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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

CECIL D. ANDRUS,	)	
	)	No. 1:15-cv-453
<i>Plaintiff,</i>	)	
	)	<b>COMPLAINT</b>
vs.	)	
	)	
UNITED STATES	)	
DEPARTMENT OF ENERGY	)	
	)	
<i>Defendant.</i>	)	

**INTRODUCTION**

1. Former Idaho Governor Cecil D. Andrus brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief and seeking the disclosure and release of agency records improperly withheld by Defendant United States Department of Energy (“DOE”).

2. Defendant DOE has violated FOIA by improperly withholding and failing to disclose information and documents relating to DOE’s proposed waiver of a 1995 settlement agreement between the State of Idaho and DOE which resolved federal court litigation initiated by former Governor Andrus, known as the “Batt Agreement.” The Batt Agreement established deadlines for the cleanup and removal of nuclear waste from

the Idaho National Laboratory (“INL”), and prohibits new shipments of commercial spent nuclear fuel to the facility.

3. DOE now seeks a waiver of the Batt Agreement from the State of Idaho that would allow INL to receive two proposed shipments of nuclear waste from commercial nuclear power plants. Numerous newspaper articles and opinions in Idaho have attempted to shed light on this issue. DOE has responded to the media’s attention by spinning the issue as a matter of supporting jobs at INL, rather than dealing with nuclear waste in Idaho.

4. Because DOE has kept the citizens of Idaho in the dark regarding the waiver of the Batt Agreement, Governor Andrus requested information under FOIA to determine what DOE has planned for Idaho’s future.

5. In keeping with its commitment to secrecy and opaqueness, DOE unlawfully relied on discretionary FOIA Exemption 5 to withhold any meaningful information from Governor Andrus’s request for information.

6. Governor Andrus now seeks relief by asking this Court to order the release of information unlawfully withheld by Defendant DOE under FOIA.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including FOIA, the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

8. Venue is proper in this court under 5 U.S.C. § 552(a)(4)(B), as Plaintiff Cecil D. Andrus resides in this judicial district.

9. Plaintiff has exhausted all administrative remedies as required under FOIA, 5 U.S.C. § 552(a)(6)(C)(i), prior to bringing this action.

### **PARTIES**

10. Plaintiff Cecil D. Andrus served as Governor of Idaho from 1971 to 1977, and again from 1987 to 1995. During his hiatus from the Governor's Office, he served on President Carter's cabinet as the Secretary of the Interior from 1977 to 1981. Governor Andrus's political career is notable for many environmental accomplishments, including his work to stabilize and remove nuclear waste at INL.

11. Governor Andrus, since the early 1970s, has monitored, commented upon and expressed grave concerns about inadequate protection of the Snake Plain Aquifer that underlies much of the site. He personally organized Idaho's Blue Ribbon Commission to comment upon the AEC's WASH-1535 document. His concerns directly led to the program to repackage and remove transuranic waste from the site for shipment to the WIPP site in New Mexico and the cessation of utilization of reinjection wells at the site.

12. Upon resuming the governorship in the late 1980s and early 1990s, Governor Andrus initiated highly visible actions – including litigation that resulted in the 1995 Batt Agreement, discussed further below – to challenge DOE's management of nuclear and hazardous wastes at the INL site, and DOE's efforts to store spent nuclear fuel and other wastes at the site. Governor Andrus has remained one of the leaders in ensuring full transparency and accountability by DOE in its management of such wastes at INL.

13. After his retirement, Governor Andrus founded the Andrus Center for Public Policy at Boise State University, which sponsors conferences, publications and other exchange of information and ideas on high-visibility public policy issues. Governor Andrus and the Andrus Center disseminate, publicize, and help explain to the public information regarding important public policy issues affecting Idaho and the West, including information sought through the FOIA request at issue here.

14. Defendant DOE is a cabinet level federal agency with headquarters in Washington, D.C., that maintains offices for its Idaho operations in Idaho Falls, Idaho. The Idaho Operations Office oversees nuclear energy research and development activities at INL.

