

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

MARK BOGAN,

Petitioner,

v.

BUREAU OF PRISONS,¹

Respondent.

ORDER

06-C-0490-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 Bureau of Prisons 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

¹ In the caption of his complaint, petitioner names as respondents Priscilla Jones, Administrative Staff Chief of the “Office of Information and Privacy” and Daryl Kosiak, Regional Counsel for the Bureau of Prisons North Central Regional Office. The Freedom of Information Act authorizes suit only against an agency and not against individual officers and governmental employees. See § 552(a)(4)(B). Therefore, I have removed the individual respondents from the caption and substituted as the only respondent the Bureau of Prisons.

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. 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 July 2000, petitioner Mark Bogan filed a Freedom of Information Act request for a number of documents from the Federal Bureau of Prisons that he believes are related to a criminal case brought against him in this court, United States v. Bogan, 99-CR-91-C-01. The Bureau of Prisons did not respond to this request and instead forwarded it to the Federal Bureau of Investigation. When petitioner did not receive everything he wanted from the FBI, he filed a civil action in this court seeking an order requiring production of the documents. See Bogan v. Federal Bureau of Investigation, 04-C-532-C. After reviewing the FBI's claims for exemptions in that case on petitioner's motion for summary judgment, I

granted petitioner's request for relief in part and denied it in part. The case was closed on June 8, 2005. However, when petitioner realized he could not obtain everything he wanted in the context of case no. 04-C-532-C, he asked the FBI to refer his Freedom of Information Act request back to the Bureau of Prisons. It has been eleven months since the request was referred back to the Bureau of Prisons and the Bureau of Prisons refuses to disclose any additional information.

DISCUSSION

Two preliminary matters require attention before I can address the merits of plaintiff's new Freedom of Information Act claim. First, petitioner has requested that the court compel respondent to disclose documents to him pursuant to a "Rule 37 motion." Motions to compel discovery are appropriate in a case that is in the discovery phase. Here, petitioner has filed a new complaint under the Freedom of Information and Privacy Acts requesting that respondent provide him with documents to which he contends he is entitled. Disclosure of the documents is the ultimate relief that petitioner is seeking, not the subject of a discovery dispute.

Second, in his request for relief, petitioner asks "for leave to file a 28 U.S.C. § 2255 motion under the principles of equitable tolling. If petitioner believes there are grounds for allowing him to file an untimely § 2255 motion, he can lay them out in a document filed

with his § 2255 motion in his criminal case. I will not address in this lawsuit the question of the potential timeliness of any § 2255 motion he might file.

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. Department 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.").

At this stage in the proceedings, 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 reasons or any other, 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).

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 Bureau of Prisons violated his rights under the Freedom of Information Act and the Privacy Act when it failed to comply with his request for information.

2. The unpaid balance of petitioner's filing fee is \$ 343.33; 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 16th day of November, 2006.

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