

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-01264-LTB-OES

MARY M. HULL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

For the following reasons Plaintiff MARY M. HULL (HULL), through her counsel, hereby moves for a summary judgment order requiring Defendant Department of Labor (DOL) to produce to HULL those documents this Court ruled are not covered by Exemption 4 of the Freedom of Information Act, 29 U.S.C. § 552(b)(4) (FOIA), and HULL seeks an order requiring the DOL to produce other papers for which the DOL does not claim a FOIA Exemption:

Brief Background. On December 2, 2005, this Court denied the DOL's request for dismissal of this action. This Court ruled, *inter alia*, that certain documents the DOL withheld from HULL on the basis of an alleged FOIA Exemption 4 are not, in fact, subject to FOIA Exemption 4. There are other documents no longer subject to any FOIA exemption, including some belatedly found papers the DOL represented were going to be processed and, then, turned over to HULL. [See DOL's representations in its August 18, 2005 filed memorandum brief – Docket No. 27 at p. 5] Alas, none of those documents were ever tendered to HULL or her counsel. Accordingly, HULL seeks a summary judgment order requiring the DOL to deliver those documents to her. ¹

¹ In the December 2, 2005 Order, this Court ruled there would be an *in camera* inspection of certain other documents.

HULL continues to protest that a citizen should not have to commence *and persist with* federal court litigation in order to shake-up a federal agency and get compliance with FOIA. But, the DOL's on-going game of cat and mouse requires HULL to forge ahead with this "tug of war" litigation. In support of her motion for a summary judgment, pursuant to Fed.R.Civ.Proc. Rule 56, HULL incorporates this Court's findings of fact and conclusions of law set forth in the December 2, 2005 Order. HULL also incorporates her Affidavit filed on July 29, 2005 [See attachment to Docket No. 24].

I. ARGUMENT

A. **The DOL Should Be Ordered to Product to HULL Qwest Pension Plan Service Contracts Which Do Not Fit Within FOIA Exemption 4.**

Summary judgment is appropriate when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *F.R.Civ.P. Rule 56(c)*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247--48, 106 S. Ct. 2505 (1986).

The DOL continues to refuse to give HULL 125 pages of Qwest's 'service contracts' with Towers Perrin, Watson Wyatt and Banker's Trust, which documents directly pertain to operation and management of the Qwest Pension Plan. In its effort to dismiss this case, the DOL contended the documents were protected by FOIA Exemption 4, but this Court ruled otherwise. FOIA Exemption 4, (5 U.S.C. § 552(b)(4)), exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This Court ruled the DOL has not met its burden of proving the 'service contracts' fall within FOIA Exemption 4 and it is not necessary to conduct an *in camera* inspection of those papers.

HULL is a participant in the Qwest Pension Plan and she contends the 'service contracts' are "other instruments under which the plan is established or operated" within the meaning of ERISA Section 104(b)4, 29 U.S.C. § 1024(b)(4). *Phelps v. Qwest Employee Benefits*

Committee, Civil Action No. 04-cv-02042-LTB-OES (D. Colo. December 2, 2005 Order)

(holding that the meaning of “instruments under which [a] pension plan is managed or operated” found in ERISA § 104(b)(4) encompasses investment guidelines/policies that set out rights, duties or obligations and confine a plan’s operations). Further support for HULL’s position that the ‘service contracts’ are documents that should have been disclosed to her is found within the Department of Labor’s Advisory Opinion 97-11A (April 10, 1997):

“if a [Third Party Contract], or any part of the contract, establishes or amends the plan in question, establishes a claims procedure, specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement, or does any of the other things described in sections 402(b) and 402(c) of ERISA, it would have to be furnished in accordance with the terms of section 104(b)(4).”

See **Exhibit 1** filed herewith.² The DOL should follow its own advice. In any event, this Court has determined it is not necessary to examine the ‘service contracts.’ Accordingly, HULL requests the Court order the DOL to produce to HULL the 125 pages of ‘service contracts’, document Bates Nos. **860-935 and 951-999**.

B. The DOL Should Be Ordered to Produce to HULL Computer Disks and Seventeen Other Alleged Belatedly Found Documents For Which No FOIA Exemption Has Been Claimed.

The DOL asserts no FOIA Exemption and gives no explanation for not releasing to HULL eleven computer disks that are listed in the DOL’s Vaughn Index. (See HULL Affidavit ¶ 17). Since there is no applicable FOIA Exemption, the DOL should be ordered to produce those computer disks to HULL. Furthermore, the DOL represented in its August 18, 2005

² Admittedly, Advisory Opinions and DOL interpretive bulletins do not rise to the level of a regulation and do not have the effect of law. A court is not required to give effect to an administrative interpretation. See *Batterson v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 231-37 (1974)). However, the DOL position as stated in an Advisory Opinion and Interpretative Bulletin is entitled to some deference because Congress specifically authorized the Secretary of Labor to interpret and enforce ERISA. *Hermann v. Nations Bank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993).

memorandum brief [See Docket No. 27, at page 5] that the agency was soon going to process and turn over to HULL “*seventeen documents [that] had not been printed out for inclusion in the investigative file.*” The DOL represented those papers were discovered in the DOL’s file on August 13, 2005. The DOL submitted an affidavit by DOL Senior Investigator John Mayer stating he found the seventeen documents on his computer hard drive on August 13, 2005. [See Docket No. 27, John Mayers Declaration at ¶¶ 8-9]. To date, none of computer disks and seventeen documents have been tendered to HULL or her counsel and no FOIA Exemption has been claimed by the DOL. The DOL has given no explanation for doing nothing since August 13, more than four months. It is time for this tug of war or game of cat and mouse to end.

II. CONCLUSION

For the aforesaid reasons and those reasons set forth in this Court’s December 2, 2005 Order and HULL’s Rule 56(f) Affidavit previously submitted, [See attachment to Docket No. 24], this Court should Order the DOL to produce to HULL the following documents:

A. Those documents this Court ruled are not covered by FOIA Exemption 4, U.S.C. § 552(a)(4)(B): Bates Nos. **860-935 and 951-999** (documents identified as Qwest’s “service contracts with Towers Perrin, Watson Wyatt and Bankers Trust concerning the operation and management of the Qwest Pension Plan.”);

B. The eleven computer disks that are listed in the DOL’s Vaughn Index and for which the DOL does not claim any FOIA Exemption; and

C. Those documents the DOL represented in its August 18, 2005 memorandum brief [See Docket No. 27, at page 5] as “*seventeen documents [that] had not been printed out for inclusion in the investigative file.*”

HULL also requests such other relief as this Court deems appropriate, including the

establishment of a **firm deadline requiring** the DOL to deliver to this Court those documents this Court states in the December 2, 2005 Order are subject to an *in camera* inspection.³

DATED this 21st day of December, 2005.

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
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Attorney for Plaintiff: Mary M. Hull

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2005, a true and correct copy of the above and foregoing document was filed with the Clerk of the Court using the CM/ECF system. I also certified that on this 21st day of December, 2005, a true and correct copy of the above and foregoing document was delivered to Defendant's counsel of record via email as follows:

Michael C. Johnson, Esq.
Assistant United States Attorney
UNITED STATES ATTORNEY'S OFFICE
1225 17th Street, 7th Floor
Denver, CO 80202
Tele: 303-454-0134
Fax: 303-454-0404
E-mail: michael.johnson2@usdoj.gov

Also, copy of the same was delivered via email to Plaintiff Mary M. Hull.

Mimi Hull
678 Clarkson St.
Denver, CO 80218-2302
E-mail: MM5Hull@msn.com

s/ Curtis L. Kennedy
Curtis L. Kennedy

³ This Court ruled that those documents identified by name on pages 11-13 of the DOL's Reply in Support of Defendant's July 11, 2005 Motion for Summary Judgment and Response to Plaintiff's Petition for In Camera Review shall be submitted to the Court for *in camera* review.

Exhibit 1

U.S. DOL  **PWBA Office of Regulations
and Interpretations**

Advisory Opinion

April 10, 1997

Mr. Ken Paff
Teamsters for a
Democratic Union
P.O. Box 10128
Detroit, MI 48210

97-11A
ERISA SECS.
104(b)(2) and 104(b)
(4)

Dear Mr. Paff:

This is in response to a letter that was originally requested by the National Office of the Teamsters for a Democratic Union (TDU). We were asked to forward our response to you. TDU inquired whether a plan administrator is required under section 104(b)(4) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to furnish a participant with a copy of the contract between an employee benefit plan and a third party administrator (TPA).

Section 104(b)(4) of ERISA provides that "[t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Although section 104(b)(4) includes the term "contract" in its specific delineation of documents required to be furnished, it is the Department of Labor's view that this term does not necessarily encompass all contracts between a plan and third parties who render services to the plan. The terms "bargaining agreement," "trust agreement," "contract," and "instruments" in section 104(b)(4) are all modified by the phrase "under which the plan is established or operated." Accordingly, only TPA contracts, or provisions

thereof, that establish, amend or constitute part of an employee benefit plan or that otherwise are instruments under which the plan is established or operated are subject to mandatory disclosure under section 104(b)(4).¹ For example, if a TPA contract, or any part of the contract, establishes or amends the plan in question, establishes a claims procedure, specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement, or does any of the other things described in sections 402(b) and 402(c) of ERISA, it would have to be furnished in accordance with the terms of section 104(b)(4).²

The plan "administrator," as defined in ERISA section 3(16)(A), is responsible for making the determination as to whether a document is a "contract" or "instrument" under section 104(b)(4) in response to a written request by a participant or beneficiary.³ The administrator's determination is reviewable by a U.S. District Court pursuant to section 502 of ERISA.

We also note that section 404(a)(1)(D) of ERISA requires a fiduciary to discharge his duties in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of Title I of ERISA. Therefore, in addition to the above section 104(b)(4) obligations, if such a plan document or instrument, consistent with the other provisions of Title I, requires the furnishing or disclosure of information to a participant or beneficiary on request, the administrator would be required to grant such a request.

This letter constitutes an advisory opinion under [ERISA Procedure 76-1](#). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

John J. Canary
Chief, Division of Reporting and Disclosure
Office of Regulations and Interpretations

¹ The same conclusion would apply under ERISA section 104(b)(2) which provides that a plan participant has a right to examine copies of the plan description, the latest annual report and the "bargaining agreement, trust

agreement, contract, or other instruments under which the plan was established or is operated "

² The Department concluded in Advisory Opinions 82-21A, 82-33A, and 87-10A that minutes of trustees' meetings that establish a claims procedure or do any of the things described in section 402(b) and 402(c) of ERISA would have to be furnished in accordance with section 104(b)(4) as "other instruments under which the plan is established or operated." We also stated in Advisory Opinion 96-14A that any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute "instruments under which the plan is established or operated."

³ Persons who hold the position of "administrator" as defined in section 3(16)(A) are, by the very nature of their position, considered fiduciaries. [See 29 CFR 2509.75-8 \(Question and Answer D-3\).](#)

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