### **STATEMENT OF FACTS**

#### **Background.**

15. During Governor Andrus's second term in office, under his leadership and direction the State of Idaho initiated federal court litigation against DOE regarding the cleanup, stabilization, and removal of nuclear waste at the INL. Governor Andrus's primary concerns were that nuclear waste stored above the Snake River Plain Aquifer would contaminate Idaho's largest water supply, and that nuclear wastes brought to Idaho would never leave the state.

16. In 1995, shortly after Governor Phil Batt succeeded Governor Andrus, the pending litigation was settled by the Batt Agreement. The Batt Agreement stipulates the treatment and removal of nuclear waste stored at INL through the year 2035. Under the Batt Agreement, shipments of new nuclear waste to INL are severely restricted and

contingent on DOE's obligations to cleanup and remove nuclear waste already stored at INL.

17. Importantly, paragraph D.2.e of the Batt Agreement prohibits new shipments of spent fuel from commercial nuclear power plants to INL, until a permanent storage facility has been established outside of Idaho. To date, DOE does not have a permanent storage facility outside of Idaho. But even after DOE establishes a storage facility, INL may only receive commercial nuclear waste under the Batt Agreement for the purpose of preparing it for permanent storage outside of Idaho.

18. On January 6, 2011, current Idaho Governor C.L. "Butch" Otter and Idaho Attorney General Lawrence Wasden executed a Memorandum of Agreement (the "2011 MOA") between the State of Idaho and DOE, under which the parties purported to agree to a "conditional waiver" of paragraph D.2.e in the Batt Agreement, in order to allow future shipments of so-called "research quantities" of commercial spent nuclear fuel to be shipped to INL in the future.

19. In December 2014, pursuant to the 2011 MOA, DOE requested "conditional approval" from Governor Otter and Attorney General Wasden for a waiver of paragraph D.2.e. of the Batt Agreement to allow two proposed shipments of commercial spent nuclear fuel to the INL. DOE asserted that the spent nuclear fuel shipments were necessary to complete the final six years of an ongoing ten-year research project. Governor Otter and Attorney General Wasden expressed conditional support for DOE's request to waive the Batt Agreement's importation restriction, contingent on a commitment from DOE to resolve its noncompliance with the Batt Agreement.

20. Neither the State of Idaho nor DOE provided advance public notice or disclosure regarding the December 2014 request for a waiver of the 1995 Batt Agreement for these two proposed shipments. Because the purpose of the 1995 Batt Agreement is to protect Idaho's citizens, environment, and economy from threats posed by improper storage of nuclear waste at the INL, former Governors Andrus and Batt became deeply concerned by the secrecy surrounding DOE's plans for shipping nuclear waste to INL.

21. Governors Andrus and Batt have publicly stated their opposition to DOE's proposal seeking a waiver of the 1995 Batt Agreement for the two proposed commercial spent nuclear fuel shipments, including because DOE has not established a permanent storage facility for commercial spent nuclear fuel outside of Idaho; and DOE has already missed key milestones under the Batt Agreement to treat highly radioactive liquid waste already stored at INL. Thus, DOE has already failed to meet its obligations to the citizens of Idaho, yet now seeks permission from the State to set progress back even further.

22. Although DOE has attempted to minimize the significance of the proposed commercial spent nuclear fuel shipments by describing them as "research quantities," DOE has briefed Idaho's Leadership in Nuclear Energy ("LINE") Commission on the possibility of future "research" at INL involving more than 20 metric tons of spent fuel.

**Plaintiff's FOIA Request.**

23. On January 22, 2015, Governor Andrus submitted a FOIA request to DOE seeking all documents relating to the DOE's December 2014 requested waiver of the Batt Agreement for the proposed commercial spent nuclear fuel shipments and the 2011 MOA.

24. On March 18, 2015, Governor Andrus agreed to narrow the scope of his request to include:

[A]ll categories of documents sought in the FOIA relate to the December 2014 request from the [DOE] to current Idaho Governor 'Butch' Otter and Attorney General Lawrence Wasden for a 'waiver' of paragraph D.2.e of the 1995 Settlement Agreement between-DOE and the State of Idaho regarding storage and cleanup of nuclear materials at the Idaho National Laboratory (INL), and that ... [a]ll categories of documents sought in the FOIA relate to this 'waiver' request, and may be read in that limited context.

