited to, all records of communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the BIA and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity.

78. This request also stated that the Community sought documents from the BIA-Central located in Washington, D.C., not the records held by BIA-MW.

79. When the Community still had not received a response to either Request No. 5 or Request No. 6 on July 24, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in the DOI's Office of the Solicitor, regarding BIA-Central's delay in responding to Request Nos. 5 and 6.

80. At the end of September, 2013 – nearly a year after the Community submitted the Request No. 5 – the DOI FOIA office notified that it was prepared to respond to Request No. 5. DOI advised the Community, however, that there was "one document in the file that has a conference call dial in/password." Stating that DOI "normally withhold[s] [such information] under a FOIA exemption," which required review by the DOI Solicitor that could take up to a month, the DOI FOIA office informed the Community that it could get the responsive documents sooner, if the Community would agree that the information could be withheld as non-responsive. The Community agreed.

81. On September 28, 2013, the Community received twenty-three pages of documents that were purportedly responsive to Request No. 5.

82. The Community has not received any documents or other response to Request No. 6, nor has it receive any response to its July 24, 2013 appeal, with respect to Requests Nos. 5 and 6.

**F. FOIA Request Submitted to BIA-MW on March 1, 2013 (2013-00875) (Request No. 7)**

83. On March 1, 2013, the Community submitted a request for the following documents and records from BIA-MW pursuant to FOIA ("Request No. 7"):

All records produced by or held by AES [Analytical Environmental Services] or its subcontractors relating to the BIA, the Menominee Tribe, the Menominee Tribe's business partners and its third party agent, AES, including counsel or representatives of the foregoing, regarding the National Environmental Policy Act review and evaluation process conducted by AES for the Menominee Tribe's Kenosha Casino Project.

All records related to the third-party contractor selection process, action of the Menominee Tribe in the selection process, and the selection of AES to prepare a Scoping Report, Draft Environmental Impact Statement, and Final Environmental Impact Statement for the Menominee Tribe's Kenosha Casino Project including any memoranda of understanding or agreement between the BIA, AES, and/or the Menominee Tribe, and other relevant documents and communications.

All records from, to, between, internal to, or mentioning the BIA, the Menominee Tribe, the Menominee Tribe's business partners and its third party agent, AES, including counsel or representatives of the foregoing, relating to the preparation, review, revision, or any other action taken with respect to the Scoping Report, Draft Environmental Impact Statement, or Final Environmental Impact Statement for the Menominee Tribe's trust application and proposed Kenosha Casino Project.

84. BIA-MW assigned control number 2013-00875 to Request No. 7 and on April 12, 2013, provided a final response letter, but no documents. In its response letter, BIA-MW stated that it had provided documents prepared by AES in response to the Community's prior FOIA requests, including the "three party agreement." This appears to be a reference to the "Professional Services Three-Party Agreement" between the BIA-MW, Analytical Environmental Services ("AES"), and the Menominee Kenosha Gaming Authority (the "Agreement"). The Agreement was not provided in response to any FOIA request detailed in this Complaint, but was provided in response to a previous FOIA request made sometime prior to the *Menominee v. Salazar* litigation. BIA-MW did not identify any other AES

documents that were responsive to the Community's request that it purportedly previously provided to the Community. In addition, BIA informed the Community that it did not make an attempt to obtain any records from AES because it determined that AES records were not "agency records." Finally, BIA-MW stated that it had compiled fifty pages of documents responsive to Request No. 7, but that it was withholding all fifty pages pursuant to Exemption 5 of FOIA.

85. BIA-MW described the documents it withheld under Exemption 5 as part of the "DRAFT Record of Decision" and stated that the documents "constitute draft documents, briefing documents, pre-decisional analysis and commentary containing recommendations, proposals, and/or suggestions that reflect the personal opinions of their authors." BIA-MW also stated that it had "not obtained any requested materials which were created and are maintained solely by AES and/or the Menominee Tribe." BIA-MW asserted that it was not in control of those materials (the "AES Records") when the Community submitted Request No. 7 and that under FOIA, an agency was required only to conduct a search of "agency records."

86. BIA-MW stated that it declined to interpret AES records as BIA-MW agency records.

87. The AES Records are BIA-MW records because AES created the records on behalf of the BIA-MW, pursuant to the Professional Services Three-Party Agreement, effective as of March 23, 2004 among the BIA-MW, AES and the Menominee Kenosha Gaming Authority, discussed above. AES serves solely as a consultant to assist the BIA-MW in meeting its statutory obligation to prepare an Environmental Impact Statement ("EIS") for Menominee's proposed Kenosha Casino. Further, the BIA-MW had control over the AES Records at the time of Request No. 7.

