

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK BOGAN,

Petitioner,

v.

THE FEDERAL BUREAU OF INVESTIGATION,

Respondent.

ORDER

04-C-532-C

This is a proposed civil action brought under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Petitioner Mark Bogan contends that respondent Federal Bureau of Investigation has violated both of these statutes by failing to comply with his requests for information in a timely manner.

Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is financially unable to prepay the full fees and costs of starting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a

prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

In his complaint, petitioner alleges the following facts.

FACTS

In a letter dated July 10, 2000, petitioner Mark Bogan requested a number of documents from the Federal Bureau of Prisons that he said were related to a criminal case against him in the Western District of Wisconsin, United States v. Bogan, 99-CR-91-C-01. He wished to use these documents to support a challenge to his conviction under 28 U.S.C. § 2255.

Suzanne Little from the United States Department of Justice responded to petitioner's request in a letter dated April 27, 2001. She wrote that petitioner's request had been received and that it would be "placed in the order in which it was received." In addition, she wrote that his request could take nine months if it involved "information about [petitioner] in criminal case files." In May 2003, the Department of Justice referred a part of petitioner's request to the Federal Bureau of Investigation. In a letter dated September 11, 2003, the FBI informed petitioner that his request had been received and would be

“processed in order of receipt.” Petitioner has not yet received the information he requested.

DISCUSSION

The Freedom of Information Act provides that, "the district court . . . has 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 the Privacy Act, an individual may file a civil action when an agency has failed to comply with a request “to gain access to his record or to any information pertaining to him which is contained in the system.” 5 U.S.C. §§ 552a(d)(1) and (g)(1)(B). Although both statutes permit courts to compel production of documents only when they have been improperly withheld, 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. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989); 5 U.S.C. § 552a(3)(A). 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.").

Petitioner does not allege that respondent refused to produce the records that he has requested. Rather, I understand petitioner to contend that respondent has failed to comply with both statutes’ mandate to act promptly. Under 5 U.S.C. § 552(a)(6), an agency has

20 days from the date it receives a request to determine whether it will fulfill or deny the request. Under § 552a(d)(1), an agency must furnish a copy of the records “upon request,” suggesting a requirement to act swiftly. Cf. 5 U.S.C. § 552a(d)(2) (allowing agency 10 days to respond to request to amend record).

At least under FOIA, an agency may be entitled to additional time to comply with a request if there are “exceptional circumstances” justifying the delay. 5 U.S.C. § 552(a)(6)(C); Fiduccia v. United States Department of Justice, 185 F.3d 1035, 1041-42 (9th Cir. 1999) (delay caused by backlog may constitute “exceptional circumstances,” but defendant failed to meet burden to show that eight-year delay was justified). However, at this stage of the proceedings, it is impossible to determine whether such justification exists. In addition, I cannot determine whether the records petitioner seeks fall within the meaning of “agency records” under § 552(a)(4)(B) or are part of respondent’s “system of records” within the meaning of §§ 552a(d) and (a)(5), whether petitioner has sufficiently identified the records he seeks to allow respondent to comply with his request, § 552(a)(3)(A) and whether the records are not subject to one of the exemptions for disclosure under § 552(b) or §§ 552a(j) and (k). (With respect to petitioner’s Privacy Act claim in particular, §§ 552a(j)(2) and (k)(2) allow agencies to promulgate rules exempting materials related to law enforcement. There is no way of knowing whether this exemption might apply without hearing from respondent.)

If respondent believes that disclosure is not required for these or any other reason, it may raise these arguments at the appropriate time. However, I cannot say that there is no set of facts consistent with petitioner's allegations that would entitle him to relief. Accordingly, I will allow petitioner to proceed on his claim. Petitioner is advised that under both statutes, the relief he may receive is limited to an order requiring respondent to produce the records he seeks. 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. §§ 552a(g)(1)(B) and (g)(3)(A). He may not receive money damages as he requests in his complaint. Wren v. Harris, 675 F.2d 1144, 1147 (10th Cir. 1982); Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 740 (W.D. Va. 2001). (Although the Privacy Act authorizes awarding money damages in some instances, these do not include failures to comply with information requests. 5 U.S.C. § 552a(g)(4).)

ORDER

IT IS ORDERED that

1. Petitioner Mark Bogan is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claim that respondent Federal Bureau of Investigation violated his rights under the Freedom of Information Act and the Privacy Act when it failed to comply in a timely manner with his request for information.
2. The unpaid balance of petitioner's filing fee is \$ 145.84; this amount is to be paid

in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. The clerk of court will forward completed Marshals Service and summons forms to the U.S. Marshal, who will serve petitioner's complaint on respondent, the United States Attorney for the Western District of Wisconsin and the United States Attorney General as required by Fed. R. Civ. P. 4(i)(2)(A). For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondent or respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 24th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge