IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID ALBINO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE and SANYAOLU O. AJODEJI,

Defendants.

OPINION AND ORDER

01-C-563-C

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In this civil action for declaratory and injunctive relief brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, pro se plaintiff David Albino seeks to compel defendants United States Postal Service and Ajodeji O. Sanyaolu[1] to produce certain records held by defendant Postal Service. Specifically, plaintiff contends that although defendants have provided him some of the requested records, they have failed to conduct a good faith search for the requested documents. In addition, he asserts that defendant Sanyaolu acted in an arbitrary and capricious manner by

[1] Defendant Sanyaolu O. Ajodeji is more properly identified as Ajodeji O. Sanyaolu, and will be referred to as such in this opinion.

failing to respond to his FOIA request. Jurisdiction is present under 5 U.S.C. § 552(a)(4)(B).

The case is currently before the court on plaintiff's "motion brief in support of order to compel production of records." Because the arguments on this motion to compel refer to plaintiff's Freedom of Information Act claims only, I will not consider any issues under the Privacy Act. Also, I will dismiss the Freedom of Information Act claims against defendant Sanyaolu because he is not a proper defendant in a Freedom of Information Act case. Such actions may be brought only against agencies that hold requested records. I find that defendant Postal Service did not conduct an adequate search for the records plaintiff requested in his fourth and fifth categories of information relating to grievances and in his sixth category of information relating to electronic documents. Therefore, plaintiff's motion to compel the production of documents will be granted as to the fourth, fifth and sixth categories of records only and will be denied as to all other categories. Because I find that Sanyaolu's failure to respond to plaintiff's request does not raise the question whether his actions were arbitrary and capricious, I will not issue a written finding to that effect under 5 U.S.C. § 552(a)(4)(F). Finally, I find that plaintiff prevailed substantially in this action and will award him costs reasonably incurred in prosecuting this action, but not attorney fees.

From plaintiff's complaint and the record, I find the following facts for the sole

purpose of deciding this motion.

BACKGROUND

Plaintiff David Albino has requested records from defendant United States Postal Service, an agency of the United States that has possession and control over the documents that plaintiff seeks. Defendant Ayodeji O. Sanyaolu is an employee of defendant Postal Service and was the plant manager of the United States Postal Service in Madison, Wisconsin until February 17, 2001. (Plaintiff alleges that as plant manager, defendant Sanyaolu is the custodian responsible for responding to requests from members of the public for postal service records.)

In a certified letter dated February 8, 2001, plaintiff asked defendant Sanyaolu for various documents in the possession of defendant Postal Service. The letter contains a subject line titled "Freedom of Information Act Request for Records" and provides:

> This is a request under the Privacy Act of 1974, 5 U.S.C. § 552a, as amended, and the Freedom of Information Act, 5 U.S.C. § 552, as amended (including the Electronic Freedom of Information Act amendments of 1996). All records requested herein that fall under the provisions of the Privacy Act will be used for statistical purposes and this should be made available in a form that is not individually identifiable.
>
> Please provide a copy of any instructions, guidelines, directives, handbooks, circulars, management instructions or memorandums of policy or other information, regardless of format or media, created by or obtained by the installation that implement, instruct, explain or otherwise put into effect the provisions of Sections

421.51, 422.24, 423(b)(4) & 423(b)(5), Employee Labor Relations Manual (August, 2000).

For every employee reassigned or reduced in grade in pursuant to §§ 422.24 and 422.25 (ELM) between December 1, 1996 and January 31, 2001 within the installation, please provide the seniority date, rate schedule, grade and step both before and after reassignment or reduction in grade. For those employees reduced in grade, please identify those employees to whom the protected rate applied under § 421.51 (ELM).

Please provide a copy of any instructions, guidelines, directives, handbooks, circulars, management instructions or memorandums of policy or information, regardless of format or media, created by or obtained by the installation that implement, instruct, explain or otherwise put into effect the provisions of the recent agreement between the American Postal Workers Union (APWU) and the Postal Service regarding new salary schedules I and II, promotion pay anomaly, 1998-2000 contract.

