

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
CHRISTOPHER SOGHOIAN,)	
)	
Plaintiff,)	Civil Action No. 11-1080 (ABJ)
)	
v.)	ECF
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h), Defendant, United States Department of Justice, hereby submits the following Statement of Material Facts as to Which There Is No Genuine Dispute (“SFNGD”) in Support of Defendant’s Motion for Summary Judgment in this action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended.

PLAINTIFF’S FOIA REQUEST FOR DOJ CRM RECORDS

1. Plaintiff submitted a FOIA request, dated April 14, 2010, addressed to “Rena Y. Ki[m], Chief, FOIA/PA Unit, Criminal Division, Department of Justice.” Declaration of John Cunningham (“Cunningham Decl.”), Attorney, Freedom of Information Act/Privacy Act (“FOIA/PA”) Unit, United States Department of Justice, Criminal Division (“DOJ CRM”), ¶ 7 & Ex. 1 thereto. In his request, Plaintiff asked DOJ CRM for copies of the following records:

- a. Any memos, email communications, reports, legal opinions, or other documents related to the government's acquisition (either compelled, or voluntary disclosure by the carrier) of cellular location information (including but not limited to Call Detail Records) regarding individuals who are roaming, and thus not using their own carrier's network, and are instead using another wireless telecommunications carrier to which the individual is not a subscriber.

- b. Any memos, email communications, reports, legal opinions, or other documents related to government requests for location of called parties in “hybrid” orders - e.g. requests that a carrier provide the government with subscriber and toll records for each number called by the target including cell site or location information associated with each call for a particular period. [Footnote omitted.]
- c. Any memos, email communications, reports, legal opinions, or other documents related to government agents requesting and obtaining non-content header information (such as “to” and “from” addresses) associated with individuals’ email communications that have been opened, or are over 180 days old, based upon a showing of relevance to an ongoing investigation (and not via a 18 USC 2703(d) order). I also request any information regarding refusals by some Internet Service Providers to deliver such noncontent header information without a 2703(d) order, even for communications over 180 days old, and any information regarding DOJ’s response to the refusal by the ISPs.

Id., ¶ 7 & Ex. 1, pp. 1-2. Plaintiff clarified that “I am particularly interested in any information held by the Office of Enforcement Operations, the Computer Crime [and] Intellectual Property Section [“CCIPS”]. The scope of this request is anything created between January 1, 2007 and April 13, 2010.” Id., ¶ 7 & Ex. 1, p. 2.

DOJ CRM’S SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF’S REQUEST

2. By letter dated May 6, 2010, Ms. Kim acknowledged receipt by DOJ CRM of Plaintiff’s request Id., ¶ 8 & Ex. 2.

3. DOJ CRM initiated searches for records in CCIPS and OEO on May 7, 2010. Id., ¶ 9 & Exs. 3 and 4.¹

4. OEO, and in particular, its Electronic Surveillance Unit (“ESU”) is responsible for reviewing all applications seeking to use electronic surveillance in federal criminal investigations.

¹ The signature blocks of the U.S. Government employees responding to the FOIA records search were redacted in Exhibits 3 and 4 to the Cunningham declaration.

Id., ¶ 9; see also 18 U.S.C. 2510 *et seq.* (“Title III.”). These applications are submitted by the United States Attorneys’ Offices to the Criminal Division on behalf of the federal law enforcement agencies that want to use this investigative technique in their investigations. Id. Once the Unit reviews the application and finds that it meets all of the statutory and policy requirements, the application is forwarded to the Office of the Assistant Attorney General, Criminal Division, where a Deputy Assistant Attorney General reviews the application and either approves or denies the request. Id. OEO does not initiate or conduct any criminal investigations. Id.

5. CCIPS is responsible for implementing the Department’s national strategies in combating computer and intellectual property crimes worldwide. Id. The Section’s attorneys work to improve the domestic and international infrastructure – legal, technological, and operational – to pursue network criminals most effectively. Id. CCIPS attorneys regularly run complex investigations. Id.

6. OEO and CCIPS attorneys resolve unique legal and investigative issues raised by emerging computer and telecommunications technologies and train federal, state, and local law enforcement personnel. Id. The Section attorneys provide substantive expertise to the DOJ leadership on these issues, which includes commenting on and proposing legislation. Id. In developing their expertise and forming their opinions on various strategies, the sections’ attorneys consult with other department attorneys, and in particular, Assistant U.S. Attorneys, who utilize the various electronic surveillance techniques on a regular basis. Id. These consultations are often done in the context of presentations that OEO and CCIPS attorneys give to Assistant United States Attorneys regarding developments in various areas of electronic surveillance. Id.

7. As a result of these searches, DOJ CRM located records responsive to Plaintiff's request in DOJ CRM's CCIPS and OEO Sections: approximately 186 pages originated from DOJ CRM, one-page originated from the U.S. Marshals Service ("USMS"),² and approximately 418 pages originated from the Executive Office for United States Attorneys ("EOUSA") (or a particular United States Attorney's Office). *Id.*, ¶ 10.

REFERRAL TO EOUSA AND USMS

8. On October 6, 2010, DOJ CRM referred the records originating from EOUSA and USMS to those agencies for processing and a direct response to Plaintiff, consistent with DOJ's regulation at 28 C.F.R. § 16.4(c)(2), which establishes a presumption that the component/agency from which a record originates is best able to determine whether to disclose it. *Id.*, ¶ 11 & Exs. 5 & 6. Because the document referred to the USMS is a one-page email, DOJ CRM did not ask the USMS for a separate Vaughn declaration and explains the basis for the withholding of this record in its entirety in its Vaughn declaration as Item 14. *Id.*, ¶ 28.

DOJ CRM'S RELEASE OF RESPONSIVE NON-EXEMPT RECORDS

9. DOJ CRM located a 299-page manual entitled Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations and referred the manual to EOUSA for processing under FOIA. *Id.*, ¶ 12. Subsequent review revealed that the manual, while published by EOUSA, was written by attorneys in the CCIPS Section of the Criminal Division. *Id.* Once it was determined that the manual has been made public and can be accessed through the DOJ internet website, <http://www.justice.gov/criminal/cybercrime/ssmanual/04ssma.html>, DOJ CRM so notified

² The one-page document described as originating from the USMS is listed and described as Item 14 in CRM's *Vaughn* Index.

Plaintiff and also released a few pages that had been previously withheld. Id., ¶ 13 (part 2) n.4 & Ex. 6 Chapter 4 of the manual, entitled “Electronic Surveillance in Communications Networks,” is relevant to Plaintiff’s FOIA request. Id.

10. As to the remaining records, after review, DOJ CRM decided to withhold them pursuant to FOIA exemptions set forth in 5 U.S.C. § 552(b)(2), (5), (6), (7)(C) and (7)(E). Id., ¶ 13 (part 1) The records withheld from release are identified as Items 1-14 in the Vaughn index attached to the Cunningham declaration. Id. Mr. Cunningham explained that in light of the Supreme Court’s decision in Milner v. Navy, 131 S. Ct. 1259 (2011), DOJ CRM no longer relies on 552(b)(2) as a basis for withholding certain material. Id., ¶ 13 (part 1) n. 3.

11. DOJ CRM notified Plaintiff of its disposition of his request – including these withholdings and the referrals to the EOUSA and USMS – in a letter dated March 28, 2011. Id., ¶ 13 (part 2) & Ex. 7 In preparing this declaration, DOJ CRM has determined that a few of the pages, previously withheld, will be released to Plaintiff. DOJ CRM also informed Plaintiff in the March 28, 2011 letter that some of the material, i.e., the manual identified in SFNGD No. 9 supra, was publicly accessible on the DOJ internet website. Id., ¶ 13 (part 2) n.4.

12. In a letter received on April 16, 2011, Plaintiff appealed DOJ CRM’s decision to DOJ’s Office of Information Policy (“OIP”). Id., ¶ 14. OIP acknowledged receipt of Plaintiff’s appeal on April 28, 2011. Id., ¶ 14 & Ex. 8.

13. When Plaintiff filed his Complaint for Injunctive Relief on June 13, 2011 (ECF No. 1), OIP had not yet made a decision on Plaintiff’s appeal. Id., ¶ 15. Because of the filing of the Complaint, OIP closed its review of the appeal. Id., ¶ 15 & Ex. 9.

EOUSA'S RELEASE OF NON-EXEMPT REFERRAL RECORDS

14. On October 6, 2010, EOUSA received a referral from DOJ CRM of records located in a search conducted in response to Plaintiff's FOIA request letter dated April 14, 2010. Declaration of John Boseker ("Boseker Decl."), Attorney Advisor, EOUSA, ¶ 6 & Ex. A.

15. By letter dated February 11, 2011, EOUSA notified Plaintiff that it had reviewed the records referred, and determined that all 417 pages of referred records would be withheld from disclosure by application of the FOIA exemption found at 5 U.S.C. § 552 (b)(3) in conjunction with the statutory authority contained 18 U.S.C. §§ 2705(b), 3123(b), 3103(a) and Court documents sealed under this statutory authority. Id., ¶ 7 & Ex. B. EOUSA also advised Plaintiff that it was withholding records under 5 U.S.C. §§ 552 (b)(2), (b)(5), (b)(7)(C), and (b)(7)(E). Id.

16. By the same letter, EOUSA also notified Plaintiff that he had 60 days within which to file an administrative appeal to OIP. Id., ¶ 8 & Ex. B.

17. By letter dated April 12, 2011, Plaintiff notified EOUSA that he had filed via e-mail an administrative appeal with the OIP regarding EOUSA's determination regarding the referral documents. Id., ¶ 9 & Ex. C.

18. OIP responded by letter dated April 25, 2011, notifying Plaintiff of the letter's receipt, and assignment of appeal number AP-2011-01715, and further advising that the appeal would be reviewed in the approximate order it was received. Id., ¶ 10 & Ex. D.

19. As a result of the commencement of this litigation, OIP sent a letter to Plaintiff dated September 6, 2011, notifying him that its appeal file was being closed in accord with 28 C.F.R. § 16.9(a)3). Id., ¶ 11 & Ex. E.

20. Following commencement of this litigation, EOUSA and the Criminal Division agreed that the latter would reassert possession and control and final determination of the CCIPS manual identified in the attached Vaughn index as Document 1.³ Id., No. 12. See also SFNGD No. 11 supra. In addition, EOUSA no longer asserts Exemption (b)(2) for the same reasons as DOJ CRM (see SFNGD No. 10 supra). Id. Finally, EOUSA has refined the statutory citations it relies on in asserting Exemption (b)(3) to those asserted in the Vaughn index attached to the Boseker declaration. Id.

NON-SEGREGABILITY OF WITHHELD MATERIAL

21. DOJ CRM and EOUSA have released all reasonably segregable portions of documents to plaintiff in response to its FOIA request. Cunningham Decl., ¶ 29; Boseker Decl., ¶¶ 28-29. All redacted information was exempt from disclosure pursuant to a FOIA exemption or was not reasonably segregable because its release would have revealed the underlying protected material. Id.

³ The Boseker declaration mistakenly refers to Tom Roberts, rather than John Cunningham, at ¶ 12 and in the accompanying Vaughn index. Mr. Roberts, who worked on this matter prior to Mr. Cunningham, has completed his detail to DOJ CRM and is no longer assigned to this matter.

