

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

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CLARENCE JOHNSON,

Plaintiff,

ORDER

v.

06-C-1248-C

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

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Plaintiff Clarence Johnson, a federal prisoner, has filed a civil action under the Freedom of Information Act seeking access to documents maintained by the Executive Office for the United States Attorneys related to Anthony Sharkey, an alleged co-conspirator in the government's 2002 prosecution of Johnson for conspiracy to distribute cocaine. Plaintiff is convinced that these documents will show that federal prosecutors and their case agent conspired to suppress exculpatory statements by Sharkey and allowed testifying witness M. Belser to perjure himself at plaintiff's trial. *See* Pltf.'s Brief, dkt. 15, at ¶ 35. In response to plaintiff's FOIA request, the agency did not search for the documents, instead denying plaintiff's request on the ground that these records were exempt from disclosure because they concerned a third party who had not authorized the release of records and plaintiff had not demonstrated that the public interest in disclosure outweighed the personal privacy interest at stake. *See* 5 U.S.C. § 552(b)(6) and (b)(7)(C).

The government has filed a motion for summary judgment. Before the court are plaintiff's motion under Fed. R. Civ. P. 56(f) for additional time to respond to the motion so that he may conduct discovery and plaintiff's motion to compel defendant to provide that

discovery. Plaintiff has served interrogatories on the DOJ's EOUSA addressed to Anthony Sharke[y] a/k/a Anthony Hardy; Assistant United States Attorneys Blackwood and Sanders and agent Gibson. Plaintiff wants to know who participated in an interview of Anthony Sharkey; whether the AUSAs or the FBI knew that Belser was going to commit perjury at trial; and why, after obtaining a writ for the purpose of securing Sharkey's presence at trial, the government did not call him to testify. Plaintiff also has served a set of Requests for Admissions on Blackwood, Sanders and Gibson, asking them to admit, among other things, that Sharkey made statements that exonerated plaintiff. Finally, plaintiff has propounded a "Request for Exculpatory Documents," in which he requests the defendant to provide copies of any statements given by Sharkey while in federal custody before plaintiff's trial.

In FOIA litigation, the agency bears the burden of showing that it was justified in concluding that the information sought was exempt from disclosure. *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000). The agency can meet this burden by submitting affidavits from its officials that "show, with reasonable specificity, why the documents fall within the exemption." *Id.* (quoting *Hayden v. NSA*, 608 F.2d 1381, 1386 (1979)). "Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Schrecker v. United States Dept. of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002). However, if the agency's affidavits or declarations are deficient, the court may ask the agency to supplement them. *Judicial Watch, Inc. v. United States Dept. of Justice*, 185 F. Supp. 2d 54, 6 (D.D.C. 2002).

Plaintiff's request for additional time to respond to the pending summary judgment motion so that he may conduct discovery is denied at this time. Plaintiff is not seeking discovery related to the adequacy of the EOUSA's reliance on the personal privacy exemption or its determination that there was no public interest in the release of the information sought by plaintiff. Rather, he is seeking to obtain through discovery the very same information he sought to obtain by virtue of his FOIA request, namely substantive information related to his 2004 trial on drug charges. This information is irrelevant to the adequacy of the agency's affidavit submitted in support of its motion for summary judgment or the legitimacy of its conclusion that the public interest in disclosure was greater than the privacy interest at stake. These are the legal questions that govern this case. They will not depend on any of the facts related to the government's conduct during plaintiff's criminal trial.

Plaintiff argues that the information he seeks through discovery would confirm his belief that the government withheld exculpatory information and deprived him of a fair trial, which is a matter of public interest. However, plaintiff has offered nothing but speculation to suggest that the government failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Further, to the extent that plaintiff seeks the information to challenge his conviction, "[t]he courts have consistently refused to recognize any public interest in disclosure of information to assist a convict in challenging his conviction." *Taylor v. United States Dept. of Justice*, 268 F.Supp. 2d 34, 36 (D.D.C. 2003) (citation omitted). Finally, assuming, *arguendo*, that the requested documents even exist, plaintiff cannot be allowed to circumvent FOIA's exemptions simply by filing a FOIA lawsuit and obtaining exempted materials through discovery. *Accord Lindell v. McCaughtry*, 115 F.3d. Appx. 872, 876 (7th Cir. 2004) (inmate cannot "evade

security restrictions by the simple expedient of filing suit and obtaining prohibited materials through discovery”) (nonprecedential disposition).

Plaintiff presents two reasons why the affidavit submitted by defendant in support of its motion for summary judgment is inadequate: 1) it refers to the wrong FOIA request number and 2) Sharkey has no privacy interest in the sought-after material because he was ordered to appear at plaintiff’s trial. Plaintiff may present these arguments to the district court as reasons why the court should deny defendant’s motion for summary judgment. However, they are not reasons to allow plaintiff the discovery he seeks.

#### ORDER

IT IS ORDERED that the motions of plaintiff Clarence Johnson for additional time to respond to defendant’s motion for summary judgment so that he may obtain discovery (dkt. #13) and his motion to compel discovery (dkt. #25) are DENIED.

Briefing shall resume on the pending motion for summary judgment as follows: Plaintiff has until September 10, 2007 in which to file and serve his response to defendant’s motion for summary judgment. Defendant has until September 20, 2007 in which to file and serve its reply.

Entered this 8<sup>th</sup> day of August, 2007

BY THE COURT:  
/s/  
STEPHEN L. CROCKER  
Magistrate Judge