Governor Andrus also agreed that the search for responsive documents would be limited to the time period between January 1, 2012, and January 22, 2015.

25. On April 28, 2015, DOE granted Governor Andrus' request for a FOIA fee waiver in light of the public nature of the request.

**DOE's FOIA Response.**

26. In spite of Governor Andrus's willingness to work with DOE, he waited months without receiving a response to his request, in violation of the deadlines imposed by FOIA. After threat of litigation, DOE eventually produced an excessively redacted response.

27. DOE formally responded to Governor Andrus's FOIA request on July 10, 2015. In its response, DOE provided a letter, an index of the documents released, and forty-one documents. The letter and index explain that DOE withheld information from thirty-four of the documents under FOIA Exemptions 4, 5, and 6.

28. FOIA exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b)(4). Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the

agency.” *Id.* § 552(b)(5). Exemption 5 is discretionary and includes attorney-client privilege, attorney work product, and agency deliberative process. Exemption 6 protects personal information and privacy. *Id.* § (b)(6).

29. Only small amounts of information were withheld under Exemptions 4 and 6, but DOE employed Exemption 5 to remove virtually all non-public information from the documents provided in response to Governor Andrus’s FOIA request. The response letter and index do not even attempt to describe the information withheld under Exemption 5, and do not identify any reasonably foreseeable harm that could justify withholding this information from the public.

30. The response letter seeks only to justify DOE’s redactions with conclusory statements that merely restate the statutory text of the FOIA exemptions. In fact, only two sentences in DOE’s response letter even vaguely attempt to address the content of the withheld information, as follows:

The material being withheld under Exemption 5 includes deliberations that reflect DOE's internal, deliberative policies concerning proposed shipments of commercial spent nuclear fuel to the Idaho National Laboratory. The information consists of possible action plans, policy concerns, and other deliberative communications pertaining to this ongoing and evolving process.

DOE Response Letter at 3 (July 10, 2015).

31. The index lists the responsive documents according to three specific DOE offices of origin. The index identifies two documents from the Idaho Office of Operations (“ID”), twenty-nine documents from the Office of Nuclear Energy (“NE”), and ten documents from the Office of Congressional and Intergovernmental Affairs (“CI”). The

actual documents included in the response are labeled with the two-letter office abbreviation and independent consecutive numbering, *i.e.*, “ID 1-2; NE 1-29; CI 1-10.”

32. The index does not describe the content of any information withheld by DOE. It merely provides the total number of documents withheld under each FOIA exemption by DOE office. For example, the index states that out of the twenty-nine documents released from NE, thirteen have been partially withheld under Exemption 5. The index does not identify which thirteen documents it is referring to, or explain whether Exemption 5 is being invoked to protect deliberative process, attorney-client communications, or attorney work product. Documents withheld under Exemptions 4 and 6 are described in equally useless terms.

33. Only six documents are specifically identified in DOE’s index. Even then, the index does not address the actual content of those documents, but only explains that omitted attachments are publicly available.

34. DOE supplemented the index by labeling redactions within each document with the asserted FOIA Exemption number. The contexts of the coded redactions adequately supports the withholding of small amounts of information under Exemptions 4 and 6, but are grossly inadequate for the enormous and solid black boxes labeled with Exemption 5. Many Exemption 5 redaction blocks span several pages without interruption, and typically cover the entire message body of DOE emails. It is impossible to determine from context why DOE is asserting Exemption 5, or whether DOE has taken any steps at all to segregate non-exempt information. Thus, there is no way for Governor Andrus to determine whether the material withheld is actually exempt from disclosure under FOIA.

35. Completely absent from DOE's response is any reference to a pending decision that would support withhold information to protect deliberative process. Likewise, there is no mention of any litigation or confidential communications between an attorney and client that would support withholding privileged information. Furthermore, the response letter does not indicate that DOE even considered the potential harm to the public's interest from the discretionary withholding of information.