For this installation, please provide copies of grievances filed between December 1, 1996 and January 31, 2001, where an issue involved application of §§ 421.51 and/or 422.25 (ELM). For each grievance, please provide the dates of any interim steps and the date and nature of any resolution.

For this installation, please provide copies of grievances filed between November 1, 1998 and January 31, 2001, where an issue involved the application of new APWU salary schedules I and II. For each grievance, please provide the dates of any interim steps and the date and nature of any resolution.

For the period between January 1, 1997 and January 31, 2001, please provide <u>electronic copies</u> of:

a. All electronic mail sent by, received by or generated by Ayodeji O. Sanyaolu, Steven Hampton, Gordon Pankratz, Dennis Campbell, Steve Raymer and their secretaries or assistants that in any way discuss the provisions and applications of §§ 421.51, 422.24, 422.25, 423(b)(4) and/or 423(b)(5) (ELM) either directly or indirectly.

b. All other electronic mail that in any way discuss the provisions of §§ 421.51, 422.24, 422.25, 423(b)(4) or 423(b)(5) (ELM).

c. All electronic mail sent by, received by or generated by Ajodeji O. Sanyaolu, Steven Hampton, Gordon Pankratz, Dennis Campbell, Steve Raymer and their secretaries or assistants that in any way discuss the provisions new APWU salary schedules I and II.

d. All other electronic mail that discuss the new APWU salary schedules I and II.

e. All databases containing any reference to and/or information about the provisions of §§ 421.51, 422.24, 422.25, 423(b)(4) and/or 423(b)(5) (ELM).

f. All databases containing any reference to and/or information about the new APWU salary schedules I and II.

g. All word-processing documents, files and file fragments that discuss the provisions of §§ 421.51, 422.24, 422.25, 423(b)(4) and/or 423(b)(5) (ELM).

h. All word-processing documents, files and file fragments that discuss the new APWU salary schedules I and II.

Please identify the name, manufacturer, version number and date of any software used to process and maintain electronic mail, database and word-processing functions responsive to this request. Please identify whether proprietary or commercial.

The letter was delivered to its destination on February 9, 2001. Defendants did not respond within 20 workdays of their receipt of the letter.

Plaintiff filed this lawsuit on October 2, 2001. In a letter dated December 21, 2001, defendants responded to plaintiff's request, providing some documents and withholding others.

OPINION

The Freedom of Information Act provides that district courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Under § 552(a)(4)(B), "federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 150 (1980). The burden is on the agency to demonstrate that the materials that are subject to the FOIA request are not "agency records" or have not been "improperly withheld." The requester has no burden to disprove these propositions. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989). See also United States Dept. of State v. Ray, 502 U.S. 164, 173 (1991) (The "strong presumption in favor of disclosure [under the Freedom of Information Act] places the burden on the agency to justify the withholding of any requested documents.").

In this case, plaintiff asserts that defendants have withheld agency records improperly by failing to conduct a good faith search for them. In addition, plaintiff contends that defendant Sanyaolu's failure to respond was arbitrary and capricious. In his initial brief, plaintiff also argues that the exemptions that defendants had asserted are inapplicable. However, between the time plaintiff filed his opening brief and the time he filed his reply brief, defendants disclosed records responsive to plaintiff's requests for which they previously

had asserted exemptions. Further, defendants concede that because they did not meet the statutory deadline for responding to his request, plaintiff is deemed to have exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C).

A. Defendant Sanyaolu

As noted above, § 552(a)(4)(B) provides that the district court "has jurisdiction to enjoin the *agency* from withholding agency records and to order production of any agency records improperly withheld from the complainant." (Emphasis added). In other words, FOIA actions may be brought only against the agency that holds the requested records. Despite the fact that plaintiff's FOIA request was addressed to defendant Sanyaolu, he is not a proper defendant to this action and will be dismissed.

B. Adequacy of Search for Records

In order to show that a search was reasonable, an agency must show that it made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. United States Dept. of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). In other words, the search need not be perfect, but adequate. The adequacy of a search is necessarily "dependent upon the circumstances of the case." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir.

1990). "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

Because the agency is often in sole possession of the requested documents and has conducted the searches for information itself, courts may rely on affidavits of agency employees in determining whether an agency has met its burden of proof. Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994); In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992). Such affidavits must be reasonably detailed, nonconclusory and submitted in good faith. Wade, 969 F.2d at 249 n.11. The affidavit should identify the searched files and describe the structure of the agency's file system that would make further searches difficult. Oglesby, 920 F.2d at 68. Although an agency is not required to search "every" record system, it is required to "explain in its affidavit that no other record system was likely to produce responsive documents." Id.

Defendant Postal Service has submitted an affidavit of Peter P. Vetter, a Labor Relations Specialist who was the primary person responsible for gathering records requested under FOIA. In the affidavit, Vetter outlines the steps he took to search for the records requested by plaintiff. Plaintiff's FOIA request lists six separate categories of records but plaintiff takes issue with the adequacy of the search only as to the first, fourth, fifth and sixth categories.

1. First category

In the first category of his FOIA request, plaintiff asked for records relating to certain provisions of the Employee Labor Relations Manual. In his affidavit, Vetter states that he searched for these records by reviewing the provisions and making a personal check of the labor office files, where he would expect to find such records if they existed. Decl. of Vetter, dkt. #11, at 2. Vetter also asked several long-term postal employees whether they knew of the existence of the requested items. Id. They informed Vetter about a December 20, 1999 letter written by Daryl Sole, the manager of human relations. Id. at 2-3. Vetter forwarded a copy of the letter to defendant Postal Service's law department and believes a copy has been provided to plaintiff.

After reviewing Vetter's affidavit as to the first category of requested documents, I find that defendant's search was reasonable. Vetter outlines in relative detail the search he performed and why he did not search elsewhere. He also relied on the memories of several long-term employees in conducting his search. Moreover, plaintiff does not argue that Vetter's search method was flawed or otherwise inadequate. Instead, plaintiff alleges that defendant failed to identify a June 29, 2000 letter written by Thomas Downs, a former postal manager, that may be responsive to plaintiff's first category of requested information. Plaintiff asserts that because defendant has failed to produce the letter or discuss its non-production even after having been notified of its existence in his initial brief, defendant

should be ordered to produce the letter. I am not convinced that defendant's failure to produce a single letter that "may be" responsive to plaintiff's request renders the search inadequate; plaintiff's speculation that a responsive letter may exist does not undermine the finding that a search is reasonable. SafeCard, 926 F.2d at 1201. Plaintiff's motion to compel the production of records responsive to his first category of information will be denied.

2. Fourth and fifth categories

The fourth and fifth categories of requested information relate to grievances involving various provisions of the Employee Labor Relations Manual and the new American Postal Workers Union salary schedules. Vetter searched for the records by looking through the labor office files and files in closed storage, because these would be the storage locations for the records if they existed. Decl. of Vetter, dkt. #11, at 5. Vetter found no records in response to plaintiff's request. However, a postal employee informed Vetter that a grievance had been filed by Thomas Wagner. Id. Vetter searched for the grievance but could not find it. His understanding is that such grievances might be maintained by the American Postal Workers Union. Id.

Plaintiff argues that defendant has failed to conduct an adequate search as to the fourth and fifth categories. Specifically, he notes that Vetter did not perform a search of the

"Grievance and Arbitration Tracking System." Presumably, plaintiff believes that such a search would have uncovered records responsive to his request. Although defendant had the opportunity to explain why Vetter did not search this system, defendant did not address this issue in its response brief. Although an agency is not required to search every record system, it must use methods that can be reasonably expected to produce the information requested. Oglesby, 920 F.2d at 68. Because plaintiff points to a grievance tracking system that Vetter does not allege was searched and because defendant fails to explain its failure to search this system, I find that defendant did not conduct a reasonable search of its records relating to grievances. Plaintiff's motion to compel defendant Postal Service to produce records falling with the fourth and fifth categories of information will be granted.

3. Sixth category

In his sixth category, plaintiff requested copies of electronic mail messages, databases and word processing documents related to the new salary schedules. To respond to the request, Vetter searched the labor office files and the labor database, the two places he expected to find the records if they existed. Decl. of Vetter, dkt. #11, at 6. Vetter also sent e-mail messages to four individuals whom plaintiff had specifically named in which he summarized plaintiff's request and asked whether they had any such records. Id. at 6-7. Each of them responded that they did not have any records responsive to plaintiff's request.

