

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE)	
COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09-0935 (RBW)
)	
FEDERAL MARITIME COMMISSION,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S REPLY IN SUPPORT OF ITS
MOTION TO DEPOSIT FUNDS**

Defendant Federal Maritime Commission (FMC) claims that it has not processed plaintiff Natural Resources Defense Council’s (NRDC) Freedom of Information Act (FOIA) request because it is awaiting a payment of fees. Through its motion to deposit funds into the Court’s registry, NRDC is offering to guarantee payment to FMC of a portion of the estimated fee (in the event that FMC prevails on the fee waiver issue) to allow FMC to process a portion of NRDC’s request. NRDC agrees with FMC that a requester must pay the reasonable fees assessed by the agency if it wants to receive records before the outcome of litigation on fees. It is precisely that recognition that prompted NRDC to file a motion to deposit funds, thereby initiating a procedure for the payment of that very fee. Nonetheless, FMC objects. Principally, FMC claims, incorrectly, that Rule 67 cannot be used to hold the disputed fee. Second, it seems that FMC is unwilling to process a portion of a request, even when it is guaranteed to be paid for processing that portion if it prevails on the issue of fee waiver. Neither position has merit.

I. Payment into the Court’s Registry

This Court has discretion to allow NRDC to deposit funds into the Court’s registry under Federal Rule of Civil Procedure 67. *See LTV Corp. v. Gulf States Steel, Inc. of Alabama*, 969 F.2d 1050, 1063 (D.C. Cir. 1992) (“The decision whether to allow a Rule 67 deposit generally lies within the discretion of the district court.”), *cert. denied*, 506 U.S. 1022 (1992). FMC

contends that a deposit is never appropriate in a case where declaratory or injunctive relief is sought, even when the outcome of the litigation would, as here, require one party to pay the other an amount of money. FMC relies for this proposition on *Dinkins v. General Aniline & Film Corp.*, 214 F. Supp. 281 (S.D.N.Y. 1963). *Dinkins* primarily rejected the plaintiff's request to deposit funds on the grounds that the plaintiff still claimed an entitlement to the funds that it proposed to deposit. *Id.* at 282. Subsequently, however, Rule 67 was amended to add that a deposit was appropriate "whether or not that party claims all or any part of the sum or thing," thus explicitly overruling *Dinkins*. 97 F.R.D. 165, 226 (1983). The Advisory Committee Notes, citing *Dinkins*, explained that "[i]n these cases the deposit-in-court procedure *should be available.*" *Id.* (emphasis added). The Advisory Committee also contemplated the type of benefit FMC would obtain from NRDC's deposit in this case, explaining that "the procedure gives other [non-depositor] litigants assurance that any judgment will be collectable." *Id.* FMC's reliance on *Dinkins* is therefore misplaced.

Although FMC is correct that Rule 67 has been sparsely interpreted, at least two district courts have exercised their discretion to allow parties seeking declaratory or injunctive relief with monetary implications to deposit the disputed funds under Rule 67 since the amendment overruling *Dinkins*. In *AT & T Communications of California v. Pac-West Telecomm, Inc.*, the court allowed the plaintiff, who had filed suit seeking a declaration that future payments to the defendant were not owed, to deposit those future payments under Rule 67 pending resolution. No. C 06-07271, 2007 WL 1114037 (N.D. Cal. April 13, 2007). Likewise, in *American National Property and Casualty Co. v. Lindgren*, the court, noting the amendment to Rule 67, allowed a plaintiff insurance company that sought a declaration that an insurance contract with the defendants was void to deposit the defendants' insurance premiums under Rule 67. 736 F. Supp. 275 (N.D. Ga. 1990). FMC's purported ban on using Rule 67 in this case does not exist.

