

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED

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EMILIO REYES,

Plaintiff in Pro Se,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR; BUREAU OF INDIAN AFFAIRS,

UNITED STATES DEPARTMENT OF THE
THE INTERIOR; OFFICE OF THE SOLICITOR,

JESSICA ROGERS, in her capacity as FOIA
Public Liaison of Indian Affairs,

RYAN ZINKE, in his capacity as
Secretary of the United States Department
of the Interior

Defendant.

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Complaint Number:

17 CV 1612 BTM BLM

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Emilio Reyes, in Pro Se, complains against Defendant Department of the Interior; Bureau of Indian Affairs and Office of the Solicitor as follows:

Introduction

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 *et seq.*, for declaratory, injunctive, and other appropriate relief to compel the disclosure and release of documents to Emilio Reyes ("Plaintiff" or "Requestor").
2. The precise documents to which plaintiff seeks access are contained in an online request submitted to the Indian Affairs-BIA FOIA Office on March June 15, 2017 and June 23, 2017. The two requests were combined by the BIA and assigned FOIA BIA-2017-01494.

3. Plaintiff request seeks records pertaining to the 1928 California Indian applications of deceased individuals Lena Mae (Montes) Lawson, Frances (Montes) Adams and Cleveland Richard Adams. In the same request, Plaintiff seeks records of Lena Mae (Montes) Lawson, relating to the Departments consideration of her enrollment and membership eligibility in the Miwok Tribe, including her application under the revised roll of the Act of 1948.
4. The BIA refused to release records relating to the Plaintiff's requests. In this case, 20 documents responsive to Plaintiff's FOIA request have been denied in full.
5. Despite Requestor timely exhausting its administrative remedies, BIA has failed to comply with its obligation under FOIA to make the requested documents and information available. Furthermore, SOL has failed to provide a decision on its appeal.
6. The requested documents are critical to Requestor understanding the actions taken by the BIA, in determining the tribal affiliations for this Native American family listed on the 1933 California Indian Census Roll as "Unknown Tribe" and "Miwok Tribe".

JURISDICTION AND VENUE

7. This court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B), 702, 706 and 28 U.S.C. § 1331.
8. Venue is proper in this District pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. § 1391(e). This action is brought against an agency of the United States.

THE PARTIES

9. PLAINTIFF in PRO SE is a resident of San Diego County. Plaintiff descends from the Gabrielino Tribe; a film and history student; and a researcher of Native American records.
10. DEFENDANT BUREAU OF INDIAN AFFAIRS ("BIA") is an "agency" within the meaning of 5 U.S.C. §552 (f)(1), and is a bureau within the United States Department of the Interior ("DOI") that enforces BIA laws. BIA has possession and control of the records Plaintiff requested, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).
11. DEFENDANT DEPARTMENT OF INTERIOR is a federal governmental agency within the meaning of 5 U.S.C. § 552(f)(1) that encompasses BIA and the Office of the Solicitor. The BIA claims to consult with the Regional Solicitor on the FOIA response at issue in this Complaint. THE OFFICE OF THE SOLICITOR ("SOL") is responsible for responding to administrative appeals of BIA FOIA

decisions, and is entity that constructively denied and/or ignored Plaintiff administrative appeal by failing to respond in a timely manner.

12. DEFENDANT JESSICA ROGERS is the Indian Affairs FOIA Public Liaison. The FOIA Public Liaison reports to the Department's Chief FOIA Officer of the Department of the Interior and serves as supervisory official to whom a requester can raise concerns about the service the requester has received. FOIA Public Liaisons are responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. She is sued in her official capacity.
13. DEFENDANT RYAN ZINKE is the Secretary of DOI and has ultimate responsibility for decisions made by BIA, as a Bureau within his Department, and by the Office of the Solicitor, as an office within his Department. He is sued in his official capacity.

