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Courts for the District of Columbia

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

MATTHEW J. HERRINGTON
2516 Q Street NW #305
Washington, D.C. 20007
(202) 429-8164

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Defendant.

Case: 1:11-cv-01330
Assigned To : Jackson, Amy Berman
Assign. Date : 7/21/2011
Description: FOIA/Privacy Act

COMPLAINT FOR INJUNCTIVE RELIEF

For seventy-three years the Department of Justice has handed out exemptions to the Foreign Agent Registration Act of 1938 (“FARA”), as amended, 22 U.S.C. § 611 *et seq.*

For seventy-three years the Department has refused to make public any information about what standards it applies in determining whether to grant FARA exemptions what applications have been granted or denied on what grounds. There is no precedent to argue from, no way to know how the law is being applied, and whether it is being applied with logic or integrity. The FARA exemption process is a bureaucratic Guantanamo.

For the past three years the Plaintiff has attempted to use the Freedom of Information Act to pull back the curtain on the Department’s administration of the FARA exemption process. The Department’s response has been shameful, yielding a stack of letters so thoroughly redacted that the only information contained is the address of the Department of Justice.

This is a *pro se* action under FOIA, 5 U.S.C. § 552 for injunctive and other appropriate relief. Plaintiff seeks the complete release of FARA review letters written by DOJ National Security Division. The letters will reveal the criteria, if any, used by DOJ to determine whether exemptions apply and thus guide those seeking a FARA exemption. This is the exact sort of case for which FOIA was designed, since the FARA review letters will inform the public's decisions while providing sunshine to check government abuse. DOJ failed to meet its obligations under FOIA and cannot validly justify the withholdings under any FOIA exemption.

JURISDICTION AND VENUE

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331.

2. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Matthew Herrington is an attorney in private practice in Washington, D.C. and a resident of Washington, D.C.

4. Defendant Department of Justice is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOJ controls the National Security Division (“NSD”) component which is in possession and control of the records requested by plaintiff which are the subject of this action.

FACTUAL BACKGROUND

5. By letter sent to defendant DOJ-NSD on July 22, 2008, plaintiff requested “access to and copies of all review letters issued by the National Security Division of the Department of Justice to present or prospective agents of foreign principals, or their attorneys, either stating or

declining to state the Department's present enforcement intentions under the Foreign Agents Registration Act”

6. Beginning in August 2008, plaintiff or plaintiff's assistant, Faith Swords, telephoned DOJ Office of Information Policy approximately one time per month to inquire into the status of the FOIA request. DOJ never gave written notice of an “unusual circumstance” warranting an extension of the 20-day time limit for a response, as required in 5 U.S.C. § 552(a)(6)(B)(i).

7. On or about March 9, 2010, Plaintiff left a final voice-mail message with the DOJ Office of Information Policy indicating his intention to file suit.

8. On March 11, 2010 at 12:33 PM, Kevin Tiernan of DOJ-NSD called plaintiff and left a voicemail message regarding the FOIA request for the FARA review letters. Mr. Tiernan asked plaintiff to return his call at (202) 307-9972.

9. On April 9, 2010 at 12:11 PM, Kevin Tiernan left a voicemail message for plaintiff stating that the proposed release package was currently being reviewed by the FARA unit. Mr. Tiernan stated that after getting the sign-off from the FARA unit, the records will be in the mail, but that he didn't know when exactly that would be.

10. On April 28, 2010 at 12:38 PM, Kevin Tiernan left a voicemail message for plaintiff to give a status update on plaintiff's FOIA request for FARA review letters. Mr. Tiernan revealed that he had a conversation with “the unit” as to whether certain information should or should not be released. Mr. Tiernan prepared a package for “the unit” to review, and it came back with recommended changes, and it is now formally going for their final approval. Mr. Tiernan hoped that something would be in the mail by the end of the week.

11. By letter dated May 3, 2010, over two years since plaintiff's initial FOIA request (No. 08-174), defendant Department of Justice responded by severely redacting the released review letters. The letter from DOJ-NSD cited four FOIA exemptions to justify withholding significant portions of the records: 5 U.S.C. §§ 552 (b)(2), (b)(4), (b)(6), and (b)(7)(C). Thirty-two (32) heavily redacted FARA review letters photocopies were enclosed with the May 3, 2010 letter. Some letters had missing pages and others had redactions of successive whole paragraphs. DOJ's excessive redactions were inconsistent. For example, DOJ sometimes withheld Heather Hunt's telephone number under exemption b(2) and other times left the number visible in the review letters. In its overzealousness or carelessness, DOJ also forgot to redact the name of one company—Qorvis Communications, LLC—in an October 5, 2006 FARA review letter. All other letters leave the name of the company redacted under exemption b(4). This inconsistency casts doubt on DOJ's excessive withholdings and its justification under b(4).