Gordon Pankratz responded that he "searched [his] archives and could not find any correspondence on the issues" Vetter had summarized. Id. at Ex. A., at 1. Ajodeji Sanyaolu stated, "I do not have any of the requested information." Id. at Ex. A., at 2. Dennis Campbell wrote, "I do not remember ever creating any ccmail that mentions the ELM sections you speak of. If I ever sent any information, it would no longer be available as it is shredded." Id. at Ex. A., at 3. Vetter also sent an e-mail message to Steven Hampton, who informed him verbally that he had no records responsive to plaintiff's request. Id. at 7. Vetter did not send an e-mail message to Steve Raymer, from whom plaintiff had requested copies of e-mail messages. As the local president of the American Postal Workers Union, Raymer is not on defendant Postal Service's e-mail system and, therefore, there would not be any e-mail messages to or from him. Id.

Plaintiff challenges the adequacy of the search for records in the sixth category on two grounds. Plaintiff takes issue with the responses to Vetter's e-mail message asking other postal employees to search for electronic records. Plaintiff's first point of contention requires little discussion. He asserts that these responses are nothing more than unsworn declarations within a sworn declaration. However, plaintiff has presented to reason to doubt the veracity of the responses and I have no basis to do so.

Second, plaintiff discredits the responses because they fail to identify what process, if any, was used to search for the records. For example, Pankratz states that he searched his

archives. Sanyaolu does not say where he looked but states simply that he has no information. Campbell does not remember creating any e-mail messages responsive to plaintiff's request and notes that such records would be shredded if they had ever existed. Without further discussion, plaintiff asserts that the General Records Schedule of the National Archives and Records Administration requires that electronic versions of "federal records" authorized for disposal elsewhere may be deleted only after copied to a recordkeeping system. Relying on this schedule, plaintiff argues that a proper method would have included an electronic search by information technology personnel of the e-mail recordkeeping system for messages responsive to plaintiff's request.

After reviewing Vetter's affidavit and its attached exhibit, I conclude that defendant has not conducted a reasonable search of its records for information in the sixth category of plaintiff's request. Although agencies are not required to search "every" record system, I find that Vetter's search method could not be "reasonably expected to produce the information requested" relating to defendant Postal Service's electronic records. Oglesby, 920 F.2d at 68. Among other records, plaintiff's request covered electronic records dated January 1, 1997 through January 31, 2001, sent to or received by certain individuals. To search for these records, Vetter sent an e-mail to the listed individuals asking them to "provide [him] with the following [records] if [they] have it." Although it is not illogical to ask the named individuals for the records, Vetter's search as to the sixth category is flawed in at least two

respects. First, his phrasing of the request (to provide the e-mail copies if they have them) does not inform the recipients that they must do anything more than check their e-mail inboxes; the memorandum did not state explicitly that the recipients needed to check records dating back to January 1, 1997, almost five years earlier. Second, even if Vetter had made that point explicit, he did not enlist the help of information technology personnel. Unlike individual employees who are not expected to archive their e-mail messages, information specialists would have access to e-mail message archives from the last five years, if they existed. Because Vetter's search for the sixth category of requested records was inadequate, plaintiff's motion to compel the production of records in his sixth category will be granted.

In granting plaintiff's request, I note that in his letter dated February 8, 2001, plaintiff offered to pay fees for his request up to a maximum of $125. If defendant estimates that the cost of producing the electronic records that plaintiff seeks in the sixth category will exceed that limit, it should inform plaintiff.

C. Sanyaolu's Alleged Arbitrary and Capricious Failure to Respond

5 U.S.C. § 552(a)(4)(F) provides that "[w]henever a court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions

whether agency personnel acted arbitrarily or capriciously with respect to the withholding," disciplinary proceedings shall be initiated against that agency employee. It appears from the statute that plaintiff can ask the court to issue a written finding of arbitrary and capricious action but that it is up to the Merit Systems Protection Board's Special Counsel and the agency to initiate disciplinary proceedings. Thus, although plaintiff argues that the circumstances surrounding Sanyaolu's failure to respond to his FOIA request raise questions of arbitrariness or capriciousness and, therefore, that disciplinary proceedings should be initiated against Sanyaolu, I will construe his request as one for the issuance of a written finding.

Nothing in the record suggests that Sanyaolu acted in an arbitrary and capricious manner. Defendant does not dispute that it did not respond to plaintiff's February 8, 2001 letter until December 21, 2001. It is also undisputed that plaintiff's certified letter arrived at the Postal Service on February 9, 2001. However, in his affidavit, Sanyaolu states that he does not recall receiving the letter and that he believes he would recall receiving it if he had. Decl. of Sanyaolu, dkt. #12, at 1-2. Sanyaolu states further that he did not become aware of the letter until November 28, when Vetter sent him an e-mail message asking about the records that plaintiff had requested. Id. at 2. Because Sanyaolu had left defendant Postal Service's Madison office shortly after plaintiff's letter was received, he called the secretary of the new Madison plant manager to see whether the plant manager's office had

a record showing receipt of the letter before his departure. Id. The plant manager's office has no record of having received plaintiff's February 8, 2001 letter. Id. Although plaintiff draws the inference that Sanyaolu acted in an arbitrary and capricious manner by failing to respond to his record request, Sanyaolu's statement simply does not lead to this conclusion. Without any facts showing that Sanyaolu received the letter, I decline to issue "a written finding that the circumstances surrounding the withholding raise questions whether [Sanyaolu] acted arbitrarily or capriciously with respect to the withholding." 5 U.S.C. § 552(a)(4)(F).

D. Attorney Fees and Costs

In an FOIA action, "the court may assess against the United States reasonable attorney fees and other litigations costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). To establish that he "substantially prevailed," a plaintiff must prove that (1) the prosecution of the action could reasonably be regarded as necessary to obtain the information; and (2) the action had a substantive causative effect on the delivery of the information. Long v. Internal Revenue Service, 932 F.2d 1309, 1313 (9th Cir. 1991).

From the fact that defendant did not respond to plaintiff's request until after it was served his complaint in this action, it is clear that the action had a direct causative effect on

plaintiff's receipt of records. As an ancillary to this fact, this action could be reasonably regarded as necessary to obtain that information. I find that plaintiff has substantially prevailed in this case under 5 U.S.C. § 552(a)(4)(E).

This leaves only one issue: attorney fees and costs. Plaintiff is proceeding pro se in this case, but he is a lawyer. The Court of Appeals for the Seventh Circuit has held that a pro se litigant who is not a lawyer may not recover attorney fees under FOIA. DeBold v. Stinson, 735 F.2d 1037, 1042-43 (7th Cir. 1984). Although neither the Court of Appeals for the Seventh Circuit nor the Supreme Court has addressed the question whether a pro se litigant who is a lawyer may recover attorney fees under FOIA, the Supreme Court has held that a lawyer who represented himself could not recover attorney fees in the context of a suit brought pursuant to 42 U.S.C. § 1988. Kay v. Ehrler, 499 U.S. 432, 438 (1991). The Court reasoned that the "statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." Id. I see no reason why this rationale should not apply to actions brought under FOIA. However, this policy does not preclude a pro se litigant from receiving an award of costs. Accordingly, plaintiff will be awarded costs reasonably incurred in prosecuting this action.

ORDER

IT IS ORDERED that

1. Plaintiff David Albino's motion to compel the production of records is GRANTED as to the fourth and fifth categories of requested records relating to grievances and as to the sixth category of requested records relating to electronic documents and is DENIED as to all other categories;

2. I decline to issue a written statement that the circumstances surrounding defendant Sanyaolu's failure to respond to plaintiff's FOIA request raise the issue whether his actions were arbitrary and capricious;

3. Defendant Ajodeji O. Sanyaolu is DISMISSED from this case; and

4. Plaintiff may have until June 7, 2002, in which to submit an itemization of the costs he reasonably incurred in prosecuting this claim; defendant United States Postal Service may have until June 17, 2002, in which to respond to plaintiff's submission. There will be no reply brief.

Entered this 20th day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge