

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

DENNIS FINBARR MURPHY,)
)
 Plaintiff,)
)
 v.)
)
 U.S. CUSTOMS AND BORDER)
 PROTECTION,)
)
 Defendant.)
 _____)

Civil Action No. 3:15CV133

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT THEREOF**

Now comes the defendant, the U.S. Customs and Border Protection, by and through undersigned counsel, Erin K. Reisenweber, Assistant United States Attorney for the Northern District of West Virginia, and respectfully moves the Court to enter judgment in its favor. Defendant’s reasons for its motion are set forth as follows.

PROCEDURAL HISTORY

The procedural history of the instant case is lengthy. The defendant now sets forth significant highlights. On December 4, 2015, Plaintiff Dennis Finbarr Murphy, proceeding *pro se*, brought this action against the United States Customs and Border Protection (“CBP”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, alleging that the defendant CBP had not yet responded to Plaintiff’s February, 2015 FOIA request for certain documents related to Plaintiff’s employment discrimination claim against the agency. On or about March 18, 2016, the defendant responded to Plaintiff’s FOIA request utilizing the same FOIAonline system by which Plaintiff had submitted his request.

On June 3, 2016, the defendant CBP moved for summary judgment on the basis that

Plaintiff's claims were moot because the agency had responded to Plaintiff's FOIA request and provided Plaintiff with the documents responsive to his request. [ECF No. 22]. Plaintiff then filed a series of motions prior to the Court ruling on the defendant's motion for summary judgment: On June 10, 2016, Plaintiff filed his opposition to Defendant's Motion for Summary Judgment, claiming he had still not received any documents from Defendant in response to his FOIA request. [ECF No.24]. On June 13, 2016, the plaintiff moved the Court to compel the defendant to produce the documents responsive to his FOIA request and to further produce a Vaughn index explaining the agency's basis for withholding other documents. [ECF No. 25]. On June 24, 2016, Plaintiff filed a Motion for an *In Camera* Inspection of Documents. [ECF No. 27]. On July 1, 2016, Plaintiff filed an Amended Motion for *In Camera* Inspection of Documents [ECF No. 28] in which he finally acknowledged that he had received the documents which Defendant had provided him via the electronic FOIAonline system in March 2016.

On August 5, 2016, the Court denied Defendant's Motion for Summary Judgment [ECF No. 30], finding that the defendant had "provided only conclusory and generalized allegations of exemptions, without any supporting information." In the same Order the Court granted Plaintiff's request for a Vaughn Index but denied without prejudice Plaintiff's amended motion for an *in camera* inspection of documents. On August 8, 2016, the defendant filed its Answer to Plaintiff's Complaint. [ECF No. 31].

On September 16, 2016, the defendant filed a Vaughn Index [ECF No. 37] as ordered and provided Plaintiff with the same. Along with the Index Defendant filed a supplemental declaration of Ms. Sabrina Burroughs, which described the steps the agency had undertaken in locating responsive documents to Plaintiff's FOIA request to date. [ECF No. 37-2]. On October 2, 2016 [ECF No. 41] the defendant filed its second Motion for Summary Judgment in which it advised

the Court that a supplemental response, including additional documents, had been sent to Plaintiff.

However, on January 23, 2017, the Court denied the defendant's second Motion for Summary Judgment [ECF No. 44], finding the defendant "failed to meet its burden in demonstrating that documents responsive to the Plaintiff's FOIA request were withheld pursuant to a recognized exemption under FOIA." More specifically, the Court found that while the search conducted by the defendant agency was sufficient, the Vaughn Index was not. Thus, in the same Order the Court granted Plaintiff's motion for an *in camera* review of documents.

Therefore, on January 25, 2017, the defendant submitted to the Court for review all documents responsive to the agency's second search in response to Plaintiff's FOIA request, in their un-redacted form. On February 2, 2017, the Court issued an Order to Show Cause as to why Defendant had withheld six (6) pages of the responsive documents (CBP00126-29 and CPB00227-28) in their entirety. [ECF No. 47]. On February 13, 2017, the defendant responded to the Court's Order. [ECF No. 51]. On February 22, 2017, the Court found the defendant's explanation as to why pages CBP00128 and CBP00129 had been withheld was insufficient and ordered Defendant to disclose them to Plaintiff, which the defendant did. [See ECF Nos. 53 and 56]. On March 20, 2017, the Court set yet another deadline for filing motions for summary judgment. Accordingly, the defendant now submits its third Motion for Summary Judgment in this case.

APPLICABLE LAW

1. FOIA

The Freedom of Information Act was enacted to simplify public access to Government documents. See John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). The statute's purpose was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v.

Department of Air Force, 495 F.2d 261, 263 (2d Cir. 1974). Nonetheless, legitimate governmental and private interests could be harmed by the release of certain information, and thus FOIA was designed to include several exemptions to disclosure. See Wickwire Gavin, P.C. v. U.S. Postal Serv., 356 F.3d 588, 592 (4th Cir. 2004). Thus, FOIA only provides access to records *if* said records are not protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. 5 U.S.C. § 552(a). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” Department of Air Force v. Rose, 425 U.S. at 361. See also 5 U.S.C. §552(c); Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973); and Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973).