12. By letter dated June 28, 2010, plaintiff exercised his right to an administrative appeal under 5 U.S.C. § 552(a)(6)(A)(i) after DOJ failed to release substantive portions of the FARA review letters. Plaintiff's letter to DOJ highlighted the "inexcusably laggard" conduct of DOJ throughout the process, and DOJ's improper withholding of information which undermines the purpose of FOIA. Plaintiff cited D.C. Circuit precedent concerning exemption (b)(4) in which the Court mandates a narrow application of the exemption. Even though FOIA requires agencies to release information without asking *why* it's requested, plaintiff's administrative appeal cites valid public policy justifications for an unobstructed release of FARA review letters.

13. By letter dated July 21, 2010, Priscilla Jones, Supervisory Administrative Specialist at DOJ Office of Information Policy, advised plaintiff that DOJ received his administrative appeal on July 2, 2010, and assigned it number 2010-2428.

14. On November 18, 2010, Janice Galli McLeod, Associate Director, DOJ Office of Information Policy, responded to plaintiff's appeal for access to FARA review letter. The response arrived 139 days after plaintiff's appeal was received by DOJ, standing in stark contrast to the DOJ-NSD 2010 average processing time for appeals of 25 days, as tracked by foia.gov. Ms. McLeod's letter indicated that "as a result of discussion between NSD personnel and a member of my staff, NSD has or will soon release additional records to you directly. I am otherwise affirming NSD's action on your request." Ms. McLeod cited three FOIA exemptions justifying the withholding of information: 5 U.S.C. §§ 552(b)(4), (b)(6) and (b)(7)(C).

15. By letter dated January 20, 2011, Arnetta James, FOIA Program Coordinator of DOJ-NSD, reminded plaintiff of the relevant exemptions for DOJ to withhold the requested FARA review letter records. Enclosed with the letter were "a revised set of records responsive" to plaintiff's FOIA request. Yet photocopies of the same thirty-two (32) FARA review letters were sent to plaintiff with equivalent heavy redactions. The only material revisions in the FARA review letters resulted in (a) consistently releasing DOJ phone numbers; (b) adding certain "Ct.No." numbers; and (c) un-redacting two new sentences: one from a FARA review letter of August 25, 2008, and the other from a May 15, 2007 letter. Defendant DOJ again relied chiefly on exemption b(4) to withhold substantive information in the "revised" set of records.

16. Plaintiff reminds this Court of the leading FOIA exemption b(4) case, *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992). This en banc decision created a test which distinguishes between information voluntarily provided versus information compelled. Parties seeking an advisory opinion regarding registration requirements under FARA provide the information voluntarily under 28 C.F.R. § 5.2(a). Thus the only relevant inquiry for the Court under *Critical Mass* is whether such information is customarily given out.

17. Plaintiff also calls the Court's attention to the DOJ regulations enacted to implement FARA. 28 C.F.R. § 5.2(m) sets out a confidentiality provision which specifically contemplates nondisclosure for "any written materials submitted pursuant to a [FARA review letter] request." Yet the confidentiality regulation in § 5.2(m) is silent regarding the content of FARA review letters themselves, thus indicating that FARA review letters are apt for release.

CAUSE OF ACTION

Violation of FOIA for Wrongful Withholding of Agency Records

18. Plaintiff incorporates by reference and realleges paragraphs 1-16.

19. Defendant DOJ has wrongfully withheld agency records requested by plaintiff in violation of 5 U.S.C. § 552(a)(3)(A). Defendant thus acts in defiance of President Obama's clear directive that "executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public" in responding the FOIA requests. Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009).

20. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant DOJ's wrongful withholding of the requested records

21. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested records.

REQUESTED RELIEF

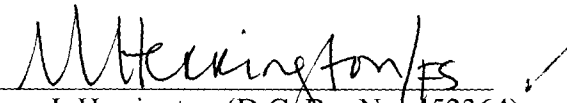
WHEREFORE, plaintiff prays that this Court:

- A. ORDER defendant DOJ to immediately disclose the requested records in their entirety;
- B. ISSUE written findings that defendant DOJ acted arbitrarily and capriciously in withholding the records under 5 U.S.C. § 552(a)(4)(F)(i);
- C. EXPEDITE this proceeding as provided in 28 U.S.C. § 1657;

- D. AWARD plaintiff its costs and reasonable attorneys' fees incurred in this action;
and
- E. GRANT such other relief as the court may deem just and proper.

Date: July 21, 2011

Respectfully submitted,

By: 
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