

FILED

APR 14 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

U.S. DISTRICT COURT-WVND
MARTINSBURG, WV 25401

Dennis Finbarr Murphy
(*pro se*)
Plaintiff

Civil Action No. 3:15CV133
The Honorable Judge Gina M. Groh

V.

U.S. Customs and Border Protection (CBP)
Defendant

Plaintiffs' Cross Motion For Summary Judgment

Pursuant to Federal Rules of Civil Procedure 56, the Plaintiff *pro se* respectfully asks the Court to deny the Defendant's request for summary judgment in its favor and instead grant a summary judgment in the Plaintiff's favor. The Plaintiff's reasons are as follows.

The Plaintiff, not the Defendant, prevailed in this case in that Court, acting at the Plaintiff's request, ordered the Defendant to produce a Vaughn Index for the records it claimed privilege over and sought to withhold. After an *in camera* review of documents the Court ordered the Defendant to produce documents responsive to the plaintiff's FOIA request that the Defendant otherwise would not have given to the Plaintiff. Were it not for the plaintiff bring this matter before the Court all the records sought by the plaintiff under the Freedom of Information Act would have otherwise remained classified as "privileged" and unavailable to the plaintiff. Thus the defendant agency did improperly claim an exemption as a matter of law.

BACKGROUND

On February 5, 2015, the Plaintiff submitted a FOIA request to the Defendant for release records (i.e.- emails, documents, memos, handwritten notes, photos etc.) regarding himself and his prior position as a federal contractor working for the CBP.

On December 4, 2015, the Plaintiff filed with the Court a **Complaint** against the Defendant for its failure to provide documents requested by the Plaintiff under FOIA ten months earlier.

On March 30, 2016, the Defendant filed a **Motion to Dismiss**, claiming the Plaintiff's service of the complaint in this case was deficient under Rule 4(i) since the Plaintiff had not at that time served the Attorney General of the United States.

On May 20, 2016, the **Court denied the Defendant's Motion to Dismiss**, finding the Plaintiff had cured his failure to serve the necessary persons under Rule 4(i) within a reasonable time.

On June 3, 2016, the Defendant filed a "**Motion for Summary Judgment**" in which it asserted the Plaintiff's complaint was moot alleging the Defendant had provided the Plaintiff with documents responsive to the Plaintiff's FOIA request. In support of its motion the Defendant submitted to the Court a "Declaration of Sabrina Burroughs" stating the Defendant had in March 2016 issued a response to the Plaintiff. In exhibits filed in support of its motion the Defendant stated it had found 146 pages responsive to the Plaintiff's FOIA request of which 116 pages it would withhold in their entirety. The Defendant stated it would only release 30 redacted pages to the Plaintiff. Thus the Defendant claimed privilege over 80% of the responsive records.

On June 9, 2016, the Plaintiff filed with the Court a "**Plaintiff's Opposition to Defendant's Motion for Summary Judgment**" in which the Plaintiff advised the Court he had not received a single document from the Defendant and the Defendant's assertion it had provided such documents to the Plaintiff were false. The Plaintiff also advised he had no means of accessing such documents online via the Defendant's FOIAonline website. The Plaintiff advised the Court that material facts in the case were still in dispute and asked the Court to deny the Defendant's Motion for Summary Judgment.

On June 13, 2016, Plaintiff filed a "**Plaintiff's Motion for an Order to Compel Production of Documents Requested Under FOIA and for a Detailed Vaughn Index**" in which the Plaintiff moved the Court to order the Defendant to file a document "describing and justifying its withholdings".

On June 24, 2016, the Plaintiff filed a "**Plaintiff's motion for an in camera inspection of documents**" withheld or redacted by the Defendant.

On July 27, 2016, the Defendant filed a “**Defendant’s response to the Plaintiff’s amended motion for a *in camera* inspection of documents**” in which it argued it had already provided the Plaintiff and the Court with sufficient explanation as to why the responsive documents were redacted or withheld.

On August 5, 2016, the Court issued a “**Memorandum opinion and order denying Defendant’s motion for summary judgment, granting Plaintiff’s request for a Vaughn Index and denying without prejudice Plaintiff’s request for an *in camera* review**” in which the Court stated “*the Defendant must submit a Vaughn Index by September 2, 2016*” and submit an answer to the Plaintiff’s complaint.

On August 8, 2016, the Defendant filed an “**Answer to Complaint**”.

On September 1, 2016, the Defendant filed a “**MOTION FOR EXTENSION OF TIME TO FILE VAUGHN INDEX**”.

On September 1, 2016, the Court filed a “**ORDER GRANTING IN PART DEFENDANT’S MOTION FOR EXTENSION OF TIME TO FILE VAUGHN INDEX**” in which the Court directed the Defendant to file a Vaughn Index by September 16, 2016.

On September 6, 2016, the Plaintiff, not knowing the Court had already ruled on the Defendant’s request for a time extension, filed a “**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR EXTENSION OF TIME TO FILE VAUGHN INDEX**”.

On September 16, 2016, the Defendant filed a “**NOTICE OF FILING OF VAUGHN INDEX AND SUPPORTING DECLARATION**” as ordered by the Court.

On September 22, 2016, the Plaintiff filed a “**Plaintiffs’ Motion Re-Requesting An In Camera Inspection Of Documents or In Alternative Request For a Hearing**” which the Court granted due to the Defendant’s insufficient Vaughn Index.

On January 23, 2017, the Court denied the Defendant’s **second Motion for Summary Judgment** finding the Defendant “failed” to meet its burden in

demonstrating that documents responsive to the Plaintiff's FOIA request were withheld pursuant to recognized exemptions under FOIA.

On February 2, 2017, the Court issued an order to show cause as to why the Defendant withheld six pages of responsive document in their entirety.

On February 13, 2017, the Defendant responded to the Court's order.

On February 22, 2017, the Court found the Defendant's explanation for withholding documents (CBP00128 and CBP00129) was insufficient and ordered the Defendant to disclose them to the plaintiff, which it did.

On March 28, 2017, the plaintiff filed a **"Plaintiff's motion for reimbursement of expenses"**.

On April 7, 2017, the Defendant filed a **"Response to Motion For Reimbursement of Expenses"** in which the Defendant stated the plaintiff's request for reimbursement was premature due to the Court not having filed a final order in the matter.

On April 10, 2017, the Court issued an order denying **"Plaintiff's motion for reimbursement of expenses"** in which the Court ruled the plaintiff was premature in his request for reimbursement due to the Court not as yet issuing a final order in the matter.

On April 10, 2017, the Defendant filed a **"Defendant's Motion For Summary Judgment and Memorandum in Support Thereof"**.

APPLICABLE LAW

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq, is designed to pierce the veil of administrative secrecy. The law promotes government transparency and accountability by opening agency records to the public upon request. Although an agency may withhold records under FOIA exemptions, the agency must justify each withholding with enough detail for the FOIA requester and the Court to meaningfully evaluate its legitimacy. This level of detail not only holds the agency accountable, but also helps balance FOIA's inherently asymmetrical distribution of knowledge to ensure a fair adversarial process. It is the Court who ultimately determines what is privileged and not the Defendant.

STANDARD OF REVIEW – SUMMARY JUDGMENT

FOIA disputes should generally be resolved by summary judgment. Summary Judgment is appropriate if the pleadings, depositions, admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

“In review of a motion for summary judgment under FOIA, the Court must conduct a de novo review of the record.” Lardner v. Dept. of Justice, 638 F.Supp.2d 14, 20 (D.D.C. 2009), aff’d, 398 Fed. Appx. 609 (2010); citing 5 U.S.C. § 552(a)(4)(B). The court determines whether the agency has sustained its burden of demonstrating that the documents requested * * are exempt from disclosure under FOIA.” Id.; Assassination Archives & Research Ctr. v. Cent. Intelligence Agency, 334 F.3d 55, 57 (D.C. Cir. 2003)) (omission in original). although, “[u]nderlying facts and inferences are analyzed in the light most favorable to the FOIA requester,” Lardner, 638 F.Supp at 20, ***“a plaintiff. . . must establish that the agency has improperly claimed an exemption as a matter of law or that the agency has failed to segregate and disclose all non-exempt information in the requested documents.”*** Id.; Perry-Torres v. Dep’t. of State, 404 F.Supp.2d 140, 142 (D.D.C. 2005)). The agency bears the burden to justify its withholding, describing with specific detail in accompanying affidavits or declarations the justifications for nondisclosure and that such non-disclosure falls within a claimed exemption, and “detailing what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.” Lardner, 638 F.Supp at 20-21.

ARGUMENT

The Plaintiff sets forth below, that agency did not met its burden regarding the application of exemptions and subsequently was ordered by the Court to provide documents to the Plaintiff that the Defendant claimed privilege over and sought to deny the such documents in their entirety.

The Plaintiff, not the Defendant, prevailed in this case in that Court, acting at the Plaintiff’s request, ordered the Defendant to produce a Vaughn Index for the records it claimed privilege over and sought to withhold. After an *in camera* review of documents the Court also ordered the Defendant to produce documents responsive to the plaintiff’s FOIA request that the

Defendant otherwise would not have given to the Plaintiff. Were it not for the plaintiff bring this matter before the Court all the records sought by the plaintiff under the Freedom of Information Act would have otherwise remained classified as “privileged” and unavailable to the plaintiff. Thus the defendant agency did improperly claim an exemption as a matter of law.

Specifically, on August 5, 2016, the Court issued a “**Memorandum opinion and order denying Defendant’s motion for summary judgment, granting Plaintiff’s request for a Vaughn Index and denying without prejudice Plaintiff’s request for an in camera review**” in which the Court stated “*the Defendant must submit a Vaughn Index by September 2, 2016*” and submit an answer to the Plaintiff’s complaint.

And on February 22, 2017, the Court the found the Defendant’s explanation for withholding documents (CBP00128 and CBP00129) was insufficient and ordered the Defendant to disclose those documents to the plaintiff, which it did.

CONCLUSION

For the foregoing reasons, the Court is respectfully asked to enter summary judgment in favor of the plaintiff.

Respectfully submitted,

A handwritten signature in cursive script, followed by the date "4-14-17".

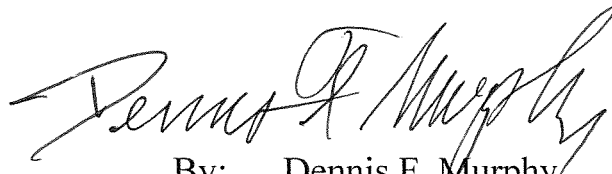
Dennis Finbarr Murphy (*pro se*)
Hedgesville, WV 25427

CERTIFICATE OF SERVICE

I, Dennis F. Murphy, do hereby certify that on April 14, 2017, I mailed via United States Postal Service, the “**Plaintiffs' Cross Motion For Summary Judgment**” to the following participants in U.S. District Court in the Northern District of West Virginia, in Martinsburg, case # 3:15CV133.

Erin K. Reisenweber, Assistant U.S. Attorney
217 West King Street, Suite 400
Martinsburg, WV 25401

Bryan Downs, Legal Counsel
U.S. Customs and Border Protection
440 Koonce Road
Harpers Ferry, WV 25425

 4.14.17
By: Dennis F. Murphy
639 Michelle Drive
Hedgesville, WV 25427