IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MARK BOGAN.

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

OPINION AND ORDER

04-C-532-C

- -

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 Mark Bogan seeks to compel defendant Federal Bureau of Investigation to produce records regarding his conviction for assaulting a prison guard. Plaintiff alleges that although defendant has given him some of the records he requested, it has failed to conduct a good faith search for the remainder. This case is before the court on plaintiff's motion for summary judgment.

The record contains no indication that defendant has conducted any independent search for the records plaintiff requested. Instead, it appears that defendant merely

processed the records it received from the Freedom of Information Act/Privacy Act Unit of the Executive Office for United States Attorneys. Accordingly, I will grant plaintiff's request to order defendant to produce in a timely manner the requested records that are within its possession and are not exempt from disclosure.

From the facts proposed by the parties, I find that the following are material and undisputed.

UNDISPUTED FACTS

Plaintiff Mark Bogan is confined at the United States Penitentiary Administrative Maximum facility in Florence, Colorado. On September 6, 1999, while incarcerated at the Federal Correctional Institution in Oxford, Wisconsin, plaintiff and another inmate, Tony Calhoun, attacked a guard. Both men were indicted, tried and convicted for this attack. On May 11, 2000, plaintiff filed a notice of appeal in the criminal case, United States v. Bogan, 99-CR-91-C (W.D. Wis.). On July 10, 2000, plaintiff filed a Freedom of Information Act request with the Bureau of Prisons. On January 5, 2001, plaintiff filed an appellate brief in his criminal case; his joint appeal with Calhoun was decided against him on September 25, 2001.

By letter dated August 22, 2000, the Bureau of Prisons referred plaintiff's Freedom of Information Act request to defendant. The referral letter read in part, "As your office may

have records responsive to this request, we are referring it to you for a direct response to the requestor." By letter dated September 22, 2000, defendant advised plaintiff that (1) it had received his Freedom of Information Act request from the Bureau of Prisons; (2) it had assigned the number 0928928-000 to the request; and (3) before defendant would conduct a search for any material responsive to his request, plaintiff would have to provide verification of his identity, including his date and place of birth and any other identifying data, along with either his notarized signature or his sworn declaration of identity.

Approximately two and a half years after the first referral of plaintiff's request, defendant received a letter dated May 20, 2003 from the Freedom of Information/Privacy Act Unit of the Executive Office for United States Attorneys. Enclosed with the letter was a copy of a handwritten letter from plaintiff, dated February 6, 2001, which contained requests that were similar but not identical to some of the requests in plaintiff's July 10, 2000 Freedom of Information Act request. The May 20, 2003 letter from the Executive Office stated that the office had located 214 pages of FBI records while processing plaintiff's February 6, 2001 request and that copies of those 214 pages were enclosed and were being referred to defendant for a direct response to plaintiff. The letter included a paragraph that read, "As your office may have records responsive to this request, we are referring it to you for a direct response to the requester."

Ten days later, on May 30. 2003, defendant received another referral letter from the

Executive Office for United States Attorneys, stating that (1) the office had received a Freedom of Information Act request from plaintiff; (2) a copy of the request was enclosed; and (3) while processing this request, the office had located and was enclosing four pages of records, one videotape, and one audiotape for a direct response to plaintiff. The Freedom of Information Act request from plaintiff that was enclosed with the May 30, 2003 letter was a copy of plaintiff's July 10, 2000 letter to the Bureau of Prisons. The office sent copies of both to plaintiff and defendant.

Defendant designated both of plaintiff's Freedom of Information Act request letters, dated February 6, 2001, and July 10, 2000, as request number GR 03-554. Of the 218 pages sent from the Executive Office for United States Attorneys to defendant with the May 20, 2003 and May 30, 2003 referrals, 7 pages were not processed because they were either the referral letters themselves or were otherwise not responsive to either of plaintiff's Freedom of Information Act requests.

On August 3, 2004, plaintiff filed a civil complaint requesting (1) a court order compelling "various agencies" to relinquish the information he had requested in his letters; (2) leave to file a motion pursuant to 28 U.S.C. § 2255 "under exceptions 2 and 4 of the section that governs when a motion can be filed"; and (3) damages and attorney fees. In an order dated August 24, 2004, this court determined that plaintiff's relief was limited to an order requiring defendant to produce the records sought by plaintiff.

