

**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 CONSOLIDATED REPLY TO PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO PLAINTIFF’S MOTION TO COMPEL**

Now comes the Defendant, the U.S. Customs and Border Protection, by and through undersigned counsel, William J. Ihlenfeld, II, United States Attorney for the Northern District of West Virginia, and Erin K. Reisenweber, Assistant United States Attorney for said District, and respectfully submits this consolidated Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment and Response to Plaintiff’s Motion to Compel.

On June 3, 2016, the Defendant U.S. Customs and Border Protection moved for summary judgment on the basis that Plaintiff’s claims are moot because the agency has responded to Plaintiff’s FOIA request and has provided the responsive documents to said request. [ECF No. 22]. On June 10, 2016, Plaintiff filed his opposition to Defendant’s Motion, claiming that he has not received any documents from Defendant in response to his FOIA request. [ECF No.24]. On June 13, 2016, the plaintiff filed a motion asking the Court to compel the defendant to produce the responsive documents to his FOIA request and to produce a Vaughn Index setting forth the agency’s basis for withholding other documents. [ECF No. 25]. The U.S. Customs and Border Protection now brings this consolidated reply to Plaintiff’s response to the motion for summary

judgment and response to Plaintiff's Motion to Compel. For the reasons stated herein, Defendant again moves the Court to enter summary judgment in its favor and also to deny Plaintiff's Motion to Compel as being moot.

ARGUMENT

Plaintiff Dennis Finbarr Murphy, proceeding *pro se*, filed a complaint on December 4, 2015, against the United States Customs and Border Protection ("CBP") pursuant to the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* In his Complaint, Plaintiff alleges that he was an armed security guard employed by a federal contractor at CBP's Advanced Training Center, located in Harpers Ferry, West Virginia. [ECF No. 1, Para. 3]. Plaintiff represents that he filed an Equal Employment Opportunity ("EEO") Complaint against the CBP, alleging he was subjected to disparate treatment and discrimination based on his race and his religion. *Id.* Plaintiff claims that he filed a FOIA request in February 2015, in an attempt to obtain documents to assist with his EEO claim. *Id.* Plaintiff's FOIA request forms the basis of the instant action. Plaintiff alleges that as of the time of filing his Complaint in December 2015, he had not yet received a response from CBP to his FOIA request.

Reply to Response to Motion for Summary Judgment

As set forth in its Motion for Summary Judgment, the CBP responded to Plaintiff's FOIA request on March 18, 2016 and again on March 21, 2016 via the electronic FOIAonline system. The system has an application by which the record requester can view the responsive documents provided by the agency. A FOIAonline screen shot of Plaintiff's request, which has an assigned number of CBP-2015-016550, demonstrates that documents have been attached electronically for his viewing. *See* Exhibit 1, attached. In response, Plaintiff alleges that he does not have a FOIAonline account and thus cannot access the documents. However, CBP's search of the

FOIAOnline system indicates that Plaintiff does have an active FOIAOnline account, and that Plaintiff created that account on December 11, 2015. See Exhibit 2, attached. CBP advises that by logging on to the FOIAOnline system using the username and password he created when he opened the account, Plaintiff can access the responsive documents the defendant has provided.¹ If Plaintiff cannot remember the username and/or password for his account, he should contact the FOIAonline support team toll free at (844) 238-7744. Nonetheless, because Plaintiff appears to have difficulty accessing his FOIAonline account, defendant CBP placed the responsive documents in the United States mail to Plaintiff on June 14, 2016.

Motion to Compel

In response to Plaintiff's Motion to Compel, which includes a request for a Vaughn Index, the defendant reiterates that the documents requested by Plaintiff have already been produced, to the extent possible under the law, both electronically via the FOIAonline system and additionally in hard copy. Furthermore, defendant submits that a Vaughn Index is not required in this case, as the agency has already properly explained the exemptions into which certain of the documents requested by plaintiff fall.

The Freedom of Information Act provides a right, enforceable in court, to obtain access to federal agency 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). Because there is a "strong presumption in favor of disclosure," Department of State v. Ray, 502 U.S. 164, 173 (1991), the nine exemptions are to be construed as narrowly as possible so to allow the highest level of access to agency information based on the overall purpose of the Act.

¹ Furthermore, FOIAonline accounts can be created by anyone by going to <https://foiaonline.regulations.gov/foia/action/public/home> The FOIAonline FOIA Public User Guide can be found at <https://foiaonline.regulations.gov/resources/public/FOIAonline%20Public%20User%20Guide.pdf> The Guide explains in detail the steps for establishing a FOIAonline account.

Ctr. for Int'l Env'tl. Law v. Office of U.S. Trade Representative, 505 F. Supp. 2d 150, 155 (D.D.C. 2007) (citing Vaughn v. Rosen, 484 F.2d 820, 823 (D.C.Cir.1973)).

Courts have consistently held that “[a] FOIA plaintiff is not entitled to a Vaughn index. Rather, he is entitled to an explanation of why information was redacted or withheld, which may be conveyed in any number of ways.” Brown v. Federal Bureau of Investigation, 675 F. Supp. 2d 122, 130 (D.D.C. 2009). Although the agency explanation may include a detailed description of each document being withheld and take the form of a Vaughn index, this index is not always mandated and the government may satisfy its burden by other means. Voinche v. Federal Bureau of Investigation, 412 F.Supp.2d 60, 65 (D.D.C.2006) (noting that because “courts have repeatedly held that it is the function of a Vaughn index rather than its form that is important, ... an agency does not have to provide an index per se”). “Regardless of the form of the government's explanation, it must show why exemption is appropriate and conclusory statements and generalized claims of exemption are insufficient to justify withholding.” Ctr. for Int'l Env'tl. Law, 505 F. Supp. 2d at 155 (citing Vaughn, 484 F.2d at 826 and see also Mead Data Cent., Inc. v. Dep't of Air Force, 566 F.2d 242, 251 (D.C.Cir.1977)).

In its second responsive letter to Plaintiff, dated March 18, 2016, CBP explained that although the agency's search returned 146 pages of records responsive to Plaintiff's request, only 30 pages were partially releasable pursuant to 5 U.S.C. §§ 552(b)(6), (b)(7)(C), and (b)(7)(E). See Exhibit 3, attached. The same letter also advised that 116 pages had been withheld in their entirety pursuant to the exemptions codified at 5 U.S.C. §§ 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Finally, the letter contained instructions as to how Plaintiff could appeal the agency's withholding determinations. Plaintiff had sixty (60) days from the date of the March 18, 2016 letter by which to file his appeal, if any. According to CBP's records, no such appeal was ever

filed. Plaintiff's Motion to Compel must be denied as moot because the responsive documents have been produced and an explanation has been provided as to those documents withheld.

As stated in its Motion for Summary Judgment, the agency considers Plaintiff's FOIA request to be closed effective March 21, 2016, and that this matter is now moot. The defendant respectfully requests that summary judgment be entered 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, hereby certify that on the 20th day of June, 2016, I electronically filed the instant Consolidated Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Response to Motion to Compel using the Court's CM/ECF system and that I also placed a hard copy of the same in the United States mail to the pro se Plaintiff at the below address:

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