88. On May 24, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's Office of the Solicitor, regarding the response to Request No. 7, challenging BIA-MW's failure to describe the nature of the redacted or withheld information sufficient to demonstrate that it met its burden of proving that Exemption 5 applies, and disputing BIA-MW's determination that the AES Records were not agency records. The Community received no response to this appeal.

**G. FOIA Request Submitted to BIA-MW on May 1, 2013 (2013-01139) (Request No. 8)**

89. On May 1, 2013, the Community requested the following documents and records from BIA-MW pursuant to FOIA ("Request No. 8"):

copies of all records obtained, created, received, or sent by your office from October 16, 2012 to the present, concerning, directly or indirectly: 1) the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes; 2) the Menominee Tribe's efforts to put a casino in Kenosha, Wisconsin (the "Kenosha Casino Project"); and 3) the Final Environmental Impact Statement ("FEIS") for the "Menominee Casino-Hotel 223-Acre Fee-To-Trust Transfer and Casino Project." This request includes, but is not limited to, all communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the Bureau of Indian Affairs ("BIA") and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity.

This request includes any records held or maintained by third party contractor, Analytical Environmental Services ("AES"), related to the Kenosha Casino Project. While BIA is the lead agency on the Kenosha Casino Project for the purposes of the National Environmental Policy Act ("NEPA"), AES agreed to act as project manager on behalf of the BIA. Under the Third Party Agreement, BIA was to provide AES technical direction, review, and quality control over all NEPA aspects of the project. Accordingly, AES records are "agency records; of the BIA due to the extensive supervision and control exercised by BIA over AES under 40 C.F.R. §1506.5(c). *See Burka v. U.S. Dept. of Health and Human Serv.*, 87 F.3d 508 (D.C. Cir. 1996). To respond to our FOIA requests, BIA must search its own records and the records of third party contractors like AES.



90. BIA-MW assigned control number 2013-01139 to the Request No. 8. By letter dated May 24, 2013, BIA-MW invoked a 10-day extension and assigned the request to the "complex processing track." On June 17, 2013, the Community received BIA-MW's "final response" to Request No. 8. BIA-MW disclosed forty pages of responsive documents, and withheld 159 pages of responsive documents, asserting the "deliberative process privilege" under Exemption 5 of FOIA.

91. BIA-MW described the withheld documents under the "deliberative process privilege" as:

DRAFT Record of Decision; Recommendation regarding Menominee Indian Tribe of Wisconsin (MITW) fee to trust application for the purpose of gaming (Class III on a 228 acre parcel located in Kenosha, WI; Section 20(b)(1)(A) recommendation regarding a two-part determination; draft documents and correspondence. The deliberative process privilege protects materials that are both predecisional and deliberative. The decision in this matter is still pending. The Regional Office provided a recommendation to the Assistant Secretary -- Indian Affairs on November 12, 2012.

92. With regard to the request for AES's records, BIA-MWRO asserted that AES's records were not "agency records" under its control.

93. BIA-MW failed to meet its burden under FOIA when it did not explain with specificity the documents comprising the "draft documents" or "correspondence" and how each of those documents were properly withheld under Exemption 5. To the extent that the withheld documents were prepared by or shared with consultants or other third parties, including Menominee, or are factual in nature, the "deliberative process privilege" exemption does not apply.

94. The withheld documents include a "recommendation to the Assistant Secretary" submitted on November 12, 2012 ("2012 Recommendation"). The Community believes that the 2012 Recommendation contains as exhibits documents that were submitted to the BIA by Menominee, contractors of Menominee, and business partners of

Menominee. The exhibits are factual material, do not constitute agency deliberations, and are not exempt from disclosure. Furthermore, to the extent that the Assistant Secretary incorporated the information from the 2012 Recommendation and its exhibits into his Two-Part Determination, it is no longer protected from disclosure by the deliberative process privilege.

95. On July 29, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's of the Solicitor regarding the response to Request No. 8, on the grounds that the BIA failed to describe the nature of the redacted or withheld information sufficient to demonstrate that an exemption applied, and that AES records were records of the BIA-MW. The Community received no response to this appeal.

