

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

NUCLEAR WATCH NEW MEXCO,

Plaintiff,

No. 06-221 BB/WPL

v.

UNITED STATES DEPARTMENT OF  
ENERGY, NATIONAL NUCLEAR  
SECURITY ADMINISTRATION,

Defendant.

**MOTION TO AMEND OR SUPPLEMENT COMPLAINT**

Plaintiff Nuclear Watch New Mexico (“Nuclear Watch”), through its undersigned counsel of record, and pursuant to Fed. R. Civ. P. 15(a), hereby respectfully moves this Court for permission to amend its original complaint filed in this action to include additional claims against Defendant United States Department of Energy (“DOE”), National Nuclear Security Administration (“NNSA”) as further described below. A copy of Plaintiff’s proposed Amended Complaint is filed as Exhibit A to this motion. Alternatively, Plaintiff moves this Court for permission to supplement its original Complaint under Fed. R. Civ. P. 15(d) to set forth relevant transactions, occurrences, and events which have occurred since the date Plaintiff filed its original Complaint on March 23, 2006. This motion is supported by the Declaration of James J. Coghlan, Executive Director of Nuclear Watch, an electronic copy of which was filed on July 28, 2006 in support of Plaintiff’s Response to Defendant’s Motion to Dismiss.

**I. Introduction and Case Background**

Plaintiff filed this proceeding on March 23, 2006 in order to obtain relief from this Court under the Freedom of Information Act (“FOIA”) to provide a remedy for ongoing violations of

the Act by Defendant DOE. At the time that Nuclear Watch filed its original Complaint, the organization had three separate outstanding FOIA requests submitted to the NNSA's Albuquerque Service Center which sought copies of the Ten Year Comprehensive Site Plans (TYCSPs) for several of the nuclear weapons facilities overseen by NNSA. These three FOIA requests were submitted to DOE as a part of Nuclear Watch's efforts to obtain information to serve its mission of keeping the public informed about the agency's activities involved in overseeing the operations of the government's nuclear weapons facilities. See Coghlan Declaration at p. 1, ¶1.

Plaintiff's original Complaint focused on DOE's unlawful withholding of several TYCSPs for the Los Alamos National Laboratory ("LANL") that Nuclear Watch had requested from NNSA's Albuquerque Service Center under the Freedom of Information Act ("FOIA") on December 22, 2004. See id. In addition, at the time Plaintiff filed its original Complaint, Nuclear Watch had also submitted two additional separate FOIA requests to NNSA's Albuquerque Service Center which sought copies of the TYCSPs for the agency's Kansas City and Pantex Plants for Fiscal Year 2006. Nuclear Watch submitted the FOIA request for the Kansas City Plant TYCSP on December 1, 2005, and the request for the Pantex Plant TYCSP on January 4, 2006. See Coghlan Declaration at pp. 1 & 2, ¶2.<sup>1</sup>

As discussed in Nuclear Watch's Complaint, the NNSA requires each of its seven sites to prepare Ten Year Comprehensive Site Plans (TYCSPs) every federal fiscal year. These Plans then largely form the basis for the NNSA's Congressional Budget Request for its nuclear weapons activities for the following fiscal year. In the NNSA's own words:

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<sup>1</sup> In addition to the Los Alamos National Laboratory, the NNSA's Albuquerque Service Center has FOIA responsibility for those two sites as well. See id.

The site TYCSPs are the foundation for the strategic planning for the physical [nuclear weapons] complex, incorporating the programs' technical requirements, performance measures, budget and cost projections within the funding constraints of the approved Future-Years Nuclear Security Program (FYNSP).... [FYNSP contains 5-year budget projections.]

Uses of the TYCSP..... 7. Facilitates assessment of the current status of the facilities and infrastructure within the NNSA complex to support the Nuclear Posture Review (NPR)'s focus on Responsive Infrastructure; ... 9. Establishes realistic planning for, and execution toward, the intended NNSA [nuclear weapons] complex of the future; ... 13. Defines the high-level linkages among weapons workload and production capability with facility requirements; ... 14. Provides the foundation for development of an Integrated Site Plan/Enterprise Plan for the NNSA nuclear weapons complex... (NNSA FY06 TYCSP Guidance, December 2004, pp. 1 & 3-4.)

