

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:18-cv-25360

MIAMI WATERKEEPER, INC.,)
)
)
Plaintiff,)
)
v.)
)
U.S. ARMY CORPS OF ENGINEERS,)
)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Miami Waterkeeper, Inc. (“Waterkeeper”), a not-for-profit organization dedicated to protecting South Florida’s waters, brings this case to remedy violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, by Defendant, the U.S. Army Corps of Engineers (“Corps”). The violations arise out of the Corps’ continuing failure to respond to Waterkeeper’s FOIA request.

2. On May 11, 2018, Waterkeeper submitted a FOIA request to the Corps for documents relating to a dredging and expansion project at Port Miami that was completed in the fall of 2015. (FOIA request attached as Exhibit A). The FOIA also requested documents pertaining to the Corps’ Port Everglades Navigation Improvement Project (“Port Everglades Project”) to deepen and expand Port Everglades in Fort Lauderdale, Florida. The Corps is deepening and expanding ports along the East Coast in order to accommodate larger sized vessels. The documents requested are related to Waterkeeper’s mission, which is advocacy and public education to protect South Florida’s waters.

3. More than seven months later, the Corps has yet to provide any documents in response to Waterkeeper's request, and has failed to provide a determination on Waterkeeper's FOIA request within the time limits prescribed under FOIA. Waterkeeper has made several, good faith attempts to follow up on this request and has waited during multiple agency requests for additional time to respond beyond that permitted by statute, all to no avail. By failing to provide the requested records, the Corps is actively impeding Waterkeeper's access to government information and its ability to carry out its organizational mission.

4. Waterkeeper has constructively exhausted its administrative remedies with the Corps and now turns to this Court to enforce FOIA's guarantee of public access to agency records and to remedy the Corps' withholding of that access.

5. Accordingly, Waterkeeper asks this Court to declare that the Corps has violated FOIA by failing to make a final determination on Waterkeeper's FOIA request and by withholding the requested records; to order the Corps to immediately provide Waterkeeper with legally compliant responses to its outstanding record request; to order the Corps to promptly provide Waterkeeper all responsive records; and to grant other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1333 (federal question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

7. Venue properly lies in this District pursuant to 5 U.S.C. § 552(a)(4)(B) because Waterkeeper resides in this District. Venue also properly lies in this District pursuant to 28 U.S.C. § 1391(b) and (e)(i) because the Defendant is an agency of the United States. This Court has authority to grant the requested relief in this case pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), (E), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

PARTIES

8. Plaintiff, MIAMI WATERKEEPER, INC. (“Waterkeeper”), is a non-profit organization serving more than 4.5 million people across Miami-Dade and Broward Counties. Waterkeeper’s mission is to defend, protect, and preserve South Florida’s watershed through citizen engagement and community action rooted in sound science and research. The organization works to ensure swimmable, drinkable, fishable water for all. Waterkeeper is also dedicated to mitigating environmental threats to Florida’s oceans and waterways, including threats to marine life, such as coral. Waterkeeper’s “Protect Florida’s Corals” campaign includes the goal of preventing damage to corals and marine ecosystems from the Corps’ dredging and expansion activities. Miami Waterkeeper’s approach combines education and outreach, scientific research, advocacy and, when necessary, legal action.

9. Defendant, U.S. ARMY CORPS OF ENGINEERS (“Corps”), is an agency of the federal government that regulates dredging activities in the navigable waters of the United States. The Corps is in possession and control of records relating to the Port Miami and Port Everglades dredging and expansion projects that Waterkeeper seeks. The Corps prepared a Feasibility Report and Environmental Impact Statement for both projects and engaged in Endangered Species Act consultation with the National Marine Fisheries Service required to assess the risks that both projects present to the survival and recovery of threatened coral species. The Corps is in the process of preparing supplemental environmental analyses and additional consultation to assess the risks and impacts of the Port Everglades Project.

STATUTORY BACKGROUND

10. FOIA’s basic purpose is to ensure government transparency and the expeditious

disclosure of government records. FOIA creates a statutory right of public access to agency records by requiring that federal agencies make records available to any person upon request. 5 U.S.C. § 552(a)(3)(A).

11. FOIA imposes strict deadlines on federal agencies to respond to requests. FOIA requires an agency to issue a final determination resolving an information request within 20 working days from the date of receipt and to immediately notify the requester of the agency's determination and the reasons therefore. *Id.* § 552(a)(6)(A)(i).

12. Issuing a final determination requires the agency to “(i) gather and review the documents; (ii) determine and communicate the scope of the agency's documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013); *see* 5 U.S.C. § 552(a)(6)(A)(i).

13. An agency may extend this 20-day period only in “unusual circumstances,” as defined by 5 U.S.C. § 552(a)(6)(B)(iii), and only for a maximum of ten working days. 5 U.S.C. § 552(a)(6)(B)(i); *see also* 15 C.F.R. § 4.6(b), (d).

