

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>JEFFREY ROSENBLATT,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<b>Civil No. 98-45-P-H</b>
	)	
<b>UNITED STATES DEPARTMENT</b>	)	
<b>OF INTERIOR, BUREAU</b>	)	
<b>OF INDIAN AFFAIRS,</b>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

Jeffrey Rosenblatt has sued the United States Department of Interior, Bureau of Indian Affairs (the “Bureau”) for the second time in an effort to obtain documents relevant to the proposed construction of a bingo hall by the Passamaquoddy Tribe (the “Tribe”) in Albany Township, Maine. Complaint (Docket No. 1) ¶¶ 2-3 and Exh. A thereto; Complaint in Civil Docket No. 97-312-P-H (“Rosenblatt I”) (Docket No. 1) ¶¶ 2-3. In his earlier action, Rosenblatt prevailed in obtaining unredacted copies of certain loan documents pursuant to the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552. Order Affirming Recommended Decision of the Magistrate Judge in Rosenblatt I (“Order in Rosenblatt I”) (Docket No. 30). He filed the instant suit when the Bureau failed to respond promptly to a second FOIA request. Complaint ¶¶ 4-5. Claiming that it possesses

no additional documents responsive to the second request, the Bureau moves for summary judgment. Defendant's Motion and Incorporated Memorandum for Summary Judgment ("Motion") (Docket No. 12). For the reasons that follow, I recommend that the motion be granted.

### **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

The Local Rules of this court require a party seeking summary judgment to provide "a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried." Loc. R. 56. The non-moving party must file a corresponding statement, "supported by appropriate record citations, as to which it is contended that there exist[s] a genuine issue to be tried." *Id.* The rule warns that all properly supported material facts asserted in the moving party's factual statement "will be deemed

to be admitted unless properly controverted by the statement required to be served by the opposing party.” *See also Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.”)

Rosenblatt has not filed a separate statement of material facts. Thus, to the extent properly supported by record citations, the Bureau’s statement of material facts is taken as true.

## **II. Factual Context**

In light of the foregoing, the summary judgment record reveals the following:

The Tribe applied to the Maine Land Use Regulation Commission for permits to build and operate a bingo hall in Albany Township. Complaint in *Rosenblatt I* ¶ 3; Answer in *Rosenblatt I* (Docket No. 2) ¶ 3. On or about June 16, 1997 Rosenblatt sent a letter to the Bureau pursuant to the FOIA seeking a copy of a contract between the Tribe and Snake River Financial Corporation [sic], which Rosenblatt believed related to development of the bingo hall. Complaint in *Rosenblatt I* ¶ 3; Declaration of Thomas Hartman in *Rosenblatt I* dated February 24, 1998 (“Hartman Decl. in *Rosenblatt I*”) (Docket No. 15) ¶ 6 and Exh. A thereto. Having received no final response from the Bureau as of October 9, 1997, Rosenblatt sued. Complaint in *Rosenblatt I* ¶ 28. The Bureau, in consultation with the Tribe, subsequently redacted portions of the requested material prior to release to Rosenblatt. Hartman Decl. in *Rosenblatt I* ¶¶ 12-13. The Bureau claimed exemptions from FOIA release requirements, but on cross-motions for summary judgment Rosenblatt prevailed in obtaining unredacted copies. Order in *Rosenblatt I*.

On or about January 27, 1998 Rosenblatt filed a second FOIA request with the Bureau seeking copies of any contracts entered into between the Tribe and several third parties, described

as Snake River Financing, Ltd., Tamir Sapir, Soiltech US, Soiltech Canada, Soiltech Environmental Systems, Inc., Zar Realty Corporation, Zar Realty Management Corporation, Joy Lud Distributors, Joy Lud Distributors Int., Joy Lud Distributors, Inc. and Joy Lud Corporation. Complaint ¶ 3 and Exh. A thereto. Having received no response, he filed the instant action on February 18, 1998. Complaint at 1.

The Bureau on April 1, 1998 filed a motion to dismiss supported by a declaration of Thomas Hartman, in which it alleged that a search had yielded no responsive documents. Defendant's Motion and Incorporated Memorandum to Dismiss (Docket No. 4); Declaration of Thomas Hartman dated March 31, 1998 ("First Hartman Decl.") (Docket No. 3) ¶ 4. In recommending denial of the motion, I expressed puzzlement as to how the Bureau could claim there were no responsive documents in view of the fact that the same documents released in Rosenblatt I were also responsive to Rosenblatt's second FOIA request. Recommended Decision on Defendant's Motion to Dismiss (Docket No. 6) at 3 n.1.<sup>1</sup>

The Bureau now explains, through a new declaration of Thomas Hartman, that in stating that there were no documents responsive to Rosenblatt's second FOIA request, it meant none other than those previously released as a result of his first. Declaration of Thomas Hartman dated July 29, 1998 ("Second Hartman Decl.") (Docket No. 14) ¶ 3. With this clarification, it reconfirms that no responsive documents were found. *Id.* ¶ 5. It finally details the manner in which it looked for materials matching Rosenblatt's second FOIA request as follows:

- (i) the Bureau's Eastern Area Office (the "EAO"), which is the records custodian for the Passamaquoddy agreements, initially searched records, after which the request

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<sup>1</sup>The recommended decision was adopted. Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 7).

was forwarded to the Office of Economic Development (the “OED”) on March 11, 1998 for a records search.

(ii) per Hartman’s request, in July 1998 John Fitzpatrick, FOIA coordinator, EAO, reviewed the EAO records search.

(iii) per Hartman’s request, Ray Brown, supervisory financial analyst, OED, reviewed the OED’s record search.

(iv) Hartman double-checked his own files relating to Rosenblatt’s second FOIA request.

*Id.* ¶¶ 2, 4-5.

### III. Discussion

In this second tussle with Rosenblatt, the Bureau argues that it is entitled to summary judgment in that the summary-judgment record evidences a thorough search for the requested documents pursuant to which, the Bureau swears, none were found.<sup>2</sup> Motion at 4-5. In the absence of contradictory evidence or a showing of its bad faith, it asserts, no more is required. *Id.* at 3. *See DeLorme Publ’g Co. v. National Oceanic & Atmospheric Admin.*, 917 F. Supp. 867, 874-75 (D. Me. 1996) (agency having claimed that it possessed no vector conversions, summary judgment warranted unless plaintiff could show evidence of unreasonable search or bad faith). Rosenblatt agrees — provided that two “extraneous, inaccurate, and irrelevant representations made by the Defendant do not alter its fundamental assertions that it has made a diligent search for the documents requested and that there are no such documents . . . .” Response of Plaintiff to Defendant’s Motion for Summary Judgment (“Response”) (Docket No. 15) at 2.

The challenged assertions are indeed “extraneous.” The Bureau cannot resist expounding

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<sup>2</sup>The Bureau clears up, to my satisfaction and apparently to Rosenblatt’s, the mystery of why it did not produce, in response to Rosenblatt’s second FOIA request, documents that it had already produced in response to his first.

on why (in its opinion) certain documents likely would not be in its possession. Defendant's Statement of Material Facts (Docket No. 13) ¶ 13; Letter dated March 31, 1998 from Nancy Jemison to Jeffrey Rosenblatt ("Jemison Letter"), attached as Exh. 1 to Second Hartman Decl.<sup>3</sup> But all that matters here is whether, regardless what it thought it might find, it looked for the materials that Rosenblatt requested. This it swears it did. Rosenblatt having adduced no evidence to call this statement into question, the Bureau is entitled to summary judgment.

Rosenblatt finally seeks reimbursement from the Bureau of his \$150 filing-fee cost. Response at 2. Despite the modesty of his request and the Bureau's silence as regards it, I nonetheless am compelled to recommend its denial. A plaintiff in a FOIA action may be awarded attorney fees or costs only if he or she "substantially prevails" on the merits. *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 568 (1st Cir. 1993). To qualify, a plaintiff must, at a minimum, obtain release of some requested documents. *Id.* Because no new documents emerged in response to Rosenblatt's second FOIA request, he cannot be said to have "substantially prevailed."

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's summary judgment motion be **GRANTED** and that the plaintiff's request for payment of his costs be **DENIED**.

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<sup>3</sup>The Bureau errs in its flat assertion in the Jemison Letter that FOIA procedures do not apply to agreements between the Tribe and third parties, as to which it says it is not privy. To the contrary, certain of such contracts are null and void unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs. 25 U.S.C. § 81. They would thus be expected to be in the Bureau's possession. The FOIA, in turn, applies in relevant part to "any request for records." 5 U.S.C. § 552(a)(3)(A). Contracts between Indian tribes and third parties are not specifically enumerated as exempt from FOIA requirements. *Id.* § 552(b).

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 22nd day of October, 1998.*

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*David M. Cohen  
United States Magistrate Judge*