See Coghlan Declaration at p. 2, ¶3.

As also discussed in Mr. Coghlan's Declaration, there is strong national public interest in obtaining unclassified information concerning the NNSA's operation of and planning for the nation's nuclear weapons complex, which in the past has caused massive environmental degradation and potential threats to the public's health, safety, and welfare. The public interest includes obtaining information concerning both the present facilities that NNSA operates now, and the future nuclear weapons complex that NNSA is responsible for planning and executing. There is strong public interest in the nuclear weapons policies enunciated in the 2001 Department of Defense/DOE Nuclear Posture Review (NPR), which the TYCSPs are intended to support. Some key issues in the NPR are future new-design nuclear weapons, the "Responsive Infrastructure" that will design and produce them, and the future composition of the nuclear arsenal and the research and production complex that will support it. See Coghlan Declaration at pp. 2&3, ¶4.

At the time Nuclear Watch filed the original complaint in this case on March 23, 2006 to try to obtain the release of the TYCSPs for LANL, Mr. Coghlan was also concerned that NNSA

had failed to make a timely determination on Nuclear Watch's two additional then-outstanding FOIA requests for the TYCSP's for the Kansas City and Pantex Plants within the twenty working days required under the FOIA. See Coghlan Declaration at p. 3, ¶5. However, Nuclear Watch ultimately decided to not include any claims regarding those two separate outstanding FOIA requests in its original complaint because, having already waited well-over a year without obtaining the TYCSPs for LANL, Mr. Coghlan decided that it would be reasonable to give the NNSA at least some additional time to make a determination on how to respond to Nuclear Watch's more recent FOIA requests for the Kansas City and Pantex Plant TYCSPs. See id. He was also hopeful that if the lawsuit that Nuclear Watch had filed to obtain the LANL TYCSPs was successful, the organization might be able to avoid litigation over those two separate requests since Mr. Coghlan reasonably assumed that if this present lawsuit caused NNSA to release the LANL TYCSPs, then the agency might be more willing to comply in a timely and reasonable manner with its duty to release those exact same type of records for the two additional nuclear weapons facilities for which they have oversight and planning responsibility. See Coghlan Declaration at p. 3, ¶5.

About two months after Nuclear Watch filed this lawsuit, DOE surprised Nuclear Watch by deciding to release all of the requested LANL TYCSPs that the organization had filed a FOIA request for on December 22, 2004, without any redactions whatsoever. This was a complete and totally unexplained reversal of the agency's previous decision to withhold more than 40% of the Fiscal Year 2004 LANL TYCSP it had provided to Nuclear Watch previously. See Complaint at pp. 6-7, ¶¶ 16-18. Moreover, on December 12, 2005, the DOE's Office of Hearings and Appeals had rejected Nuclear Watch's appeal and protest of those redactions. The appeal and protest also

included a challenge to DOE's failure to provide any LANL TYCSPs whatsoever for FYs 2003, 2005 and 2006. See Coghlan Declaration at pp. 3-4, ¶6.

After Nuclear Watch learned about the DOE's decision to release the LANL TYCSPs in late May 2006, the organization made a decision to try once again to obtain some type of cooperation from the NNSA's Albuquerque Service Center to avoid further litigation over the two outstanding (and by then long-overdue) FOIA requests for the TYCSPs for the NNSA's Kansas City and Pantex Plants. Nuclear Watch contacted the NNSA's FOIA Office again by email in an effort to obtain information about the status of DOE's determination on those two pending requests and to determine whether or not the agency would be willing to make any kind of reasonable commitment to produce the two additional TYCSPs sought in the December 2005 and January 4, 2006 FOIA requests in a more timely manner than with the LANL TYCSPs. See Coghlan Declaration at pp. 4-5, ¶8. Given DOE's abrupt reversal of its previous decision to withhold substantial portions the LANL TYCSPs, Mr. Coghlan was hopeful that Nuclear Watch might be able to avoid litigation over those two separate requests since he reasonably assumed that DOE might now be more willing to comply with the agency's duty to timely release those exact same type of records concerning the two additional nuclear weapons facilities which the organization had submitted virtually identical FOIA requests for. See id.