14. Unusual circumstances are defined as:

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

5 U.S.C. § 552(B)(iii).

15. Agencies are required to provide “an estimated date on which the agency will

complete action on the request” whenever a request will take more than ten days to resolve. 5 U.S.C. § 552(a)(7)(B). Agencies extending the period for unusual circumstances must, when providing notice of the extension, provide “the date on which a determination is expected to be dispatched.” *Id.* § 552(a)(6)(B)(i); 15 C.F.R. § 4.6(d)(1).

16. The agency must then make the requested records “promptly” available.” 5 U.S.C. § 552(a)(3)(A). In so doing, the agency must make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C), (D).

17. The agency may withhold from production the limited classes of records exempted under 5 U.S.C. § 552(b). For any record withheld, the agency bears the burden of proving that one of the statutory exemptions applies. 5 U.S.C. § 552(a)(4)(B). Even if some information is exempt from disclosure, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” *Id.* § 552(b).

18. An agency’s failure to comply with FOIA deadlines constitutes a constructive denial of the request, and the requester’s administrative remedies are deemed exhausted for purposes of litigation. *Id.* § 552(a)(6)(C)(i).

STATEMENT OF FACTS

19. In January 2016, the Corps approved the Port Everglades Project to deepen and expand Port Everglades in Fort Lauderdale, Florida. Pursuant to the National Environmental Policy Act (“NEPA”) 42 U.S.C. § 4321, the Corps completed an Environmental Impact Statement in May 2015 to evaluate the environmental impacts of the Port Everglades Project. The Corps also consulted with the National Marine Fisheries Service in accordance with the

Endangered Species Act (“ESA”), 16 U.S.C. § 1531, regarding impacts to threatened coral species located in the area.

20. On August 16, 2016, Waterkeeper, along with a coalition of other advocacy groups, filed a lawsuit challenging the Corps’ approval of the Port Everglades Project for the agency’s failure to fully analyze the environmental impacts. *Miami Waterkeeper, Inc. v. U.S. Army Corps of Eng’rs*, No. 0:16-cv-61975-WPD, 2016 WL 4402059 (S.D. Fla.). As a result of that litigation, the Court stayed the proceedings pursuant to an agreement by the parties and ordered the Corps to provide a status report every 90 days and upon completion of new ESA and NEPA documents. *Id.*, Doc. 35, Order Staying Proceedings; Administratively Close Case (Jan. 23, 2017).

21. The Corps agreed to complete a draft biological assessment that it expects to submit to the National Marine Fisheries Service in January 2019.

22. As part of that process, the Corps has completed surveys of the Port Everglades Project area intended to estimate the population of ESA-listed coral species and the hardbottom habitat.

23. Additionally, the Corps agreed to issue draft supplemental NEPA documents by the spring of 2019. As part of that process, the Corps has conducted a Reconnaissance Survey to obtain information on the natural communities in the area.

24. The Corps has also been collecting data and analyzing the full impacts of the Port Miami dredging and expansion project that the Corps completed in 2015. The Corps expects the impacts from dredging during the proposed Port Everglades Project to be similar to those that occurred in Miami between 2013 and 2015. The Corps dramatically underestimated dredging impacts to corals in this project, claiming that the effect would be insignificant. Instead, fine-grained sediment from the project covered coral colonies and acres of reef designated as “critical habitat” for ESA-listed staghorn corals. *See* Letter from David Bernhart, Assistant Regional

Administrator for Protected Resources, Nat'l Oceanic and Atmospheric Admin. ("NOAA"), to Jason Spinning, U.S. Army Corps of Eng'rs (May 14, 2015) (Attached as Exhibit B). The Corps intends to use the data and information collected regarding the impacts of dredging at Port Miami on corals and the marine ecosystems when evaluating the environmental impacts of the Port Everglades Project.

25. On May 11, 2018, Waterkeeper submitted a narrow and specific FOIA request to the Corps for documents pertaining to the Port Everglades Project and the completed Port Miami dredging and expansion project. (Exhibit A). The request sought documents and data relating to the Port Everglades Project ESA-listed Coral Species Surveys and the Reconnaissance Surveys conducted, any documents related to the Corps' ESA consultation or NEPA analyses for the Port Everglades Project, as well as any post-project reviews, reports, lessons-learned documents, and other materials related to the impacts of the Port Miami dredging and expansion.

26. Waterkeeper's FOIA request furthers the organization's objectives to ensure healthy oceans and inform its members and the public about threats to marine life, such as coral.

27. On May 18, 2018, the Waterkeeper received a form email from the Corps acknowledging that the Corps' Jacksonville office received the request on May 11, 2018, and stating that the Corps had 20 working days to respond to the request, excluding holidays. The acknowledgment did not indicate the scope of the documents the Corps would produce, nor did it indicate any planned withholdings or exemptions. (Email attached as Exhibit C).

28. Under federal law, the Corps was required to issue a final determination on Waterkeeper's FOIA request no later than June 11, 2018. 5 U.S.C. § 552(a)(6)(A)(i).

