

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5083

September Term, 2017

1:14-cv-01742-EGS

Filed On: September 13, 2017

John Passmore,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly concluded that appellee's search for responsive records was adequate under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq. See Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (summary judgment proper when agency has shown "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents"). Appellant's unsupported and speculative allegations that the FBI possesses, but is withholding, additional emails do not raise substantial doubt as to the adequacy of the search. See Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.").

The district court did not err in determining appellant to be ineligible for a fee waiver, as disclosure of the records was not "likely to contribute significantly to public understanding of the operations or activities of the government." See 5 U.S.C. § 552(a)(4)(A)(iii). Thus, the FBI had no obligation to provide copies of more than 100 pages—out of the 16,039 it originally identified as responsive to appellant's

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request—without his agreement to pay copying fees. See id. § 552(a)(4)(A)(iv)(II); 28 C.F.R. § 16.10(d)(4)(i); see also Judicial Watch, Inc. v. U.S. Dep't of Justice, 365 F.3d 1108, 1127 (D.C. Cir. 2004). Appellant asked the FBI to include specific categories of emails within that 100-page allotment, and he objects that the 100 pages the FBI produced were non-responsive to his specification. The FBI had no obligation to spend more than two hours searching free of charge. See 28 C.F.R. § 16.10(d)(4)(ii). But the record does not reflect that the FBI asked appellant to pay for staff time required to search within the 16,039 pages for the categories appellant prioritized. Nonetheless, the FBI appears to have ultimately searched within the documents in its possession and provided copies of the only ten pages of emails it had that fell within the specific categories appellant prioritized.

Further, to the extent appellant argues that the search was inadequate because appellee failed to search for emails within the files of two employees of Yahoo, Inc., or their successors, appellee had no obligation to retrieve documents from third parties. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 155 (1980). Appellant has forfeited any challenge to the remaining portions of the district court's decision granting summary judgment by not addressing them on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

Finally, the district court did not abuse its discretion in denying appellant's motion to compel discovery. See Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) (stating that discovery in FOIA cases is "rare," and unwarranted when requester "offered no evidence of bad faith to justify additional discovery") (internal citations omitted); see also SafeCard Servs., Inc. v. SEC, 926 F.2d 1107, 1200 (D.C. Cir. 1991) ("This court will exercise its broad discretion to manage the scope of discovery only in unusual circumstances.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5083

September Term, 2017

1:14-cv-01742-EGS

Filed On: October 20, 2017

John Passmore,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN PASSMORE,

Plaintiff,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Civil Action No. 14-1742 (EGS)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant's Motion for Summary Judgment [ECF No. 14].¹ The motion will be denied without prejudice.

In his first FOIA request to the FBI, plaintiff requested "Emails for P.C. Gateway Computer Serial # 0014990444, model # TBR3450PIII; and Emails from Gateway P.C. Serial # 0020449123; Also, warrant[] and witness statement[s]." Mem. of P. & A. in Support of Defs.' Mot. for Summ. J. ("Def.'s Mem."), Decl. of David M. Hardy ("Hardy Decl."), Ex. A (Letter to FBI from plaintiff dated May 1, 2013). He sent a second request to the FBI seeking "All material[s] under file # 7A-PH-93427, including emails from P.C. Gateway Computer Serial # 00200449123," as well as copies of emails sent to and received by three particular email

¹ The U.S. Department of Justice is the proper defendant to this FOIA action, *see, e.g., Flaherty v. President of the United States*, 796 F. Supp. 2d 201, 205-06 (D.D.C. 2011), *aff'd*, 468 F. App'x 8 (D.C. Cir. 2012), and defendant "John Doe/Jane Doe, Agency Head," *see* Compl. ¶ 4, is dismissed as a defendant in this action.

addresses. Hardy Decl., Ex. B (Letter to David M. Hardy, Record/Information Dissemination Section, Records Management Division, FBI, dated May 15, 2013).

FBI staff assigned the matter a tracking number, FOIPA Request Number 1215884-000, and informed plaintiff that his requests “did not contain sufficient information to conduct an accurate search of the Central Records System (‘CRS’).” *Id.* ¶ 7. Plaintiff responded by submitting a completed Certificate of Identity Form, and in a separate letter he clarified his request as one for “all information pertaining to John Passmore, including all information under File # 7A-PH-93427,” including emails sent from and received by four email accounts identified by plaintiff as cham1339@yahoo.com, nore149@yahoo.com, shawlove6917067@yahoo.com, and cham4665@kutztown.edu. *Id.* ¶ 8; *see generally id.*, Ex. D.