LEGAL FRAMEWORK

The Freedom of Information Act

14. FOIA's basic purpose is for government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).
15. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requestor of its determination within 20 working days of receiving a FOIA request, and it must make records "promptly" available, unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A),(a)(6); 43 CFR § 2.16(a). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).
16. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).
17. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).
18. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

19. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth “unusual circumstances” to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to assist in the resolution of any disputes between the requester and the agency.” *Id.*
20. FOIA requires the Public Liaison for assisting in resolving disputes and increase transparency. 43 CFR § 2.66(c).
21. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculate to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).
22. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.
23. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.
24. FOIA provides that a request for records must be “reasonably described.” *Id.* § 552(a)(3)(A)(i); 43 CFR § 2.5. Courts have determined that a FOIA request reasonably describes the requested records so long as they agency’s records custodian can locate the records.
25. FOIA provides a greater access of requested records by submitting proof that the person either consents to the release of records or is deceased. In addition, the Bureau can require to supply additional information if necessary to verify that a particular person has consented to disclosure or is deceased. 43 CFR § 2.9(a)(1)(2)(b).
26. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant” *Id.* § 552(a)(3)(4)(B).
27. Alternatively, an agency’s response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or

unreasonably delayed. *Id* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.” *Id* § 706(2)(A).

FACTUAL BACKGROUND

28. An Act of Congress of May 18, 1928 (45 Stat. 602), authorized the Attorney General of California to bring suit in the U.S. Court of Claims on behalf of Indians of California for the benefits they would have received under the 18 treaties negotiated with the U.S. These treaties were submitted to the Senate for ratification on June 1, 1852, but were never ratified. Section 6 of the act stipulated that no part of any judgment should be paid out in cash on a per capita basis. Rather, a trust fund should be established, with appropriations made by Congress for educational, health, industrial, and other purposes benefiting the California Indians.
29. The act authorized the Secretary of the Interior to create two census rolls. Roll 1 was the roll of California Indians residing in California on May 18, 1928. For the purpose of the act, the Indians of California were defined as those living in the State on June 1, 1852, and their descendants living in the State on May 18, 1928. Roll 2, authorized by section 7 of the act, was the roll of non-California Indians residing in California on May 18, 1928. No limit on the degree of Indian blood was fixed, and no requirements regarding tribal recognition and the maintenance of tribal relations were established.
30. Lena Mae (Montes) Lawson is listed on the enrollment application of her mother, Maud (Burke) Montes, Application number #9686. Lena is listed as 1/4 Indian blood from the Miwok Indian Tribe.
31. The sister of Maud (Burke) Montes, Frances (Montes) Adams is listed as applicant number #7406 having 1/2 Indian blood from an “Unknown Tribe”.
32. Frances (Montes) Burke married Cleveland Richard Adams, who is listed as applicant #7405 having 1/2 Indian blood also from an “Unknown Tribe”.
33. Lena Mae Montes married an Indigenous from Baja California whose family resided in the Mesa Grande Indian Reservation and later moved to the San Pasqual Indian Reservation. His name was Theophillus McKinnon, AKA, Allen Ernest Lawson.
34. The instructions provided by the Secretary of the Interior described the 1928 application should be brief and explicit; the words “Yes”, “No”, and “Unknown” may be used in cases where applicable. Therefore, no issue was noticeable at the time of approving Frances (Montes) Burke and Cleveland Richard Adams 1928 enrollment applications.

35. By subsequent legislation, the Roll of California Indians was reopened and revised in 1948 (*62 Stat. 1165*) and again in 1968 (*82 Stat. 860*). The 1948 roll listed most California Indians as "Mission Indians." In the final roll of 1968, the Bureau of Indian Affairs hired special agents to assign tribal affiliations of the descendants of about 756 approved applicants whom are listed on the 1928 roll as unknown tribe, tribe not given, mission tribe and California tribe.
36. During the Act of 1968, the BIA should have assigned a tribal affiliation for Frances (Montes) Adams, Cleveland Richard Adams and their descendants.
37. The National Archives and Records Administration ("NARA") is an independent agency of the United States government charged with preserving and documenting government historical records, including the original 1928 applications
38. NARA holds BIA records up to the early 1970's.
39. The 1928 applications are fully available at the NARA with full access to the public. Other public libraries hold copies of the same records in microfilms, their records are also available to the public with no restrictions.
40. The 1928 applications were created between 1929-1933. In other words, the creation of these records are between 84-88 years old.
41. In addition, the BIA holds copies in their repository of the applications under the Act of 1928. Moreover, the copies held in their repository contain additional notes and possible correspondence related to those records.
42. The additional correspondence the BIA has related to 1928 applications, may consist of wrong tribal affiliations, incorrect blood quantum, adoptions, etc.
43. The 1928 applications in the repository of the BIA, contain additional notes on their 1928 applications. Those notes contain the current tribal affiliation/s of the individual, the current blood degree and other important factors that determine eligibility of Federal, State and tribal benefits of their descendants.
44. Plaintiff has conducted extensive research on the 1928 applications that were submitted under the Act of 1928. Plaintiff also can verify and explain in further details the inconsistencies and errors on the 1928 applications. Furthermore, the additional notes and correspondence on the 1928 applications that are held in the repository of the BIA, are important to Plaintiff's research.

