

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION

RUSI P. TALEYARKHAN,)	
)	
Plaintiff)	
)	
v.)	Case No. 4:10 cv 39
)	
PURDUE UNIVERSITY,)	
)	
Defendant)	

OPINION AND ORDER

This matter is before the court on the Request for Motion to Compel Discovery Material [DE 25] filed by the plaintiff, Rusi Taleyarkhan, on August 8, 2012. For the reasons set forth below, the motion is **DENIED**.

Background

In 2002, the plaintiff, Rusi P. Taleyarkhan, led a team of scientific researchers in the discovery of sonofusion. His work was published in various magazines and journals. Over the next few years Taleyarkhan and his team developed a table-top fusion device. The defendant, Purdue University, recruited Taleyarkhan in 2003 as a professor and researcher. While employed at Purdue, a university administrator, L. Tsoukalas, began calling Taleyarkhan's sonofusion research into question. Taleyarkhan alleges that Tsoukalas organized investigatory committees and publically accused Taleyarkhan of research misconduct. Taleyarkhan further

alleges that he suffered harassment in the form of racial name-calling and ridicule at the hands of Purdue's staff because of his Indian descent.

The Office of Naval Research launched a federal investigation on Taleyarkhan's work which was overseen by Holly Adams, the Inspector General for the Office of Naval Research, from 2007-2009. Taleyarkhan alleges that Adams subsequently was removed from her position as inspector general as a result of having engaged in improper conduct during her investigation, including having personal communications with two individuals at Purdue. The investigation resulted in a conclusion that Taleyarkhan committed misconduct. Taleyarkhan complains that the Navy's investigation led to the misconduct finding by Purdue and subsequent sanctions, including being stripped of titles, funding, and positions on committees.

Taleyarkhan filed a charge of discrimination with the Equal Employment Opportunity Commission. He was issued a Notice of Right to Sue on February 10, 2010, and filed his *pro se* complaint on May 4, 2010, alleging that the defendant violated Title VII of the Civil Rights Act and committed several torts, including defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. Purdue moved to dismiss Taleyarkhan's claims, but the motion was denied on all accounts

except Taleyarkhan's request for punitive damages on his Title VII claim.

The court held a telephonic status conference on June 22, 2012, and set discovery deadlines. Taleyarkhan now moves to compel the non-party Office of Naval Research to provide an unredacted copy of its investigation report. He previously requested a copy of the report under the Freedom of Information Act and received a redacted copy, which was filled in by an investigative reporter. Taleyarkhan claims that the information could play a pivotal role in the outcome of the case.

Taleyarkhan also requests an order compelling production of unredacted e-mail correspondence between Adams, Congressman B. Miller, and Purdue employees. Taleyarkhan previously requested copies of the e-mails, but the Department of Naval Research declined, explaining that Adams' e-mails to Purdue employees were personal and that her e-mails to five other people, including Congressman Miller, had been located, but the electronic files had been corrupted and could not be recovered.

Discussion

Taleyarkhan first requested the information sought in his motion from the Office of Naval Research under the Freedom of Information Act (FOIA). The Office of Naval Research provided the documents but redacted certain information, citing to spe-

cific exemptions to the FOIA. The FOIA makes information maintained by government agencies available to any person on request. 5 U.S.C. §552(a); 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §8437. An individual seeking the information is not required to show need or relevancy, nor is the information limited to a party to a court proceeding. ***ACLU v. Brown***, 609 F.2d 277, 280 (7th Cir. 1979); ***Culinary Foods, Inc. v. Raychem Corp.***, 150 F.R.D. 122, 126 (N.D. Ill. 1993). The FOIA provides nine narrowly drafted exemptions to the information each agency is required to produce. 5 U.S.C. §552(b). When the Office of Naval Research responded to Taleyarkhan's request, it explained that certain information in the investigative report was subject to exemption 7 of the FOIA, which states in relevant part: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C).

Similarly, the Privacy Act, which the Office of Naval Research also referred to when declining to provide the requested documents, exempts

investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any indi-

vidual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence

5 U.S.C. §522a(k)

Taleyarkhan asserts that the information he requested should not be exempted from production and asks the court to issue an order compelling the non-party Office of Naval Research to produce an unredacted version of the report.