The FBI’s first search “located approximately 16,039 pages of records potentially responsive to [plaintiff’s] request.” *Id.* ¶ 11. If the FBI had released all of these pages, plaintiff would have incurred \$1,593.90 in duplication fees for paper copies, or \$485 for a CD. *Id.*; *see id.*, Ex. G (Letter to plaintiff from David M. Hardy dated September 12, 2013). However, the FBI notified plaintiff that the first 100 pages released on paper would be provided at no charge. *Id.*, Ex. G. Plaintiff challenged the FBI’s response by filing an administrative appeal to the DOJ’s Office of Information Policy (“OIP”). *Id.* Generally, plaintiff complained that the FBI failed to respond to his FOIA request “within lawful time limits.” *Id.*, Ex. H (Letter to Office of Information and Privacy from plaintiff dated August 20, 2013). Because the FBI had not made an adverse determination at that time, “OIP informed plaintiff that there is no action for [OIP] to consider on appeal.” *Id.* ¶ 15.

Meanwhile, plaintiff acknowledged receipt of the FBI’s September 12, 2013 fee letter. *Id.* ¶ 14. In addition, plaintiff emphasized his desire to receive paper copies of the emails first,

assuming perhaps that hard copies of the emails would not exceed 100 pages. *See id.*, Ex. J (undated letter to David M. Hardy from plaintiff) at 1-2. Plaintiff also requested a fee waiver “up to 2000 pages.” *Id.*, Ex. J at 3.

On January 13, 2013, the FBI informed plaintiff that its staff had reviewed 103 pages of records and it released 100 pages to plaintiff, after having withheld certain information under FOIA Exemptions 3, 6, 7(C), 7(D), and 7(F). *Id.* ¶ 16; *see id.*, Ex. L (Letter to plaintiff from David M. Hardy dated January 13, 2013). Plaintiff complained that the FBI sent him a CD when he requested records in paper form. *Id.* ¶ 17; *see id.*, Ex. M (Letter to David M. Hardy from plaintiff dated January 16, 2014). The FBI obliged plaintiff by sending him 103 pages of records in paper form on January 30, 2014. *Id.* ¶ 17 n.3.

Plaintiff challenged the FBI’s apparent refusal to release “the actual inter-active email conversations between” the email accounts he identified during a specified time period, from March 2002 to July 2002. *Id.*, Ex. N at 2. He “requested the emails only and not the first 100 pages of [records maintained in] Case No. 7A-PH93427.” *Id.*, Ex. N at 3-4. Insofar as plaintiff reiterated his interest in the emails alone, the OIP treated plaintiff’s FOIA request as having been “limited [in] scope . . . to the email traffic between specific email addresses.” *Id.*, Ex. P (Letter to plaintiff from Anne D. Work, Senior Counsel, Administrative Appeals Staff, OIP, dated May 15, 2014) at 1. OIP addressed the “releaseability” [sic] of the email communications as follows:

After carefully considering your appeal, I am denying in full your narrowed request for third-party email messages. The [FOIA] provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. Please be advised that we can neither confirm nor deny the existence of records responsive to your narrowed request. Without consent, proof of death, official acknowledgment of an

investigation, or an overriding public interest, confirming or denying the existence of such records, including law enforcement records, concerning an individual would constitute a clearly unwarranted invasion of personal privacy, and could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Id., Ex. P at 1.

“After further evaluation of plaintiff’s request, the FBI attempted to locate the specific emails requested by plaintiff.” *Id.* ¶ 22. It located and released 10 pages of records to plaintiff on June 25, 2015, after having withheld certain information under FOIA Exemptions 6, 7(C), and 7(E). *Id.*; *see id.*, Ex. Q (Letter to plaintiff from David M. Hardy dated June 25, 2015). Further, the FBI informed plaintiff that “additional records (emails)[] which may have been responsive to his FOIPA request[] were destroyed on or about February 17, 2010 pursuant to evidence destruction procedures.” *Id.* Ultimately, “the FBI processed 103 pages at the administrative stage and 10 pages at the litigation stage.” *Id.* ¶ 4.

Based on plaintiff’s representations that the 103 pages released at the administrative stage “were not what he is seeking,” *id.* ¶ 4; *see id.*, Ex. N at 3, 7; *see also id.*, Compl. ¶¶ 36, 38, defendant’s motion focuses only on the 10 pages of records released to plaintiff on June 25, 2015. Missing from its submission is any discussion of the FBI’s response to plaintiff’s original FOIA request, the decision to treat plaintiff’s subsequent correspondence as a narrowed request for emails alone, a ruling on plaintiff’s fee waiver request, or an explanation of the origin of the 10 pages of records released on June 25, 2015. And although the 10 “Bates-numbered pages . . . have been provided to plaintiff,” Hardy Decl. ¶ 35, the FBI does not submit copies for the Court’s review. On the current record of this case, the Court cannot determine whether the FBI has fulfilled its obligations under the FOIA.

Accordingly, it is hereby

ORDERED that John Doe/Jane Doe, Agency Head is DISMISSED as a party defendant;
it is

FURTHER ORDERED that defendant's Motion for Summary Judgment [14] is DENIED
WITHOUT PREJUDICE; and it is

FURTHER ORDERED that plaintiff's "Emergency Motion to Direct Superintendent at
SCI Forest to Issue Plaintiff His Legal Work Under this Above Case, which Superintendent Has
Not Given Plaintiff" [28] is DENIED.

SO ORDERED.

February 16, 2016

/s/
EMMET G. SULLIVAN
United States District Judge