

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPALACHIAN MOUNTAIN
ADVOCATES, INC.,

Plaintiff,

v.

WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION, et al.,

Defendants.

Case No. 14-C-985
(Hon. Charles E. King, Judge)

2014 OCT 20 PM 2:05
CATHY S. KING, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

On September 10, 2014, and September 15, 2014, the Parties appeared before the Court, by Counsel, and presented evidence and argument on the motions currently pending before the Court. For the following reasons, the Court hereby **DENIES** Defendants' Motion to Dismiss, and **GRANTS** Plaintiff's Motion for Expedited Hearing, for Preliminary and Permanent Injunction, For Declaratory Judgment, and For Consolidation of Hearing on Preliminary Injunction With Trial on the Merits.

FINDINGS OF FACT

1. On November 12, 2013, Plaintiff submitted a request pursuant to the West Virginia Freedom of Information Act ("FOIA") to Defendants for "[a]ll coal mining related . . . discharge monitoring report data for the third quarter of 2013." Joint Exhibit B. Plaintiff requested "electronic copies (preferably in excel spreadsheets) of" those public records. *Id.* Although Plaintiff expressed a preference for an Excel spreadsheet, the request cannot be interpreted only as a request for an Excel spreadsheet.

2. In January 2014, Assistant Director of the West Virginia Department of Environmental Protection's Division of Mining and Reclamation John Vernon, acting under the direction and

authority of Defendants, directed Plaintiff to the ePermitting website to access the requested discharge monitoring reports (“DMRs”). Joint Exhibit D.

3. Plaintiff explained to Assistant Director Vernon, via e-mail, the severe limitations in accessing data through the ePermitting website. Joint Exhibit E.

4. Defendants then responded with a denial of Plaintiff’s November 12, 2013 FOIA request on February 25, 2014. Joint Exhibit F.

5. On March 3, 2014, Plaintiff submitted to Defendants a request for “[a]ll coal-mining related . . . discharge monitoring report data for the period from October 1, 2013, through December 31, 2013 (the Fourth Quarter of 2013).” Joint Exhibit G. Because Defendants had previously provided similar data in an Excel spreadsheet, the March 3, 2014 requested that, “because these records exist in electronic form, that the agency provide the records . . . in an excel spreadsheet.” Id.

6. On March 10, 2014, Assistant Director Vernon, acting under the direction and authority of Defendants, responded to the March 3, 2014 FOIA Request by email, stating that “[t]his information does exist in our system” and committing to contact Plaintiff “with information on how to view or receive the information.” Joint Exhibit I. Defendants did not offer to provide the requested information in any spreadsheet or electronic file.

7. On March 11, 2014, WVDEP denied March 3, 2014 FOIA Request. Joint Exhibit J.

8. On May 28, 2014, Plaintiff commenced this action seeking injunctive and declaratory relief pursuant to W. Va. Code § 29B-1-5(1).

9. For a number of years, Plaintiff has requested DMRs from Defendants pursuant to the FOIA. On multiple occasions, Plaintiff has requested that Defendants provide to it all of the coal-mining related DMRs received by the agency during a particular time frame. Until

Defendants denied the two FOIA requests at issue in this action, Defendants had always provided the requested information in Excel spreadsheets.

10. For example, in August 2013, Plaintiff submitted request under the FOIA to Defendants for, among other things, “[a]ll coal mining related . . . discharge monitoring report data for all quarters of 2012.” Joint Exhibit K. Defendants fulfilled that request in the form of an Excel spreadsheet and assessed Plaintiff a “Programming Fee” for one (1) hour of time at the rate of \$37.00. Joint Exhibit L. Plaintiff paid that \$37.00 fee without complaint.

11. At the September 15, 2014 evidentiary hearing in this action, Plaintiff presented the testimony of Evan Hansen, President of Downstream Strategies.

12. Mr. Hansen is an expert in computer programming and environmental data management and analysis.

13. Excel is a spreadsheet computer program sold by Microsoft. A spreadsheet is a computer file in which data are arranged in columns and rows.

14. It is common to export the result of database searches into an Excel format.

15. Based on the expert testimony of Mr. Hansen, the Court finds that the creation of an Excel spreadsheet file from the results of a database search does not result in the creation of a new document or record because the content of the Excel spreadsheet is identical to the content of the database. There is no evidence in the record to the contrary.

16. Based on the expert testimony of Mr. Hansen, the Court finds that exporting information from a database into an Excel spreadsheet is similar to making a photocopy of a paper document extracted from a filing cabinet. The information in the photocopy is substantially identical to the information in the original, even if the format—i.e., paper size—of the photocopy is different from the format of the original.

17. At Plaintiffs' request, Mr. Hansen reviewed Defendants' ePermitting website for the purpose of determining how long it would take to use the ePermitting website to compile the information sought in Plaintiffs' FOIA requests for DMRs.

18. Defendants maintain DMRs that they receive from permit holders that operate coal mines in an electronic database.

19. To retrieve data from a database, the user must perform a search. Such searches are what make databases usable. Without those searches, databases would simply be compilations of data with no way to access that data.