45. Therefore, to determine the tribal affiliations and blood degree of Lena Mae (Montes) Lawson, Frances (Montes) Adams and Cleveland Richard Adams, a FOIA request was submitted to the BIA.

Plaintiff's FOIA Request

46. Plaintiff submitted a FOIA request on June 15, 2017 and June 23, 2017. These two requests were combined and assigned FOIA BIA-2017-01494.

47. On June 15, 2017 Plaintiff seeks the following:

“All records related to the 1928 California Indian application of Lena Mae (Montes) Lawson, application number 9686, and all related records to her enrollment on the revised roll of 1948. Please include, any and all related records regarding to the department's consideration of Lena's membership and enrollment in the Miwok Tribe. Please also include all related records to Lena's genealogy and family tree charts in the possession of the Pacific Regional Office and the Central California Agency of the Bureau of Indian Affairs.”

48. On June 23, 2017 Plaintiff seeks the following:

“1928 California Indian application for Cleveland R Adams #7405 and Frances M Adams #7406.”

49. Based on the information provided by the Plaintiff, the BIA was able to locate twenty pages of records responsive to Plaintiff's request, however, the BIA withheld all records claiming Exemption 6.
50. Harley Long, Pacific Regional Office Tribal Government Officer was responsible for this denial. Kevin Mack, Assistant Regional Solicitor in the Office of the Solicitor was consulted in invoking Exemption 6 on these records.
51. On July 8, 2017 Plaintiff contacted the FOIA Public Liaison of the BIA via email. In its dispute it was argued that:
- 51.1 The BIA never requested death records or proof of death to provide a greater access of the records.
- 51.2 The BIA is required under FOIA to make a communication effort with the Requestor.

- 51.3 The BIA failed to act in a spirit of cooperation with the Plaintiff.
 - 51.4 The BIA is fully aware the individuals on the requested records are deceased.
 - 51.5 The BIA should not place any restrictions on records created at least 84 years ago.
 - 51.6 The BIA on multiple times has denied records related to the 1928 California Indian applications and other records claiming exemptions that don't apply.
 - 51.7 The NARA and other Federal agencies use the 75-year-old rule process. If the files/records are over 75 years old, NARA considers the subject to the deceased. Privacy related-restrictions on access apply only to records about living persons. ("Exhibit 1")
 - 51.8 It is very unlikely, the individuals listed on the requested records are living. However, if the BIA believes the individuals are living, the BIA is required to provide redacted records, if and only, the individuals listed on the records are living, and after the Requestor fails to provide proof of death.
 - 51.9 The BIA has in their possession many of the death records for deceased Native Americans. Therefore, the BIA failed to provide a greater access.
 - 51.10 Exemption 6 was wrongfully claimed.
 - 51.11 The full withholding of the records is inconsistent and inadequately explained in violation of FOIA.
 - 51.12 The BIA failed to consult with the Solicitor in regards to the withholding of the records of deceased individuals.
 - 51.13 Plaintiff requested to investigate if the Solicitor was consulted as the BIA claims.
 - 51.14 Plaintiff requested to escalate the dispute to the Chief of Staff or a higher authority.
52. On July 10, 2017 Jessica Rogers – FOIA Public Liaison replied to the Plaintiff's dispute. The Defendant's replied the following:

52.1 “It appears that the Action Office found 20-pages responsive to your request. The Action Office’s decision as to whether information should be released or withheld is made by the Action Office in coordination with the Office of the Solicitor.”

52.2 “Please note you have appeal options available to you.”

52.3 Plaintiff’s request to escalate its dispute to the Chief of Staff was ignored.

53. On July 11, 2017, Plaintiff submitted an administrative FOIA appeal to DOI challenging BIA, arguing that the exemptions were misapplied, consistent with Paragraph 1-51, above.

54. In its appeal, Plaintiff argued that:

54.1 The BIA failed to communicate or make an attemptable effort to request proof of death records to provide a greater access pursuant 43 CFR § 2.9(a)(2),(b).