36. DOE's failure to identify an agency decision that would be harmed by disclosure is particularly relevant here. DOE's FOIA regulations prohibit the use of discretionary exemptions when disclosure is in the public's interest. *See* 10 C.F.R. § 1004.1. Citing Department of Justice policy, DOE stated in its response to Governor Andrus's administrative appeal that discretionary exemptions are to be used only when DOE articulates "a reasonable foreseeable harm to an interest protected by that exemption." DOE OHA Case No. FIA-15-0056 at 4 (Aug. 20, 2015). But DOE has not identified the nature of the redacted information or how that information would contribute to a final agency decision. Thus, it is not reasonably foreseeable that release of the information would harm the agency's decision-making process. *See Kowack v. U.S. Forest Service*, 766 F.3d 1130, 1135 (9th Cir. 2014).

37. In summary, DOE's justification for withholding information merely restates the language of the statutory exemptions and "is not sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology of Wash. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Furthermore, DOE has failed to identify any reasonably foreseeable harm that would justify withholding the requested information from the public.

**Plaintiff's Administrative Appeal.**

38. On August 10, 2015, Governor Andrus filed an administrative appeal with DOE seeking production of the information unlawfully withheld from him under Exemption 5, in conformance with the DOE's FOIA appeal regulations.

39. The administrative appeal alleged that DOE's conclusory and generalized statements do not provide "detailed justification" for withholding information under Exemption 5, and that DOE failed to take reasonable steps to segregate non-exempt information. *Vaughn v. Rosen*, 484 F.2d 820, 823 (1973); 10 C.F.R. § 1004.7.

40. The administrative appeal requested that DOE follow its own regulations and release all material withheld under Exemption 5 because disclosure is in the public interest. 10 C.F.R. § 1004.1.

41. On August 20, 2015, the DOE's Office of Hearings and Appeals ("OHA") denied Governor Andrus's appeal. Echoing DOE's original FOIA response, OHA's rationale for withholding information simply restated the statutory language of the exemptions. OHA also failed to identify any reasonably foreseeable harm to DOE that would be caused by releasing the information in the public interest.

**FIRST CLAIM FOR RELIEF:  
FOIA VIOLATION**

42. Plaintiff realleges and incorporates by reference the preceding paragraphs.

43. Based on the above facts and legal obligations, DOE unlawfully invoked FOIA Exemption 5 to justify its refusal to release information pursuant to Plaintiff's FOIA request.

44. DOE's denial of Plaintiff's FOIA request violates FOIA, 5 U.S.C. § 552(a), and has deprived Plaintiff of his right to public documents in the possession of DOE.

WHEREFORE, Plaintiff prays for relief as set forth below.

**SECOND CLAIM FOR RELIEF:  
APA VIOLATION**

45. Plaintiff realleges and incorporates by reference the preceding paragraphs.

46. DOE's failure and refusal to release the requested information in the public's interest violates its own regulations and is arbitrary, capricious, an abuse of discretion, not in accordance with law and constitutes agency action unlawfully withheld or unreasonably delayed under the APA, which has caused or threatens prejudice and injury to Plaintiff's rights and interests, in violation of FOIA and the APA, 5 U.S.C. § 706.

WHEREFORE, Plaintiff prays for relief as set forth below.

**PRAYER FOR RELIEF**

Plaintiff Cecil D. Andrus respectfully requests that the Court grant the following relief:

A. Declare, adjudge and hold that Defendant DOE violated FOIA and/or the APA by failing to disclose all relevant information pursuant to Plaintiff's January 22, 2015 FOIA request;

B. Declare, adjudge and hold that Defendant DOE violated FOIA and/or DOE's regulations and the APA by invoking Exemption 5 to justify withholding relevant information pursuant to Plaintiff's January 22, 2015 FOIA request;

C. Order that Defendant DOE immediately provide Plaintiff with unredacted copies of the records he has requested, free of charge;

D. Grant Plaintiff's costs of litigation, including reasonable attorney fees as provided by FOIA, the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and any other applicable provision of law, and

E. Provide such other relief as the Court deems just and proper.

Dated: September 29, 2015

Respectfully submitted,

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