29. On July 17, 2018, Waterkeeper sent the Corps an email informing the Corps that its response deadline had passed and inquiring as to the status of the request. (Email attached as Exhibit D).

30. On July 18, 2018, the Corps responded again that the Jacksonville office had received the requested records, but added that the records required review by office staff and that “FOIA reviews are done by our office on a first in, first out basis.” The Corps also said there were unusual circumstances that impacted its ability to “quickly process” the request. The unusual circumstances described by the Corps were: “(1) our office is still responding to a number of expedited FOIA requests that arose due to the two hurricanes that impacted Florida and Puerto Rico; and (2) other litigation pending in our office.” (Email attached as Exhibit E).

31. On July 20, 2018, the Corps sent an email to Waterkeeper stating that it anticipated the agency should be able to provide a final response by August 31, 2018. (Email attached as Exhibit F).

32. As of August 31, 2018, the Corps still failed to provide a response. Waterkeeper received no determination or documents.

33. On November 16, 2018, Waterkeeper again sent an email to the Corps, advising the agency that it had now been over six months since it received Waterkeeper’s FOIA request and that Waterkeeper had not yet received a determination or any responsive documents. (Email attached as Exhibit G).

34. On November 19, 2018, the Corps responded that it would need *at least* another 4-5 weeks to provide a final determination. The agency again cited “unusual circumstances,” including: “(1) our office is still responding to a number of FOIA requests that arose due to the two hurricanes that impacted Florida and Puerto Rico last year; (2) the volume of records that

were produced for your FOIA request that require review; and (3) other litigation pending in our office.” (Email attached as Exhibit H).

35. To date, Waterkeeper has received no further correspondence and no responsive documents from the Corps.

36. While the Corps acknowledged receipt of the FOIA request in May 2018, the Corps has failed to substantively respond to the request; indicate the scope of the documents it would produce; identify any anticipated withholdings or exemptions; or provide the determinations required by FOIA and governing regulations. It has now been more than seven months since the request was received, more than six months since the expiration of applicable FOIA deadlines, and more than four months since the agency indicated that it would provide a response. Court intervention is required to compel the agency’s compliance with federal law.

CLAIMS FOR RELIEF

Count I – Failure to Make Determinations On FOIA Request, 5 U.S.C. § 552(a)(6), (7).

37. The Corps is an “agency” under FOIA. 5 U.S.C. § 552(f)(1). The Corps has possession and control of the requested records.

38. The Corps was required to provide a final determination within 20 working days of Waterkeepers’ May 11, 2018 FOIA request, making the response due June 11, 2018. *Id.* § 552(a)(6). The Corps could extend this 20-day period only in “unusual circumstances,” as defined by 5 U.S.C. § 552(a)(6)(B)(iii), and only for a maximum of ten working days. 5 U.S.C. § 552(a)(6)(B)(i); *see also* 15 C.F.R. § 4.6(b), (d).

39. The Corps was required to provide “estimated date[s] on which the agency [would] complete action on the request.” *Id.* § 552(a)(7)(B); *accord id.* § 552(a)(6)(B)(i).

40. The Corps’ actions and omissions violate FOIA by failing to make any of the

findings required in a FOIA determination. *Id.* § 552(a)(6)(B)(i), (7)(B); *Citizens for Responsibility & Ethics in Wash.*, 711 F.3d at 188.

41. Waterkeeper has constructively exhausted all administrative remedies required by FOIA. 5 U.S.C. § 552(a)(6)(A), (C).

Count II – Failure to Respond to a FOIA Request, 5 U.S.C. § 552(a)(3), (b).

42. FOIA requires the Corps to process records requests and promptly provide the requested records or the reasonably segregable portion of the requested records not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3), (b).

43. The Corps has not provided Waterkeeper any responsive documents to its May 11, 2018 FOIA request.

44. The Corps has not claimed that any of the records it has are exempt from disclosure.

45. The Corps' actions and omissions violate FOIA. *Id.*

REQUEST FOR RELIEF

WHEREFORE, Waterkeeper prays that this Court:

A. Declare that the Corps failed to make timely determinations on Waterkeeper's records request in violation of FOIA, 5 U.S.C. § 552(a)(6),(7);

B. Declare that the Corps failed to promptly provide records in response to Waterkeeper's information requests in violation of 5 U.S.C. § 552(a)(3), (b);

C. Order the Corps to immediately provide determinations on Waterkeeper's FOIA request, as required by FOIA;

D. Order the Corps to conduct searches that are reasonably calculated to locate all records responsive to Waterkeeper's request, as required by FOIA;

E. Order the Corps to provide all responsive records or the reasonable segregable portions of lawfully exempt records, as required by FOIA, within ten days of this Court's order;

F. Maintain jurisdiction over this action until the Corps is in compliance with FOIA and every order of this Court;

G. Award Waterkeeper its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and

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

Respectfully submitted this 21st day of December, 2018.

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