54.2 The BIA cannot deny a record without establishing in their records or the Requestor that an individual’s privacy will be violated.

54.3 The BIA has in its possession Native American death records and presumed dead individuals, in which are used for probate cases, land cases, tribal matters, etc.

54.4 The BIA is fully aware the individuals listed on the requested records are deceased, therefore, the exemptions claimed don’t apply.

54.5 The requested records are available at the National Archives and many other public libraries throughout the United States with no privacy restrictions.

54.6 The creation of the records requested exceed at least 84 years, therefore, the individuals listed on the records can be presumed deceased.

54.7 BIA inconsistent and inadequately FOIA procedures is in complete violation of FOIA.

- 54.8 The requested records in the Defendant's possession have been improperly withheld.
- 54.9 The BIA failed to consult and inform the Solicitor that the individuals are deceased in accordance to 43 CFR § 2.13.
- 54.10 The BIA is required under FOIA to provide any reasonably segregable portion after redacting any exempt information, if, and only exemptions apply.
- 54.11 FOIA requires agencies of the federal government to release records to the public upon request, unless the agency "demonstrates" that one of the nine exemptions applies, in this case, the exemptions don't apply.
- 54.12 FOIA encourages accountability through transparency, and is the most prominent to ensuring an open government.
55. As of the date of this Complaint, long after DOI; OFFICE OF THE SOLICITOR working day deadline, Plaintiff has received no decision on its appeal.

CAUSES OF ACTION

56. Plaintiff repeats and re-alleges the allegations of Paragraphs 1 through 55.
57. Defendant's ("BIA") failure to grant Plaintiff full disclosure of the records violates 43 CFR § 2.13(b)(1), 43 CFR § 2.23(c) and 43 CFR § 2.25 as the agency failed to consult with the Office of the Solicitor before denying responsive documents.
58. Defendant's ("BIA") failure to deny access of the records sought by these Request's violates 43 CFR § 2.24(3) and 5 U.S.C. § 552(b)(6) as disclosure would not harm an interest protected by the applied exemption(s) or disclosure as the BIA claims.
59. Defendant ("BIA") failed to provide a greater access on the records by not communicating with the Plaintiff pursuant 43 CFR § 2.9(a)(2),(b).
60. Defendant ("FOIA Public Liaison") failed to communicate with the BIA to increase transparency in accordance to 43 CFR § 2.66(c).
61. Defendant's ("SOL") failure to grant a decision within 20 workdays after receipt of the appeal and to notify statutory right to seek review in the United States District court violates 43 CFR § 2.62(a)(b).

REQUESTED RELIEF

WHEREFORE, Plaintiff in Pro Se respectfully requests that judgment be entered against Defendant Department of the Interior, Bureau of Indian Affairs; Office of the Solicitor; and the Indian Affairs FOIA Public Liaison and that this court:

- A. Declare that Defendant BIA violated FOIA by unlawfully withholding the requested records;
- B. Declare that Defendant BIA withholdings were internally inconsistent and inadequately explained, in violation of FOIA;
- C. Declare that Defendant, SOL violated appealing procedures as provided by statute;
- D. Declare that the BIA FOIA Public Liaison has the obligation to increase transparency by verifying the BIA claims, including the Solicitor's denial and make proper recommendations in accordance to FOIA;
- E. Award Plaintiff its reasonable costs pursuant to 5 U.S.C. § 552(a)(4)(i);
- F. Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the circumstances surrounding the withholding was arbitrary and capricious act having no basis in law;
- G. Order Defendants to release in full, with no restrictions, all 1928 California Indian applications upon the public's request;
- H. Order Defendant to establish rules and make reasonable guidelines to release in full all other DOI records upon the public's request pursuant 5 U.S.C. § 552(a)(e)(9).
- I. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA request, and to provide Plaintiff, by a date certain, with all responsive records sought in this action;
- J. Grant such other and further relief as the Court may deem just and proper.

Plaintiff reserves the right to amend this Complaint to plead new parties, claims and/or allegations.

Respectfully submitted this 10th day of August, 2017

Emilio Reyes

A handwritten signature in black ink, appearing to be the name 'Emilio' in a stylized, cursive script.

615 5th Ave

Chula Vista, CA 91910

619-829-0130

emiliotongva@gmail.com