Unfortunately, when Nuclear Watch contacted the NNSA FOIA Office by email on two separate occasions in June and July 2006 to inquire about the status of the two additional outstanding FOIA requests for the TYCSPs for the Kansas City and Pantex Plants, the organization received responses from the agency that made absolutely no commitment whatsoever about when the agency might make a determination on its two outstanding FOIA requests. Mr. Coghlan's current understanding is only that, after nearly seven months of delay,

those documents are still “undergoing review,” and DOE has refused to provide any estimate of the additional time it may take for them to make the determination of releasability that the FOIA requires in twenty working days. See Coghlan Declaration at p. 5, ¶9.

## II. Discussion

A. Plaintiff should be allowed to amend or supplement its original complaint to set out the facts and claims pertaining to DOE’s unlawful withholding of the additional TYCSPs it seeks under the FOIA.

Although Nuclear Watch is not unhappy to have finally obtained the release of the LANL TYCSPs, Mr. Coghlan is concerned that his organization was only able to receive this information after a delay of almost one and a half years, as well as the apparent necessity of having to file both an administrative appeal and then a lawsuit to enforce those rights. See Coghlan Declaration at p. 4, ¶7. Furthermore, in light of the extremely untimely and obstructive manner in which NNSA’s Albuquerque Service Center responded to the organization’s December 2004 FOIA request for the LANL TYCSPs, Nuclear Watch is concerned about DOE’s continuing failure to comply with the FOIA’s timelines in response to the organization’s two additional outstanding FOIA requests from December 2005 and January 2006 for the additional TYCSPs it seeks for the NNSA’s Kansas City and Pantex Plants. See Coghlan Declaration at p. 5, ¶10.

Given the uncontested fact of DOE’s past unlawful obstruction and delay in providing Plaintiff with this exact same type of agency record, along with DOE’s continuing failure to make the legally-required determinations as to the releasability of the records sought in the organization’s two still-outstanding and long-overdue FOIA requests for the additional TYCSPs, it is clear that DOE is engaging in a pattern and practice of unlawfully withholding these publicly significant and informative agency records from Plaintiff and the public in violation of the FOIA.

See Coghlan Declaration at p. 5, ¶10. This conclusion is also confirmed by the agency's recent and ongoing refusal to provide Nuclear Watch with any reasonable timeline or other assurance that copies of the TYCSPs for the agency's Kansas City and Pantex Plants will be released in a timely manner.

Therefore, even though DOE has, after a lengthy period of unlawful and unjustified delay, finally produced the agency records responsive to Plaintiff's original December 22, 2004 FOIA request, the controversy between Plaintiff and DOE which gave rise to the claims set out in Nuclear Watch's original Complaint is ongoing because the agency is continuing its unlawful pattern and practice of refusing to make timely determinations on the organization's FOIA request for TYCSP records, and is unlawfully withholding the same type of agency records in response to Nuclear Watch's two still-outstanding and now long-overdue FOIA requests for the Kansas City and Pantex TYCSPs. As discussed in its Response to Defendant's Motion to Dismiss, Plaintiff specifically included a request for declaratory and injunctive relief in its original complaint to obtain the Court's assistance in bringing a halt to DOE's unlawful violations of the FOIA. In light of the fact that DOE is currently continuing a pattern and practice of unlawfully refusing to provide Plaintiff with the same exact type of agency records sought under the FOIA, Plaintiff's original request for declaratory and injunctive relief is not moot, because the same controversy exists between the parties which required Nuclear Watch to initiate this proceeding.

In light of the foregoing facts and concerns, Plaintiff seeks this Court's permission to amend its original Complaint, or alternatively to supplement the existing pleadings to set forth the events which have occurred since the date of Plaintiff filed its original Complaint on March 23, 2006, pertaining to DOE's continued unlawful withholding of the TYCSPs for the NNSA's

Kansas City and Pantex Plants for which Nuclear Watch submitted FOIA requests on December 1, 2005, and January 4, 2006. Plaintiff also seeks to amend its original Complaint to add a claim that DOE is continuing to engage in a pattern and practice of unlawfully withholding the TYCSPs for NNSA's several nuclear weapons facilities from Plaintiff, and to add language which seeks relief from this Court to provide a remedy as the Court deems just and proper to avoid similar violations of the FOIA by Defendant in response to future FOIA requests for similar agency records.

B. Applicable Law on Amended and Supplemental Pleadings

Fed. R. Civ. P. 15(a) provides that once a responsive pleading has been served, a party may amend the party's pleading only by leave of court or by written consent of the adverse party. However, the rule states that such leave "shall be freely given when justice so requires." The grant of leave to amend the complaint is within the discretion of the trial court. Ketchum v. Cruz, 961 F. 2d 916, 920 (10th Cir. 1992). However, a Court's refusal to grant leave to amend is generally justified only upon a showing of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the proposed amendment. Foman v. Davis, 371 U. S. 178, 182 (1962). In the absence of any apparent or declared reason such as undue delay, bad faith or dilatory conduct, etc. the leave sought should, as the rules require, be freely given. Outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. Foman v. Davis, 371 U. S. at 182 (1962); see also Hom v. Squire, 81 F. 3d 969 (10th Cir. 1996).



Similarly, Fed. R. Civ. P. 15(d) provides for supplementation, as opposed to amendment, of pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. The Tenth Circuit has advised that motions to supplement are addressed to the sound discretion of the trial court. Gillihan v. Shillinger, 872 F. 2d 935, 941 (10th Cir. 1989)( per curiam)(citation omitted). Leave to supplement a complaint should be liberally granted unless good reason exists for denying leave, such as prejudice to the defendants. Id.

In this case, Plaintiff should be allowed to amend or supplement its original Complaint in order to add claims under the FOIA to remedy the exact same type unlawful agency conduct by DOE that was first challenged in Plaintiff's original Complaint in regard to DOE's unlawful actions in response to Nuclear Watch's FOIA request for the LANL TYCSPs. Unfortunately, DOE is continuing to engage in that same unlawful conduct in response to Plaintiff's two additional outstanding FOIA requests for the TYCSPs for the NNSA's Kansas City and Pantex Plants. Defendants have not yet filed an Answer to Plaintiff's original Complaint and will not be unduly prejudiced by the proposed amendments to Plaintiff's original Complaint. Furthermore, Plaintiff has not engaged in unjustified delay or dilatory conduct, nor has Nuclear Watch acted in bad faith by choosing to try to give DOE additional time from when it first filed the original Complaint on March 23, 2006 until now to produce the additional TYCSP records or to otherwise cooperate with Plaintiff in setting a reasonable timeline for the agency's determination and production of records in response to those two additional requests.

### III. Conclusion

For the reasons discussed above, Plaintiff respectfully requests that the Court grant its Motion to amend or supplement its original complaint filed in this action to: 1) include the additional allegations and claims for relief pertaining to DOE's continued unlawful withholding of the TYCSPs for the NNSA's Kansas City and Pantex Plants for which Nuclear Watch submitted FOIA requests on December 1, 2005, and January 4, 2006; 2) to add a claim that DOE is continuing to engage in a pattern and practice of unlawfully withholding the TYCSPs for NNSA's several nuclear weapons facilities from Plaintiff; and 3) to add language which seeks relief from this Court to provide a remedy as the Court deems just and proper to avoid similar violations of the FOIA by Defendant in response to future FOIA requests for similar agency records submitted by Plaintiff.

RESPECTFULLY SUBMITTED,

(electronically filed)

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I certify that a copy of the foregoing was served on opposing counsel electronically on this 30<sup>th</sup> day of July, 2006, and by first class mail on the 31st day of July, 2006.

(electronically filed)  
Richard Mietz