20. Based on the expert testimony of Mr. Hansen, the Court finds that, for Plaintiff to use the ePermitting website to compile the information sought in the FOIA requests at issue would impose an unreasonable burden on Plaintiff.

21. Mr. Hansen testified that using the ePermitting website to locate DMRs is the equivalent of going on a scavenger hunt, and the Court credits this testimony based on Mr. Hansen's description of the process required to use the ePermitting website.

22. The ePermitting website is not searchable by date or by permit number.

23. Searching the ePermitting website by permittee name generates a list of results that includes a "Submitted Date"—but the submitted date is not the date that particular samples were taken. Rather, the date listed under "Submitted Date" will either be for the previous month's data, previous quarter's data, or late submittal data.

24. To compile the coal-mining related DMRs for the third quarter of 2013 using the ePermitting website would require the review of approximately 3,420 records, at an average pace of five (5) minutes per record.

25. Some of the records viewable through the ePermitting website include downloadable data. Others do not, and those records would necessitate the manual entry of the data within them.

26. Based on the expert testimony of Mr. Hansen, the Court finds that it would take approximately 289 hours to compile the coal-mining related DMRs for the third quarter of 2013 through the ePermitting website. If Plaintiff retained Mr. Hansen's firm to perform that work, it would cost Plaintiff approximately \$18,785. To compile the DMRs for a calendar year, it would take approximately 598 hours, at a cost of \$38,870.

27. In contrast, it would take Defendants less than one hour to compile the same information, and the cost to Plaintiff would be \$37.00.

CONCLUSIONS OF LAW

1. The FOIA is to be liberally construed to provide access to public records. W. Va. Code § 29B-1-1.

2. The DMRs at issue are public records pursuant to W. Va. Code § 29B-1-2(4).¹

3. Upon receipt of a request for public records under the FOIA, the custodian of the public record has five days to either provide copies of the requested information, advise the person making the request of the time and place at which he or she may inspect and copy the materials, or deny the request. W. Va. Code § 29B-1-3(4).

4. If the public body chooses to allow inspection of the records rather than furnishing copies, the opportunities for inspection and examination must be "proper and reasonable." W. Va. Code § 29B-1-3(3). Moreover, "[i]f the records requested exist in magnetic, electronic, or

¹ It is the understanding of the Court that it is not disputed that the Defendants have a mandatory duty to maintain DMRs from permittees as public records and to make them available to the public.

computer form, the custodian of the records shall make copies available on magnetic or electronic media, if so requested.” Id.

5. Contrary to Defendants’ contention, searching an electronic database of public records does not result in the creation of a new record, regardless of whether that result is formatted as an Excel file or some other electronic file.

6. The fulfillment of Plaintiff’s FOIA requests through the provision of any usable electronic file would not result in the creation of a new record or document. Plaintiff’s FOIA requests do not require the Defendants to create or compile records. The FOIA requests merely require the Defendants to extract already existing records from an existing database.

7. Defendants’ contention that providing the public records to Plaintiff in an electronic form would require the creation of a new record is contrary to the caselaw governing access to electronically stored information.

8. Although it is true that a public body is not required to create a new public record, Affiliated Const. Trade Found. v. Regional Jail & Correctional Facility Auth., 200 W. Va. 621, 625 (1997), neither the computer program used to search an electronic database, nor the results of a search of an electronic database constitute the creation of a new public record.

9. Although that precise question has not arisen in West Virginia, it has been addressed by the federal courts, and the West Virginia Supreme Court of Appeals looks to federal FOIA cases for guidance, finding opinions of the United States Court of Appeals for the District of Columbia Circuit “highly persuasive.” Farley v. Worley, 215 W. Va. 412, 420 n.7 (2004).

10. Consistent with the United States Court of Appeals for the District of Columbia Circuit, the Court concludes that “[a]lthough accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these

differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA.” Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982).

11. Defendants cannot use excuses based on technology to limit access to public records such as DMRs that they are required by law to maintain.

12. “Electronic database searches are thus not regarded as involving the creation of new records.” Schladetsch v. U.S. Dept. of H.U.D., Civ. No. 99-0175, 2000 WL 33372125 at *3 (D.D.C. Apr. 4, 2000).

13. “The fact that the agency may have to search numerous records to comply with the request and that the net result will be a document the agency did not previously possess is not unusual in FOIA cases, nor does this preclude the applicability of the Act.” Id.

14. Defendants’ reliance on National Sec. Counselors v. C.I.A., 960 F. Supp. 2d 101 (D.D.C. 2013), is misplaced. The FOIA request at issue in National Sec. Counselors sought “a record that would indicate the ten individuals responsible for the most FOIA requests submitted (each) in Fiscal years 2008, 2009, and 2010.” Id. at 125. The National Sec. Counselors Court distinguished between requests of that sort—which call for the creation of a list or index of the contents of an electronic database—and requests that simply call for the provision of unaltered data from a database. Id. at 159–60. The former calls for the creation of a public record; the latter does not. Id.