Plaintiff received defendant's answer to his civil complaint on November 15, 2004. In a letter dated December 21, 2004, defendant advised plaintiff that, in response to his Freedom of Information Act request number GR-03-554, it had reviewed 211 pages of records referred to it by the Executive Office for United States Attorneys and was enclosing copies of 209 pages of those records, some with deletions, as well as a redacted copy of a videotape and a redacted copy of an audiotape. Defendant advised plaintiff that it was withholding two pages in their entirety.

Defendant informed plaintiff in the December 21, 2004 letter that redactions and exemptions were made in accordance with Privacy Act exemption, 5 U.S.C. § 552a(j)(2), as well as exemptions in the Freedom of Information Act 5 U.S.C. §§ 552(b)(2) and (b)(7)(C).

Plaintiff wrote defendant on January 7, 2005, clarifying his earlier Freedom of Information Act requests and adding new requests. Although plaintiff intended this letter to be only a description of previously requested records, the new items constituted a new Freedom of Information Act request. In the January 7, 2005 letter, plaintiff stated that he believed that all but one section of the information that he requested could probably be located at the Federal Correctional Institution in Oxford, Wisconsin. The remaining information consisted of a letter written by a third party to defendant regarding plaintiff's criminal case and records of that third party's supervised release status. Plaintiff had not requested these items previously. Defendant forwarded plaintiff's letter to the Executive

Office for United States Attorneys, in compliance with the United States Department of Justice's requirement that all new Freedom of Information Act requests be forwarded to that office.

On April 18, 2005, defendant filed the declaration of David M. Hardy, Section Chief of defendant's Records/Information Dissemination Section of its Records Management Division. The declaration included a Vaughn index to explain the procedures used in the review and processing of the records and tapes responsive to plaintiff's Freedom of Information Act requests. In addition, the Vaughn index included explanations for the withholding or redaction of some of the documents plaintiff had requested.

OPINION

A. Timeliness of Defendant's Production of Records

The time limit set out in 5 U.S.C. §552(a)(6)(A) for an agency's response to a Freedom of Information Act request is twenty days from the receipt of the request; this limit "may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched." 5 U.S.C. §552(a)(6)(B)(I). Federal courts have the power to allow an agency additional time to complete its review of a request if the agency can show

that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." 5 U.S.C. § 552(a)(6)(C).

In its response to plaintiff's motion for summary judgment, defendant concludes that "the facts do not show that the FBI's actions were grossly untimely." Defendant provides no explanation for this conclusion. Even assuming that the July 10, 2000 request was not processed because of plaintiff's failure to respond with verification of his identity, defendant received a valid referral from the Executive Office for United States Attorneys on May 20, 2003. Defendant sent plaintiff an acknowledgment of that referral approximately three and a half months later, on September 11, 2003, without setting forth any explanation for the delay in responding or giving an estimation of or explanation for the delay that would follow. Defendant's next acknowledgment of plaintiff's requests did not come until December 21, 2004, more than 19 months after defendant had received the referral and after plaintiff had filed this action.

It is the case that defendant receives an enormous number of Freedom of Information Act requests. Cohen v. F.B.I., 831 F. Supp. 850, 854 (S.D. Fla. 1993) (agencies cannot possibly respond to overwhelming number of requests received within time constraints imposed by Act). In this case, however, defendant has not shown that it either attempted to comply with the notification requirements of 5 U.S.C. §552(a)(6)(B)(I) or that it faced exceptional circumstances and asked for time from this court to complete its review of the

request. It may well be that the Act's time limits are unrealistic. If they are, that is a matter for the legislature, not the court, to remedy. The present record provides no basis on which to find that defendant complied with its obligations under the Act.

B. Timeliness of Defendant's Search of Its Own Records in Response to Plaintiff's Request

With certain exceptions, "the component that first receives a request for a record is the component responsible for responding to the request." 28 C.F.R. § 16.4(a). One of the exceptions is 28 C.F.R. § 16.4(c)(2), which states that a component may refer the responsibility for responding to a request regarding a record to the component that is best able to determine whether the record should be disclosed. A further exception, 28 C.F.R. § 16.4(d), states that "[w]henever a request is made for a record containing information that relates to an investigation of a possible violation of law and was originated by another component or agency, the receiving component shall *either refer the responsibility for responding to the request regarding that information to that other component or agency or consult with that other component or agency*." (Emphasis added.)

