

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

FILED
JUN 10 2016
U.S. DISTRICT COURT-WVND
MARTINSBURG, WV 26401

DENNIS FINBARR MURPHY
(*pro se*)

Plaintiff

Civil Action No. 3:15CV133

V.

U.S. Customs and Border Protection (CBP)

Defendant

Plaintiff's Opposition to Defendant's Motion for Summary Judgment

The Plaintiff respectfully requests the Court to deny the Defendant's "Motion for Summary Judgment" on the basis a genuine issue of fact does exist, the Defendant has made false assertions in its motion and the Defendant is not entitled to judgment as a matter of law re Fed. R. Civ. P. 56(a).

Procedural History

The Plaintiff submitted a FOIA request on February 5, 2015, 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 a civil complaint against the Defendant for its failure to comply with the Plaintiff's FOIA request made ten months earlier.

On March 30, 2016, the Defendant filed a Motion to Dismiss which the Court denied.

On June 3, 2016, the Defendant filed a Motion for Summary Judgment. The Defendant falsely claimed "*the defendant has responded to the Plaintiff's FOIA request and has provided Plaintiff with the responsive documents, Plaintiff's claim is now moot.*" In support of its motion the Defendant stated "*On March 18, 2016, the CBP responded to Plaintiff utilizing the FOIAonline system and advised Plaintiff that a search for the*

documents he requested had returned a total of 146 responsive pages.” The Defendant went on to list as Exhibit 1 a letter dated March 18, 2016, authored by a Sabrina Burroughs address to the Plaintiff. The Defendant then stated *“The agency considers the Plaintiff’s FOIA request to be closed as effective March 21, 2016.”*

Applicable Law

Summary judgment is warranted when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 6(a); Anderson. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact dispute is “‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” George v. Leavitt, 407 F.3d 405, 410 (D.C. Cir. 2005) (quoting Anderson, 477 U.S. at 248). Thus, in considering a motion for summary judgment, the court must view the evidence *“in the light most favorable to the nonmoving party.”*

Arguments

The Plaintiff wishes to formerly state that at the time of this writing he has not received a single document from the Defendant in response to his FOIA request. Therefore, the Plaintiff wishes to assure the Court and the Defendant there absolutely are disputed facts in this case as follow:

The Plaintiff wishes first to point out that the Defendant still has not answered the complaint in this case. By filing its Motion for Summary Judgment it appears the Defendant is by default agreeing entirely with the contents of the Plaintiff’s complaint.

As part of its Motion for Summary Judgment the Defendant claimed to have sent the Plaintiff a letter dated March 18, 2016, from a Sabrina Burroughs along with responsive records to the Plaintiff. However, the Plaintiff never received or had been given Burroughs’ letter or any other documents nor was the Plaintiff even aware of the existence of Burroughs’ letter until the afternoon of June 8, 2016, when the Plaintiff, acting directly in response to the Court’s Roseboro Notice, accessed the pager.gov website to view for the first time the Defendant’s Motion for Summary Judgment, Exhibits and Burroughs’ letter. These internal documents generated by the Defendant and not given to or sent to the Plaintiff do not constitute being responsive to the Plaintiff’s FOIA request. The Plaintiff hopes the Court will

take note that the Defendant did not provide a single piece of documentation reflecting it had ever mailed, given or sent the Plaintiff the any such documents.

The Plaintiff hopes the Court will consider that on March 30, 2016, the Defendant filed, a Motion to Dismiss. In its motion the Defendant made no mention of Burroughs' letter or any other responsive documents or responsive actions. If it were true the Defendant had complied with the Plaintiff's FOIA request on March 18, 2016, as alleged in the Motion for Summary Judgment, why then did the Defendant file a Motion to Dismiss after allegedly complying with the FOIA request two weeks earlier?

On March 18, 2016, the Plaintiff did receive the following cryptic email from the Defendant. The email had no attachments or instructions as to when or how the Defendant would send the records to the Plaintiff.

*"On Fri, 3/18/16, CBPFOIA@cbp.dhs.gov
<CBPFOIA@cbp.dhs.gov> wrote:*

From: CBPFOIA@cbp.dhs.gov <CBPFOIA@cbp.dhs.gov>

Subject: Final Disposition, Request CBP-2015-016550

*To: "celtsgreen@yahoo.com"
<celtsgreen@yahoo.com>*

Date: Friday, March 18, 2016, 2:07 PM

A search of CBP databases produced records responsive to your Freedom of Information Act (FOIA) request CBP-2015-016550.

CBP has determined that the responsive records are partially releasable, pursuant to Title 5 U.S.C. § 552 and have applied the appropriate exemptions.