15. Indeed, the National Sec. Counselors Court expressly recognized that “[e]lectronic database searches are . . . not regarded as involving the creation of new records” id. at 159 (quoting People for the Am. Way Found. v. U.S. Dep’t of Justice, 451 F. Supp. 2d 6, 14 (D.D.C.

2006)), and that ““sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record.”” Id. (quoting Nat’l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 270 (D.D.C. 2012)).

16. Plaintiff’s FOIA requests at issue in this action do not call for the creation of a list or index of the contents of Defendants’ electronic database of DMRs. It is not as if Plaintiff requested a list of the top ten coal mines discharging iron into West Virginia’s waters. Plaintiff has not asked Defendants to perform any analysis or manipulation of the information requested. Rather, Plaintiff merely seeks the unaltered data from Defendants.

17. Defendants’ referral of Plaintiff to the ePermitting website to obtain the information requested violates the FOIA in this case because it does not provide Plaintiff with “proper and reasonable opportunities for the inspection and examination of the records.” W. Va. Code § 29B-1-3(3).²

18. The West Virginia Legislature “surely did not envision agencies satisfying their disclosure obligations under the FOIA simply by handing requestors a map and sending them on scavenger expeditions” U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 153 (1989). The Court concludes, based on the expert testimony of Mr. Hansen, that, by providing Plaintiff with a guide to ePermitting and sending it on its way, Defendants essentially sent Plaintiff on a scavenger hunt.

19. Defendants are obligated to provide reasonable access to public records. W. Va. Code § 29B-1-3(3).

² This finding regarding the ePermitting website is limited in that it relates only to the specific FOIA requests at issue and the ePermitting website as it existed at the time of the hearing in this case. The Court acknowledges that referral to the ePermitting website may be appropriate for some FOIA requests and that referral to the ePermitting website for the type of FOIA requests at issue may be appropriate in the future if changes are made to the website.

20. The burden that using the ePermitting website places on Plaintiff to compile the requested information—nearly 289 hours of time just to compile one calendar quarter’s worth of DMRs—substantially outweighs the burden on Defendants to search its database and provide the results to Plaintiff—approximately one hour. That is particularly true when the agency can and does charge the requestor for that time, and the requestor pays it. In such a case, Defendants offer of access through the ePermitting website is clearly unreasonable. See Brownstone Publishers, Inc. v. New York City Dep’t of Bldgs., 146 Misc. 2d 376, 378, 550 N.Y.S.2d 564, 566 (N.Y. Sup. 1990) (holding that, because of burden of reviewing records in provided form, governmental agency had not provided reasonable access to the requested records); Menge v. City of Manchester, 113 N.H. 533, 538, 311 A.2d 116, 119 (N.H. 1973) (holding that to provide reasonable access, the governmental agency had to provide electronic records, rather than permitting access to thousands of field cards).

21. Because the uncontested, expert testimony in this case establishes that the creation of an Excel spreadsheet file or any other usable electronic file containing the results of a search of Defendants’ electronic DMR database does not result in the creation of a new record; because the federal case law holds that search results from an electronic database do not create new records; because the FOIA is to be liberally construed in favor of public access to public records; and because Defendants’ referral of Plaintiff to the ePermitting website to obtain the information requested violates the FOIA because it does not provide Plaintiff with “proper and reasonable opportunities for the inspection and examination of the records”, the Court rejects Defendants’ argument that it is not obligated under FOIA to search its electronic database of DMRs for records responsive to Plaintiff’s requests and provide those results to Plaintiff.

CONCLUSION

Based on the foregoing, the Court hereby **DENIES** Defendants' pending motion and **GRANTS** Plaintiff's pending motion. The Court hereby **DECLARES** that Defendants violated the FOIA in this case by referring Plaintiff to the ePermitting website in lieu of providing the information sought in an electronic file and by denying Plaintiff's FOIA requests on the basis that the creation of such files would constitute the creation of new public records. Accordingly, the Court hereby **ORDERS** Defendants to provide Plaintiff the coal-mining related DMRs for the third and fourth quarters of 2013 to Plaintiff in an Excel spreadsheet or other usable electronic file within five (5) business days of the receipt of this Order. The Defendants may charge Plaintiff a fee reasonably calculated to reimburse it for its actual cost in making reproductions of such records.

Finally, the Court hereby **DIRECTS** Plaintiff that, if it intends to file a motion for attorney fees and costs pursuant to W. Va. Code § 29B-1-7, then it shall file a motion seeking such fees and costs within 30 days of the entry of this Order.

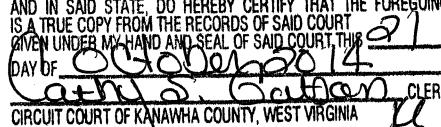
The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.

The Clerk of the Court is **DIRECTED** to forward a certified copy of this Order to all counsel of record.

ENTERED this 20TH day of October, 2014.



CHARLES E. KING, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT, THIS 21
DAY OF October 2014


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA