

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 MOTION FOR LEAVE TO DEPOSIT FUNDS
TO THE COURT’S REGISTRY AND FOR AN ORDER TO DEFENDANT
TO PRODUCE DOCUMENTS**

Pursuant to Rule 67 of the Federal Rules of Civil Procedure, plaintiff Natural Resources Defense Council (NRDC) requests that this Court enter an order granting NRDC leave to deposit \$5,000 to the Court’s registry. NRDC also requests that this Court enter an order directing defendant Federal Maritime Commission (FMC) to begin production of documents at the time of such a deposit. As explained in greater detail below, NRDC makes this request so that it may receive time-sensitive materials responsive to its request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, pending this Court’s resolution of NRDC’s claim that it is entitled to a waiver or reduction of fees associated with the request.

BACKGROUND

The primary issue in this case is whether NRDC is entitled to a waiver or reduction of reproduction and search costs associated with its FOIA request. On October 9, 2008, NRDC submitted a FOIA request to FMC seeking documents related to FMC’s review of the Clean Trucks Programs at the Los Angeles and Long Beach ports. As part of its FOIA request, NRDC

requested a full waiver of fees associated with the request under FOIA's public interest fee waiver provision, or, in the alternative, that it be recognized as a representative of the news media, which would entitle it to reduced fees. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (providing for waiver of fees where disclosure of documents requested under FOIA is in the public interest); *id.* § 552(a)(4)(A)(ii)(II) (providing that representatives of the news media are entitled not to be assessed search fees). NRDC explained that the Clean Trucks Programs have generated great interest among the press and the public and that prompt access to the records is necessary to educate the public about FMC's review process and factors concerning its decision to conduct an investigation. In a December 17, 2008 communication to FMC, NRDC stated it was willing to pay up to \$2,500 under protest and with a reservation of rights to challenge FMC's final fee waiver decision.

On March 4, 2009, FMC denied NRDC's request for status as a representative of the news media and denied in part NRDC's request for a fee waiver, granting instead a 20% reduction in fees. On April 15, 2009, FMC denied NRDC's timely appeal of that decision. Although FMC's March 4, 2009 denial of the fee waiver stated that the fees would exceed \$2,500, it did not give an estimated cost. As of this time, FMC has not produced any records in response to NRDC's request.

On August 19, 2009, FMC provided its first estimate of costs for processing NRDC's request and releasing what FMC claims are the non-exempt portions of the responsive records, amounting to \$51,000. It is not yet clear whether the \$51,000 estimate represents the cost after the 20% reduction that FMC granted NRDC, or whether the \$51,000 is the full amount of search and duplication cost estimates, 20% of which FMC will waive.

NRDC moves this Court to grant it leave to deposit a portion of the fee and to order FMC to produce, on a rolling basis, what FMC claims to be the non-exempt portions of responsive records, starting with those records that NRDC identifies as its highest priority.

ARGUMENT

Pursuant to the schedule ordered by this Court on August 21, 2009, briefing on the parties' cross-motions for summary judgment will not be complete until December 9, 2009. By the time briefing is complete and the Court enters a judgment on the fee waiver and news media status issues, the records requested by NRDC may have lost much of their utility. The Clean Trucks Programs are still the subject of active debate, litigation, and policy discussions. As legislation is being discussed at the federal level and litigation is currently pending in California by the American Trucking Associations, the documents sought by NRDC are needed and relevant now. NRDC thus faces a Hobson's choice. It must either pay the fees demanded by FMC to receive the requested documents even though it believes it has a statutory right to a waiver of fees, or forgo the timely opportunity to shed light on questions of great public concern.

This dilemma can be avoided by entry of an order granting NRDC leave to deposit a portion of the fees estimated by FMC and ordering FMC to begin production of responsive records. *See United Farm Workers v. U.S. Dep't of Labor*, No. 07-2241 (D.D.C. Feb. 22, 2008) (order granting leave to deposit funds to the court's registry). Deposit of funds to the Court's registry will provide FMC with the assurance that the 80% of the reproduction and search costs it intended to charge NRDC will be paid if FMC's decision to deny a full waiver of fees or grant NRDC status as a representative of the news media is upheld. It will also allow NRDC to receive the portion of the requested records that is its highest priority. Moreover, it will serve judicial economy in expediting the resolution of the case if FMC begins processing the request

immediately. Once the outcome of the fee waiver issue is decided by the Court, the prevailing party can move to withdraw funds in accordance with this Court's decision.

NRDC therefore requests that this Court grant it leave to deposit the sum of \$5,000 in the Court's registry. It also requests that this Court order FMC to begin processing NRDC's request immediately upon such a deposit, and that it process NRDC's highest priority documents first, up and until it has expended an amount of search and duplication costs such that \$5,000 would cover 80% of those costs. NRDC's highest priority documents are: any records presented by the FMC and/or its agents to any outside parties related to the Clean Trucks Programs and any records presented by any outside parties to FMC and/or its agents related to these Clean Trucks Programs. These records are limited, as outlined in the original request, to records dated, originating, or received on or after August 1, 2006. NRDC, by letter dated December 17, 2009, also excluded from the scope of its request any records provided to the agency by NRDC, Sierra Club, and the Coalition for Clean Air; any records that are publicly available, including records available on the Internet; and any records available on the Public Access to Court Electronic Records (PACER). NRDC requests that this Court order FMC to produce, on a rolling basis, what it claims are the non-exempt portions of the high priority responsive records to NRDC every two weeks following the deposit of funds, until all such records are produced or until the deposited funds become insufficient to continue.

At the conclusion of such production, if there are remaining funds, NRDC will identify its next highest priority set of documents for FMC to begin processing. When the funds run out, NRDC will assess whether it is in the position to move this Court to grant it leave to deposit additional funds.

CONCLUSION

This Court should grant NRDC leave to deposit \$5,000 to the Court's registry pending resolution of the fee waiver and fee reduction issues in this case. This Court should further order that FMC begin processing NRDC's high priority documents immediately upon deposit of funds, and that it release, on a rolling basis, the non-exempt portions thereof every two weeks following the deposit up and until it has produced all such high priority documents or funds have become insufficient to cover 80% of the search and duplication costs.

/s/ Margaret B. Kwoka

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CERTIFICATE OF CONFERENCE

On September 8, 2009, I provided a copy of this motion to Ms. Claire Whitaker, counsel for FMC. On September 11, 2009, I discussed the matter with Ms. Whitaker by telephone, and she followed up that same day by email to indicate that FMC opposes this motion.

/s/ Margaret B. Kwoka

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