You have a right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter,

within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Please notate file number CBP-2015-016550 on any future correspondence to CBP related to this request.

Given the nature of this request, some records are only being released to you as the requester. If you have an account in FOIAonline, you may access those records by logging into FOIAonline. Otherwise, those responsive records will be sent via the method agreed upon with the FOIA processor."

Please consider the language at the bottom of the email where it states "*If you have an account in FOIAonline, you may access those records by logging into FOIAonline.*" By using this choice of words in its email the Defendant acknowledged the Plaintiff may not have access to such an account. For the record the Plaintiff wishes to state to the Court he does not have a FOIAonline account. In early December 2015 when the Plaintiff initially submitted his FOIA request he was not made aware of or given an opportunity to obtain such an account. Please note that contrary to the false assertions made in the Defendant's Motion for Summary Judgment the above email does not reflect any attachments being sent to the Plaintiff.

In the final sentence of the email states "*Otherwise, those responsive records will be sent via the method agreed upon with the FOIA processor.*" This deliberately vague statement left the Plaintiff with the belief the Defendant would mail paper copies of the records to the Plaintiff. However those records still have not come.

The closing paragraph of the of the Defendant's Motion for Summary Judgment at the bottom of page 5 the Defendant states: "*In the case at*

hand, the agency's letter to the Plaintiff, dated March 18, 2016, (Attachment B to Exhibit) clearly demonstrates that each responsive document in regards to Plaintiff's request has been produced or is exempt. The CBP has complied with 5 U.S.C. section 522, et seq., in full." As stated above the Plaintiff was not give the letter or even made aware of its existence and only learned of the letter on June 8, 2016, when the Plaintiff, acting on his own initiative, logging into pager.gov.

On March 21, 2016, the Plaintiff received a second similarly cryptic email from the Defendant. As in the prior email, the Defendant did not provide any attachments or stated how or when it would send the Plaintiff the responsive documents.

*"On Mon, 3/21/16, CBPFOIA@cbp.dhs.gov
<CBPFOIA@cbp.dhs.gov> wrote:*

From: CBPFOIA@cbp.dhs.gov <CBPFOIA@cbp.dhs.gov>

Subject: Final Disposition, Request CBP-2015-016550

To: "celtsgreen@yahoo.com" <celtsgreen@yahoo.com>

Date: Monday, March 21, 2016, 3:41 PM

We are sending this letter to correct a mistake in our previous letter dated March 18, 2016.

Given the nature of this request, some records are only being released to you as the requester. If you have an account in FOIAonline, you may access those records by logging into FOIAonline. Otherwise, those responsive records will be sent via the method agreed upon with the FOIA processor."

IN SUMMARY

The Plaintiff asks the Court to consider as a matter of disputed fact that the Plaintiff still has not received any of the records sought in this case nor does the Plaintiff have a means of obtaining the records the Defendant falsely claims to have furnished. Apparently, it never occurred to the Defendant to just send the Plaintiff paper copies of the responsive documents via registered U.S. mail. Instead, the Defendant deemed it more appropriate to further encumber the Court with a disingenuous Motion for Summary Judgment. Once again the Defendant has sought to further delay, deny, obstruct and confound the Plaintiff's acquisition of documents the Defendant is legally bound to have provided 18 months ago without litigation under FOIA.

The Plaintiff asks the Court to deny the Defendant's Motion for Summary Judgment and to direct the Defendant to provide the required records in paper form and furnish an applicable *Vaughn Index* in accordance with the *Vaughn v. Rosen* 484 F.2d 820 (D.C. Cir. 1973) for those records it considers exempt and seeks to withhold.

Respectfully submitted,



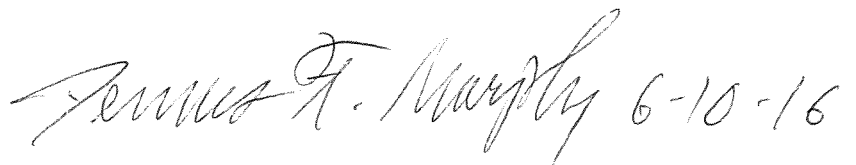
Dennis Finbarr Murphy
639 Michelle Drive
Hedgesville, WV 25401

CERTIFICATE OF SERVICE

I, Dennis F. Murphy, do hereby certify that on June 10, 2016, I mailed via United States Postal Service, the “**Plaintiff’s Opposition to Defendant’s 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 Luby, Legal Counsel
U.S. Customs and Border Protection
440 Koonce Road
Harpers Ferry, WV 25424

A handwritten signature in cursive script that reads "Dennis F. Murphy" followed by the date "6-10-16".

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