Using the Court's registry in this case would be prudent. Although FMC claims that it

would refund any paid fee to NRDC in the event that NRDC prevails on the issue of fee waiver, NRDC has no guarantee or enforceable order for that refund, and in any event the use of the Court's registry would be more efficient. Were such an order to become necessary, this Court's jurisdiction over the refund question could be disputed or other issues might arise. *See* 28 U.S.C. § 1491(a)(1); *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). The use of the Court's registry would avoid any confusion about this Court's jurisdiction or need to litigate that or other issues. Because this case as it stands involves no such complicated issues, and because NRDC is asking FMC to do only as much processing as its deposit can pay for, NRDC's deposit into the Court's registry will avoid future conflict over the payment of fees once the fee-waiver issue is resolved.

FMC's position that NRDC's motion to deposit funds requests relief on the "ultimate issue" in this case is incomprehensible. *See* Def.'s Opp. to Pl.'s Mot. to Deposit Funds, at 5-6. NRDC is asking to be permitted to guarantee FMC payment of a fee in the event that FMC prevails on the fee waiver issue. NRDC's motion does not request adjudication on the propriety of the fee. Indeed, NRDC has filed separate summary judgment papers on that issue.

II. Processing a Portion of the Request

NRDC is not prepared at this time to pay the full \$51,000 estimated fee into the Court's registry. It is prepared, however, to deposit the significant sum of \$5,000. FMC's refusal to process a portion of a FOIA request without processing the whole FOIA request would frustrate the purpose of FOIA. FOIA is designed to "permit access to official information long shielded unnecessarily from public view" and "[d]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Refusing to allow a FOIA requester to obtain a portion of the requested documents is hardly consistent with that purpose, where, as here, the requester is not asking the agency to do any more processing than the requester is prepared to guarantee payment for.

NRDC identified with specificity the subset of requested records that it needs the most

urgently. If NRDC's initial request had been for this same subset of records and nothing more, FMC would have been required to search for and produce those records. NRDC's motion merely asks FMC initially to treat the request in that fashion; in other words, FMC would process the subset of requested records as if that were the entirety of the request. There would be no need to do two searches, as FMC suggests, nor would this procedure involve NRDC telling FMC how to do its job. *See* Def's Opp. to Pl's Mot. to Deposit Funds, at 7. FMC would simply not need to search for the records not encompassed in the identified subset at this time.

Moreover, NRDC is not requesting or anticipating any continuing supervision of this process by this Court, apart from the monthly status reports this Court has already ordered. NRDC proposed a rolling production only to give FMC a flexible production schedule that is typically preferred by agencies when the records to be produced are voluminous. In fact, FMC initially proposed a rolling production of records to NRDC in a December 6, 2008 email response to NRDC's request. *See* Pl.'s Mot. for Partial Summ. J., Martinez Decl. Ex. 3 Attach. C ("Instead of holding documents until completion of review, I [FMC Secretary Gregory] propose that we send documents that are ready for submission in a series of batches – frequency would be every 2-3 weeks until request has been completed."). In any event, rolling productions in FOIA cases are common. *See, e.g., Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 769 n.16 (E.D. Pa. 2008) (explaining prior scheduling order requiring agency to produce documents on rolling basis); *Elec. Frontier Found. v. Dep't of Justice*, 517 F. Supp. 2d 111, 121 (D.D.C. 2007) (ordering rolling production of records during pendency of *Open America* stay); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 306 F. Supp. 2d 58, 62 (D.D.C. 2004) (noting that agency production had occurred on rolling basis). If FMC prefers, however, to produce all of the high-priority records at one time, NRDC certainly does not oppose a single deadline.

NRDC anticipates that during the production of records, it, like any other requester, would be able to work with FMC to resolve any problems that occur or questions that arise.

There will therefore be no additional burden on this Court's time if this Court grants NRDC's motion to deposit funds.

CONCLUSION

For the foregoing reasons, NRDC respectfully requests that this Court grant its motion to deposit funds.

Respectfully Submitted,

/s/ Margaret B. Kwoka

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