Requests for information under the FOIA and federal discovery rules are not identical. *Culinary Foods*, 150 F.R.D. at 125. Both allow litigants access to information, but the purpose of the FOIA "was not to benefit private litigants by serving as a supplement to the rules of civil discovery." *Culinary Foods*, 150 F.R.D. at 125. When an agency refuses to provide information sought under the FOIA, the proper recourse for the individual requesting the information is to seek an injunction against the agency from withholding documents that do not fall within an exemption. *Kazacky & Weitzel, P.C. v. United States Dept. of Treasury*, 2008 WL 2188457, *2 (N.D. Ill. April 10, 2008). The

court cannot require a non-party to produce documents without affording it a day in court. *See National Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of the Bahais of the United States*, 628 F.3d 837, 851 (7th Cir. 2010) ("[O]ne who is not a party to the action in which the injunction was issued cannot be bound by it is that he has not had his day in court with respect to the validity of the injunction."). However, the Federal Rules of Civil Procedure provide two mechanisms for obtaining discovery from a non-party. The information can be gathered by serving a subpoena under Rule 45 or by deposing the non-party under Rule 30. *Henderson v. Zurn Industries, Inc.*, 131 F.R.D. 560, 565 (S.D. Ind. 1990) ("In federal court . . . documents and other materials can be acquired from non-parties only through the use of a deposition and a subpoena under Rule 30 and 45.").

Because this is not an action against the Department of Naval Research for violating the FOIA and the Department of Naval Research is not named as a party, the court cannot prohibit the Department of Naval Research from withholding information that may not fall under an exemption. The proper course for Taleyar-khan to obtain discovery from the non-party Department of Naval Research would be to serve a subpoena on the department. *See* Federal Rule of Civil Procedure 45(a)(1)(A)(iii); *Peterson v.*

Farrakhan, 2009 WL 1543600, *3 (N.D. Ind. June 2, 2009); **Hender-son**, 131 F.R.D. at 565.

The Civil Procedure Manual for the Northern District of Indiana Federal Courts explains:

A subpoena is defined as a writ commanding a person to appear before a court or other tribunal, subject to a penalty for failure to comply or as a court order that may require a person to appear at a trial, hearing or deposition for the purpose of testifying as a witness at a specified time or else risk being held in contempt of court. There are two types of subpoenas. The first is a subpoena ad testificandum, which is a subpoena ordering a witness to appear and give[] testimony. The second is a subpoena duces tecum, which is a subpoena that orders a witness both to appear and to bring specified and relevant documents or records. In general, pursuant to Fed.R.Civ.P[ro] 45(a), parties to legal proceedings have the power to obtain a subpoena compelling a witness to appear and testify at a designated time and location.

Subpoenas can be issued in blank form or signed and sealed to all parties in legal proceedings, including pro se plaintiffs/non-incarcerated pro se litigants. Requests for subpoenas can be made in person, by telephone or in writing. Subpoenas will not be issued to incarcerated/prisoner pro se plaintiffs without an order from the court.

Civ.P.Manual, N.D.Ind., p. 213

If Taleyarkhan desires to obtain the information, he need only contact the Clerk's Office and request a subpoena. If the Department of Naval Research then refuses to provide the documents, the burden would be on the Department of Naval Research to

explain the basis of its refusal. See *Brown*, 609 F.2d at 280 ("[T]he FOIA itself puts the burden upon the agency to justify its classification of the documents" . . .) (citing 5 U.S.C. §552(a)(4)(B)). Information exempted from production under the FOIA may be discoverable. *Culinary Foods*, 150 F.R.D. at 125. This is because the requesting party's need is not a factor in denying information under the FOIA, whereas the court must weigh the litigant's need and the government's interest in confidentiality when determining whether the information is discoverable. *Culinary Foods*, 150 F.R.D. at 125-26. Although the FOIA exemptions do parallel certain discovery privileges, when determining whether the information is discoverable, the court must weigh the litigant's need against the government's interest in confidentiality in light of the underlying FOIA exemptions. *Culinary Foods*, 150 F.R.D. at 125-26. For this reason, the information Taleyarkhan sought, although it may be exempted under the FOIA, may be subject to discovery. At this point, Taleyarkhan must follow the proper procedures for obtaining non-party discovery before seeking court intervention.

Based on the foregoing reasons, the Request for Motion to Compel Discovery Material [DE 25] filed by the plaintiff, Rusi Taleyarkhan, on August 8, 2012, is **DENIED**.

ENTERED this 24th day of October, 2012

s/ ANDREW P. RODOVICH
United States Magistrate Judge