The Freedom of Information Act gives district courts "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). "The burden is on

the agency to demonstrate that the records do not have to be produced. The requester has no burden to disprove these propositions." 5 U.S.C. § 552(a)(3)(A). Department 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.").

Defendant asserts that its production of records in response to plaintiff's civil complaint rendered his claim "for the most part, moot." That assertion is based on this court's August 24, 2004 order holding that the only relief available to plaintiff is an order requiring defendant to produce the requested records. Defendant states that even if its response was untimely, plaintiff is left without remedy; a court order to produce records would be unnecessary because of its prior production of those records. Defendant's position rests on its assumption that it has fulfilled its duty to produce the requested records, but the record does not support that assumption. Instead, it indicates that defendant has never addressed plaintiff's request in full but has only processed documents and other items referred to it. Therefore, this court has jurisdiction to require defendant to produce the requested records or provide justification for any exemption or delay in doing so.

Defendant asserts that it has met the requirements for responding to Freedom of

Information Act requests contained in 28 C.F.R. § 16.4, because it received plaintiff's requests as referrals and "the FBI's responsibility for responding to referrals is different from its responsibility in responding to requests that are made by the requester directly to the FBI." Defendant asserts that 28 C.F.R. § 16.4(c) requires only that it take responsibility for responding to plaintiff regarding the records that the Executive Office for the United States Attorneys has referred to it.

Defendant overlooks the fact that the May 20, 2003 referral from the Executive Office for United States Attorneys was composed of *two* parts: one referring specific enclosed records and another stating that defendant might have records responsive to the request and that the office was referring the original request to defendant for a direct response to plaintiff. This second part of the referral transferred the responsibility for responding to plaintiff's entire request to defendant. This method of referral is valid under 28 C.F.R. § 16.4(d). Defendant's responsibility was not limited to processing the records referred to it by the Executive Office; it had responsibility for searching its own records for responsive documents as well.

Defendant has not said whether it has made any review of its own records to locate information responsive to plaintiff's requests. It is possible that it has made such a review and found no records in its possession or found only records that are exempt from disclosure. It is also possible that plaintiff's original requests were not sufficiently specific to enable

defendant to locate the requested records. In the absence of any information from defendant about what it did to review its own records, I cannot rely on the presumption that defendant has fulfilled its responsibility to respond to plaintiff's request in a timely manner.

C. Adequacy of Defendant's 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, only adequate. The adequacy of a search is necessarily "dependent upon the circumstances of the case." Truitt v. Dept. 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. Id, The

affiant should identify the searched files and describe the structure of the agency's file system if he or she is suggesting that further searches would be 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.

In the August 24, 2004 order I raised the question whether the records plaintiff seeks are "agency records" or are within defendant's "system of records." Defendant provided no answer to this question. In its affidavit concerning the search for records, defendant should explain the method of the search and identify those portions of plaintiff's request for which it has no responsive documents. Plaintiff will then know which records were not produced because they did not exist or were not in defendant's system of records.

Perhaps as a result of defendant's belief that it had fulfilled its duty by reviewing and producing the records provided by the Executive Office for United States Attorneys, defendant has not said whether plaintiff's request was sufficiently specific. With no statement on the record regarding this issue, the presumption is that it was. If defendant determines otherwise in the course of further review, it should notify plaintiff and give him a chance to provide a more specific description.

D. Exemption and Redaction of Records

Hardy's affidavit states that although access to the records at issue "was denied under

the Privacy Act [section (j)(2)], they have been processed under the access provisions of the Freedom of Information Act." Section (t)(2) of the Privacy Act states that "No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title." 5 U.S.C. § 552a(t)(2). This means that if records are requested under both the Privacy Act and the Freedom of Information Act, the requester can gain access to them by showing that they were accessible under one of the two acts. Shapiro v. Drug Enforcement Admin., 762 F.2d 611, 612 (7th Cir., 1985); Fedrick v. United States Dept. of Justice, 984 F. Supp. 659 (W.D.N.Y. 1997). Because the Freedom of Information Act provides broader access to records than the Privacy Act, this analysis will focus on the Freedom of Information Act.