Because of the strong presumption in favor of disclosure, the burden is upon the agency to justify the withholding of any requested documents. Department of Air Force v. Rose, 425 U.S. at 361. “Th[e] burden [to justify any withholding] remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document.” U.S. Department of State v. Ray, 502 U.S. 164, 173 (1991). See also City of Va. Beach, Va. v. U.S. Department of Commerce, 995 F.2d 1247, 1252 (4th Cir.1993)(holding that the federal agency bears “the burden of demonstrating that a requested document falls under an exemption.”) See 5 U.S.C. § 552(a)(4)(B).

If a dispute arises, an agency must demonstrate that the search it undertook in response to a FOIA request was adequate and that any information the agency determined to withhold qualifies under an exemption to FOIA. As to the adequacy of the search, the statute provides that in responding to a request for records “an agency shall make reasonable efforts to search for the records in electronic form or format.” 5 U.S.C. § 552(a)(3)(C). The statute defines “search,” as

“to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. § 552(a)(3)(D). Thus, a FOIA search does not need to be a perfect search but rather “only a reasonable one.” Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 362 (4th Cir. 2009); see also Ethyl Corp., 25 F.3d at 1246 (“In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed, but whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents.” (internal quotation marks and citation omitted)). The reasonableness of a search is often demonstrated by the use of an affidavit or declaration providing “sufficient detail regarding the search for documents to allow the district court to determine if the search was adequate.” Wickwire Gavin, P.C., 330 F. Supp. 2d at 598. In providing the declaration as to the reasonableness of the search, some detail is required—“conclusory and generalized allegations of exemptions” will not do. Vaughn, 484 F.2d at 826.

2. Standard of Review – Summary Judgment

FOIA disputes should generally be resolved on summary judgment. Competitive Enter. Inst. v. United States Dep't of State, Civil Action No. 1:16cv00080 (AJT/IDD), 2016 U.S. Dist. LEXIS 166987, at *5-6 (E.D. Va. Dec. 1, 2016) (citing Hanson v. USAID, 372 F.3d 286, 290 (4th Cir. 2004) (“As a general rule, . . . FOIA determinations should be resolved on summary judgment.”). Summary judgment is appropriate if the pleadings, depositions, admissions on file, together with the affidavits, show that 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. Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat summary judgment unless it is both genuine and material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, (1986). A factual dispute is “material” if

it would affect the outcome of the suit under the governing law, and “genuine” if a reasonable trier of fact could return judgment for the non-moving party. Id.

To survive a motion for summary judgment in a FOIA action, “the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” Lapp v. FBI, No. 1:14CV160, 2016 U.S. Dist. LEXIS 21497, at *8 (N.D.W. Va. Feb. 23, 2016, J. Keeley) (citing Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C.Cir. 1978); Students Against Genocide v. Department of State, 257 F.3d 828, 833, 347 U.S. App. D.C. 235 (D.C.Cir. 2001).

ARGUMENT

When determining to withhold information, the agency bears the burden of showing that the records withheld fall within one of FOIA’s specific exemptions to disclosure. 5 U.S.C. § 552(a)(4)(B); City of Va. Beach, Va. v. U.S. Dep’t of Commerce, 995 F.2d 1247, 1252 (4th Cir. 1993). “The government can meet this burden by describing the withheld material with reasonable specificity and explaining how it falls under one of the enumerated exemptions.” Hanson, 372 F.3d at 290. To date the defendant U.S. Customs and Border Protection has undertaken an initial search of records in response to Plaintiff’s FOIA request and has supplemented that search, as described in the Declaration of Ms. Sabrina Burroughs [ECF No. 37-2]; has disclosed the records responsive to said searches not statutorily exempted from disclosure; has prepared a Vaughn Index; has submitted all responsive documents to the Court for *in camera* review; and has disclosed additional pages (CBP00128 and CBP00129) as ordered by the Court. In its Order dated March 20, 2017, the Court reached the conclusion that the Defendant’s “FOIA search was adequate and that any information the Defendant withheld qualifies as an exemption to FOIA.” [ECF No. 55].

As demonstrated by the record in this case, the defendant has met its burden as required under the law as to both adequacy of the searches undertaken and the justification as to why specific documents were withheld. Thus, it is defendant's position that at this time, there no longer exists any genuine issue of material fact and summary judgment should be granted in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Erin K. Reisenweber, Assistant United States Attorney for the Northern District of West Virginia, do hereby certify that I electronically filed the foregoing THIRD MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system and that I have mailed, by United States Postal Service, the document to the *pro se* Plaintiff at the following address:

Dennis Finbarr Murphy
639 Michelle Drive
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on this 10th day of April 2017.

/s/ Erin K. Reisenweber
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