**H. FOIA Request Submitted to OIG on May 1, 2013 (2013-01256)  
(Request No. 9)**

96. On May 1, 2013, the Community requested the following documents and records from OIG pursuant to FOIA ("Request No. 9"):

copies of all records obtained, created, received, or sent by the Office of Indian Gaming [from] September 9, 2009 to the present, concerning, directly or indirectly, the Menominee Tribe's application to the United States to acquire the Dairyland Dog Park in trust for gaming purposes and/or for a Secretarial Determination. This request covers all efforts by the Menominee Tribe to put a casino in Kenosha, Wisconsin. This request includes, but is not limited to, all communications with: a) the Menominee Tribe or its employees, agents, consultants or investors; b) Analytical Environmental Services ("AES"); c) Eric Olson; d) Rory Dilweg; e) the Bureau of Indian Affairs ("BIA") and the Department of the Interior; f) any other local, state or federal agency; or g) any other individual, corporation, or entity.

97. In the request, the Community clarified that the Community sought records from OIG in Washington D.C., not records held by BIA-MW.

98. On June 20, 2013, more than thirty days after the Community made Request No. 9, the Community received a letter from OIG, assigning control number BIA-2013-

01256 to the request, invoking a 10-day extension to process it, and estimating that the Community would receive a final response by June 24, 2013.

99. On July 10, 2013, more than forty-five work days from the date of Request No. 9, the Community received a letter from OIG informing the Community of the cost for processing the request. On July 16, 2013, the Community mailed a check for the full amount of the processing cost to OIG. The Community has never received any documents in response to Request No. 9 or an explanation as to why OIG accepted payment of fees, but failed to report the results of its search.

100. On July 24, 2013, the Community filed a timely appeal with the FOIA Appeals Officer in DOI's Office of the Solicitor, based on OIG's failure to respond to Request No. 9. The Community has received no response to this appeal.

101. On April 14, 2014, the Community sent a letter to OIG seeking clarification regarding a separate request, Request No. 4 (BIA-2013-00108). On July 18, 2014, the Community received a response letter from OIG. Even though the Community's April 14, 2014 letter sought clarification only as to Request No. 4, the OIG letter addressed both that Request and Request No. 9 (BIA-2013-01256).

102. In the July 18, 2014 letter, OIG informed the Community that the scope of Request No. 9 "need[s] [to] be narrowed and clarified in order for the records to be located, processed, and released." Thus, the BIA waited fourteen (14) months after the Community made the initial FOIA request, and a year after accepting the Community's payment for the BIA's estimated costs of processing the request to provide notice of the purported need to narrow and clarify the request.

103. OIG's July 18, 2014 letter further informed the Community that it would not further process Request No. 4 or Request No. 9 until it received clarification and, "if we do not hear from you within 20 workdays of the date of this letter, we will assume

you are no longer interested and close the file." On August 5, 2014, the Community sent a response to OIG narrowing its request, as set forth above at ¶73.

104. As set forth above at ¶74, on December 2, 2014, the Community received from OIG over two thousand documents purportedly responsive to Request Nos. 4 and 9 consisting primarily of form mailers in support of the Kenosha Casino Project.

**I. FOIA request submitted to BIA-Central on August 30, 2103 (Request No. 10)**

105. On August 30, 2013, the Community submitted a request to BIA-Central concerning the Two-Part Determination by the Assistant-Secretary, regarding Kenosha Casino Application. Specifically, the Community asked for the following documents and records pursuant to FOIA ("Request No. 10"):

A. All records listed in the 22 items of the Attachment List to the Section 20 Determination, and in addition

B. Each record described in the 360 footnotes to the Section 20 Determination which are not included in the foregoing paragraph A.

106. The Community has never received a response to Request No. 10. On November 19, 2013, the Community filed a timely appeal with the FOIA Officer in DOI's Office of the Solicitor, based on the BIA-Central's failure to respond to Request No. 10. The Community has received no response to this appeal.

**J. Public Disclosure of Records Responsive to the FOIA Requests**

107. On August 23, 2013, DOI issued the Two-Part Determination.

108. DOI transmitted the Two-Part Determination and attachments to Governor Walker.

109. The attachments include many and possibly, all of the records that the Community sought through its FOIA requests.

110. In transmitting the Two-Part Determination and attachments, DOI noted that:

[t]his letter and its enclosures contain commercial and financial information that is protected from release under exemption 4 of the Freedom of Information Act (FOIA). Due to the sensitive nature of this information, it is the Department's practice to withhold it from the public under FOIA, and to contact the Tribe if a member of the public requests it. The Community respectfully request that the State of Wisconsin take appropriate steps to provide similar protections to the commercial interests of the Tribe by referring any FOIA requests to the Department.

Two-Part Determination at 52.

111. Upon information and belief, DOI's transmission of the Two-Part Determination and attachments was not subject to an agreement under which Governor Walker agreed to maintain the records as confidential.

112. DOI posted the Two-Part Determination (without the attachments) on the DOI's website.

113. DOI's transmission to Governor Walker of the attachments constitutes public disclosure of those records and therefore DOI has waived its right to withhold the attachments under FOIA's exemptions.

**IV. FIRST CAUSE OF ACTION  
VIOLATION OF THE FREEDOM OF  
INFORMATION ACT, 5 U.S.C. §§522 *ET SEQ.***

114. By failing to provide the Community with all records responsive to Request Nos. 1, 2, 3, 7, and 8, Defendant BIA-MW has denied the Community's right to this information under FOIA.

115. By failing to provide the Community with all records responsive to Request Nos. 5, 6, and 10, Defendant BIA-Central Office has denied the Community's right to this information under FOIA.

116. By failing to provide the Community with all records responsive to Request Nos. 4, and 9, Defendant OIG has denied the Community's right to this information under FOIA.

117. By failing to respond to the Community's administrative appeals with regard to Request Nos. 1-10 in a reasonably timely manner, Defendant DOI has denied the Community's right to the records requested on appeal under FOIA.

118. Defendants' failure to provide the Community all records responsive to Request Nos. 1-10 also denied the Community the right to meaningfully consult with the Assistant Secretary on the Kenosha Casino Application, and undermined FOIA's purpose of allowing public scrutiny of agency decision-making.

119. Defendants' actions were arbitrary and capricious when they withheld records responsive to the Community's requests.

120. Unless enjoined by this Court, Defendants will continue to violate the Community's legal right to access the records it requested in the foregoing FOIA requests, and in the foregoing administrative appeals, and will prevent the Community from effectively conferring with Governor Walker on whether to concur with the Two-Part Determination.

121. The Community is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. 5 U.S.C. §552(a)(4)(E).

**V. SECOND CAUSE OF ACTION  
DOI ENGAGED IN A PATTERN  
AND PRACTICE OF VIOLATING FOIA**

122. The Community realleges the facts set forth in paragraphs 1 through 121.

123. Defendants BIA-MW's, BIA-Central's, and OIG's repeated failures to respond at all or to make timely responses to the Community's FOIA requests, failure to adequately explain the basis for withholding documents, failure to independently evaluate the conclusions of Menominee's consultant(s) regarding the application of exemptions and failure to produce the results of its searches after the Community's payment of fees constitutes a pattern or practice of violating FOIA.

124. The OIG's misleading representations regarding its intent to produce responsive records, its collection of fees for those records, and its subsequent failure to produce such records constitutes a pattern or practice of violating FOIA.

125. DOI's failure to respond to the Community's appeals constitutes a pattern or practice of violating FOIA.

126. Unless enjoined by this Court, Defendants will continue its pattern and practice of violating FOIA and will continue to violate the Community's legal right to receive the records.

### **PRAYER FOR RELIEF**

WHEREFORE, the Community prays for the following relief:

A. A Declaratory Judgment that Defendants' failure to provide responsive documents to the Community's FOIA requests and FOIA administrative appeals set forth above is unlawful.

B. A Judgment against Defendants ordering Defendants to promptly provide the Community with copies of all of the documents responsive to the Community's FOIA requests and administrative appeals set forth above.

C. For a Judgment against Defendants awarding the Community's costs and reasonable attorneys' fees pursuant to 5 U.S.C. §552(a)(4)(E) and 28 U.S.C. §2412.

D. A Judgment against Defendants ordering them to produce responsive records that have been publicly disclosed or, if the Court finds that there has been no public disclosure, order Defendants to provide explanation regarding which exemptions apply and why, as remedy for improper withholding.

E. A Judgment against Defendants ordering them to conduct adequate searches to identify all responsive records, as a remedy for improper withholding.

F. An order enjoining Defendants from future improper withholding of records, as remedy for pattern and practice of violating FOIA.

G. An order expediting this proceeding as provided for in 28 U.S.C. §1657.

H. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/Dennis J. Whittlesey  
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