"The Freedom of Information Act is designed to broaden public access to government information by mandating disclosure of federal agency documents. At the same time, Congress realized that some disclosures would intrude unduly into individual privacy and hamper legitimate governmental operations." Antonelli v. Federal Bureau of Investigation, 721 F.2d 615, 617 (7th Cir. 1983). In a Freedom of Information Act case, the burden is on the government agency to justify exemption of records. It must provide a detailed analysis of the exemption, "addressing the requested documents specifically and in a manner allowing for adequate adversary testing." Struth v. Federal Bureau of Investigation, 673 F. Supp. 949, 955 (E.D. Wis. 1987). That detailed analysis is often referred to as a Vaughn index. Vaughn

v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

Defendant claims three exceptions for records: 5 U.S.C. § § 552(b)(2), (6), and (7). The first, 5 U.S.C. § 552(b)(2), "was not designed to authorize withholding of all matters except otherwise secret law bearing directly on the propriety of actions of members of the public . . . [but] simply to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest." Department of the Air Force v. Rose, 425 U.S. 352, 369-370 (1976). This exemption is generally held applicable to agency information such as parking and sick leave rules, file numbers and date stamps. However, at least one court has held it applicable to FBI telephone numbers. Voinche v. Federal Bureau of Investigation, 46 F. Supp. 2d 26, 30 (D.D.C. 1999).

5 U.S.C. § 552(b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption requires a balancing of the individual privacy interest against the public purpose served by disclosure. To succeed with a (b)(6) exemption, defendant must prove that the burden to the individual privacy interest outweighs the public purpose. Ripskis v. Dept. of Housing & Urban Development, 746 F.2d 1, 3 (D.C. Cir. 1984). As a general rule, it is used to protect personal information of government employees, but in some cases has been extended to information pertaining to third parties. Church of Scientology

v. United States Dept. of Army, 611 F2d 738 (9th Cir. 1979).

The third exemption claimed by defendant, 5 U.S.C. § 552(b)(7)(C), allows an agency to withhold documents from disclosure if they are records or information compiled for law enforcement purposes. This exemption is narrowly bounded. It is more protective of privacy than § 552(b)(6) because the former provision applies to any disclosure that "could reasonably be expected to constitute" an "unwarranted" invasion of privacy, while the latter bars only disclosures that "would constitute" an invasion of privacy that is "clearly unwarranted." United States Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 497 (1994).

Defendant has provided a Vaughn index in response to plaintiff's request. It has claimed exemptions under various provisions of the Freedom of Information Act to protect the names and identifying information of FBI agents and support personnel, local law enforcement personnel, internal agency facsimile, telephone and pager numbers. It exempted names and identifying information of third parties merely mentioned in the course of the investigation. These exemptions are all valid, because the privacy interests of the persons in question significantly outweigh the public interest in disclosure.

Plaintiff asserts that the third party has no genuine privacy interest in the audiotape itself, because plaintiff was able to produce transcripts of the third party's testimony in which that third party is identified as the speaker in the telephone conversation, as well as a

transcript of the redacted phone call itself. Even if the contents of the conversation have been revealed, the third party had a reasonable expectation of privacy when the phone call was made. The public interest served by releasing an unredacted version of the tape is not significant enough to outweigh the protection of § 552(b)(7)(C). The same is true for the third party's letter that was introduced at the trial; presumably, the writer assumed a degree of confidentiality at the time of writing. Even if parts of that communication were revealed later, the entire letter need not be disclosed.

ORDER

IT IS ORDERED that

1. Plaintiff Mark Bogan's motion is GRANTED with respect to defendant Federal Bureau of Investigation's duty to perform a good faith search of its own records for documents that are responsive to plaintiff's request and that are not otherwise exempt. Defendant is to document exempt or redacted records in a Vaughn index and document its search by affidavit. Defendant is to notify plaintiff in a timely manner if it considers any area of his request too vague to allow a search for responsive documents. Also, defendant is to notify plaintiff in a timely manner if any part of his request cannot be fulfilled because of exemptions or redactions or because the records are not in defendant's control.

2. Plaintiff's motion is denied as to the records already produced, exempted, or redacted by defendant. The 211 pages processed by defendant in response to plaintiff's May 20, 2003 request were exempted and redacted appropriately pursuant to 5 U.S.C. § § 552(b)(2), (6) and (7). Defendant is not required to produce the undisclosed portions of those records.

This case will be closed administratively, subject to reopening by either party for good cause shown.

Entered this 7th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge