

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

SIM B. MOORE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL NO.: WDQ-13-2353

* * * * *

MEMORANDUM OPINION

Sim B. Moore, Jr., *pro se*, sued the United States of America for violating the Freedom of Information Act ("FOIA").¹ ECF No. 1. Pending is the defendant's motion to dismiss or for summary judgment. ECF No. 9. No hearing is necessary. Local Rule 105.6 (D. Md. 2011). For the following reasons, summary judgment will be granted.

I. Background²

From February 1991 to October 2002, Moore was employed by the U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). See ECF No. 9-3 at 1. On May 7, 2013, he submitted a FOIA request to ATF requesting "a copy of the following documents (or documents containing the

¹ 5 U.S.C. § 552.

² In reviewing a motion for summary judgment, the nonmovant's evidence "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

following information)[:] [m]y complete ATF personnel file including all reports, correspondences, emails, and records during my service with ATF." *Id.* On May 20, 2013, ATF's Disclosure Division (the "Division") sent a letter to Moore informing him that he needed to submit a certification of identity form (Form DOJ-361), which is required by DOJ regulations for FOIA and Privacy Act³ requests. *Id.* at 2-3. On June 3, 2013, Moore provided the completed form to the Division. *Id.* at 5-6. On June 11, 2013, the Division informed Moore by letter that his request was received and assigned number 13-1056. *Id.* at 6.

After ATF failed to produce the requested documents, on August 13, 2013, Moore sued the United States, alleging that ATF "ha[d] wrongfully withheld the requested records from him" by not responding to his FOIA request. See ECF No. 1 at 3. Moore sought: (1) a Court order requiring the defendant "to disclose the requested records in their [entirety] and make copies available . . . without redaction or cost;" (2) five hundred dollars in damages; and (3) litigation costs. *Id.*

On September 30, 2013, the Division told Moore that his official personnel file ("OPF") was located at the National Personnel Records Center ("NPRC") in Valmeyer, Illinois where

³ 5 U.S.C. § 522a.

OPFs of former government employees are usually kept.⁴ See ECF No. 9-3 at 8. Moore subsequently contacted the NPRC, which informed him that ATF had requested a copy of his OPF on April 20, 2012, and accordingly instructed him to contact ATF. See *id.* at 13. On November 14, 2013, Moore gave a copy of the NPRC's letter to the Division, which located his OPF in the Litigation Division of the Chief Counsel's Office. See ECF Nos. 9-2 at 3, 9-3 at 14.

On November 18, 2013, the Division provided Moore with a complete copy of his OPF (154 pages) without charge.⁵ ECF Nos. 9-2 at 3, 9-3 at 15. The Division did not withhold any documents from Moore's OPF and only redacted the social security numbers of third parties. See *id.*

Believing that ATF's response was incomplete, Moore provided ATF with a list of six categories of documents that he believed should be in his OPF: (1) proposals for, and decisions on, disciplinary actions; (2) emails and correspondence on

⁴ The Division was unaware that Moore had sued ATF for violations of a class action settlement agreement. ECF No. 9-2 at 2. If not for this litigation, under ATF's standard operating procedures, Moore's file would have been transferred to the NPRC based on the amount of time since his employment with ATF had ended. *Id.*

⁵ The letter noted that the request was processed under the Privacy Act. ECF No. 9-3 at 15. The Privacy Act provides that "no agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by . . . the individual to whom the record pertains." § 552a(b).

disciplinary actions; (3) the signed settlement agreement between him and ATF after ATF "attempted [to] remov[e him] in 1998 for medical [u]nsuitability;" (4) medical reports and records provided to ATF at its request from his physician, and from a physician selected by ATF; and (5) "AD of Inspection approvals of discipline." ECF No. 9-2 at 3-4.

After receiving Moore's list, Stephanie M. Boucher, Chief of the Division, contacted ATF's Payroll Processing department, which "handles ATF's [OPFs]." *Id.* at 4. The Branch Chief of Payroll told Boucher that "the items listed by Mr. Moore are not the types of items that are filed in the OPF."⁶ *Id.*

On December 16, 2013, the government moved to dismiss or for summary judgment. ECF No. 9. Attached to the motion is a declaration from Boucher. ECF No. 9-2. She declares that her statements describing ATF's process of responding to Moore's request "are based on knowledge [she acquired] through the performance of [her] official duties," and that she is "familiar with the procedures followed by this office in responding to [Moore's] FOIA request." *Id.* at 1

⁶ Boucher also declares that employees' official medical files are maintained in a separate file at the NPRC. ECF No. 9-2 at 4.

On January 6, 2014, Moore opposed the government's motion.⁷
ECF No. 11. On January 23, 2014, the government replied. ECF
No. 12.

II. Analysis

A. Legal Standard

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).⁸ In considering the motion, the judge's function is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for

⁷ Moore's complaint asserts only that ATF failed to respond to his FOIA request. See ECF No. 1 at 3. In his opposition, Moore asserts that ATF did not conduct an adequate search in response to his FOIA request, but he has not sought to amend his complaint to add this claim. See ECF No. 11 at 2. Because ATF responded to his FOIA request on November 18, 2013, Moore's request for the Court to order ATF to respond is now moot. See *Reg'l Mgmt. Corp., Inc. v. Legal Servs. Corp.*, 186 F.3d 457, 465 (4th Cir. 1999) ("[A] challenge to a particular denial of a FOIA request becomes moot if an agency produces the requested documents."). Because Moore is proceeding *pro se*, however, the Court will construe his opposition as an amended complaint and address his claim that ATF did not conduct an adequate search under FOIA. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (internal quotations and citations omitted)).

⁸ Rule 56(a), which "carries forward the summary-judgment standard expressed in former subdivision (c)," changed "genuine 'issue' [to] genuine 'dispute,'" and restored the word "'shall' . . . to express the direction to grant summary judgment." Fed. R. Civ. P. 56 advisory committee's note.

trial." *Anderson*, 477 U.S. at 249. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The Court must "view the evidence in the light most favorable to . . . the nonmovant and draw all reasonable inferences in [his] favor." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002). In general, FOIA disputes should be resolved on summary judgment. *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 290 (4th Cir. 2004).

Here, the defendant requests summary judgment on Moore's claim on the ground that it has fully responded to his FOIA request for documents. See ECF No. 9-1 at 5-6. To demonstrate that it has discharged its obligations under FOIA by conducting an adequate search--and is therefore entitled to summary judgment--the agency must show that its "search [was] reasonably calculated to uncover all relevant documents." *Ethyl Corp. v. United States Environmental Protection Agency*, 25 F.3d 1241, 1246 (4th Cir. 1994) (quoting *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); *Wickwire Gavin, P.C. v. Def. Intelligence Agency*, 330 F. Supp. 2d 592, 596-97 (E.D. Va. 2004). An agency may rely on a reasonably detailed, nonconclusionary, good faith affidavit to show the adequacy of its search and must aver "that all files likely to contain

responsive materials (if such records exist) were searched."⁹
See *Ethyl*, 25 F.3d at 1246-47. It is not necessary that a search unveil every potentially responsive or relevant document. *Id.* at 1246.

B. FOIA Claim

Under FOIA, federal agencies must promptly make records available when the request reasonably describes the records sought and is made in accordance with published rules. See § 552(a)(3)(A). Records that are properly requested must be provided in any form or format requested, if it is readily reproducible by the agency in that form. See *id.*

§ 552(a)(3)(B). The purpose of FOIA is to open government agency action to public scrutiny. See *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 1599, 48 L. Ed. 2d 11 (1976). Under § 552(a)(4)(B) "federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980).

⁹ Boucher has averred that--with the exception of the documents already produced--she is "aware of no other documents that are responsive to the request." ECF No. 9-2 at 4. "The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency." *Spannaus v. U.S. Dep't of Justice*, 813 F.2d 1285, 1289 (4th Cir. 1987) (quoting *Barney v. Internal Revenue Service*, 618 F.2d 1268, 1272 (8th Cir. 1980)).

Moore argues that ATF's response was inadequate, because "it was not a reasonably calculated search where other responsive documents might be." ECF No. 11 at 2. He contends that ATF improperly limited its search to a single "file," when "he asked for documents." *Id.* at 5. He also disputes the Division's contention that he must make a separate FOIA request for the documents in the "more specific" list that he provided to ATF after they sent him his OPF, because these documents were responsive to his original request. *See id.* at 4-5.

Here, Moore requested a copy of his "complete ATF personnel file including all reports, correspondences, emails, and records." ECF No. 9-3 at 1. Boucher avers that, on November 18, 2013, she produced Moore's complete OPF in response to this request, and no documents in his OPF were withheld.¹⁰ ECF No. 9-2 at 3. Although Moore believes that additional documents are responsive to his request, agencies are not obligated to look beyond the "four corners" of a FOIA request "when formulating their searches, nor [are] they required to chase rabbit trails that may appear in documents uncovered during their search." *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 365 (4th Cir. 2009). Moore's FOIA request, on its face, seeks only a

¹⁰ In his opposition, Moore asserts that ATF improperly withheld his OPF twice before finally producing it. ECF No. 11 at 2. However, now that ATF has properly produced his personnel file, any claims arising out of these previous failures to disclose are moot. *See Reg'l Mgmt.*, 186 F.3d at 465.

copy of his "complete" personnel file "including" all the documents within it.¹¹ ATF reasonably interpreted Moore's request to mean that he wanted a copy of his OPF, which it produced in full. If Moore wishes ATF to produce additional documents that were not in his OPF, he should submit a second FOIA request. See *Carter, Fullerton & Hayes, LLC v. F.T.C.*, 601 F. Supp. 2d 728, 735 (E.D. Va. 2009) (citing *id.*). Because Boucher's declaration establishes that ATF conducted a search "reasonably calculated to uncover all relevant documents," the defendant will be granted summary judgment on Moore's inadequate search claim.

C. Request for Damages and Costs

In addition to a Court order requiring ATF to respond to his FOIA request, Moore's complaint requests money damages and

¹¹ In Moore's opposition, he faults ATF for failing to search the "immediate area" of the Chief Counsel's office for other allegedly responsive documents, especially since some of the documents he was seeking--the settlement agreement and medical records--are legal documents. See ECF No. 11 at 2-3. However, Moore did not request a copy of the settlement agreement--or even ask for "legal" documents--in his FOIA request. ECF No. 9-3 at 1. Further, the Office of Personnel Management's ("OPM") OPF checklist--submitted with the defendant's motion--states that settlement agreements between an agency and individual may not be put in an OPF. *Id.* at 24. Finally, Boucher avers that employee medical records are kept in a separate file at the NPRC. ECF No. 9-2 at 4.

Similarly, Moore did not specifically ask for "disciplinary records" in his FOIA request, see ECF No. 9-3 at 1, and the OPM checklist notes that such documents "may" be included in the OPF as "temporary" records but are not "permanent" records, see ECF No. 9-3 at 17.

costs. ECF No. 1 at 3. Money damages are not available under FOIA. See *Smith v. Commc'ns Works of Am. (CWA)-Dist. 2*, 8:12-CV-00027-AW, 2012 WL 6727150, at *4 (D. Md. Dec. 26, 2012) *aff'd sub nom. Smith v. E.E.O.C.*, 517 F. App'x 159 (4th Cir. 2013) (citing § 552(a)(4)(B)). Thus, ATF will be granted summary judgment on this claim.


However, FOIA authorizes an award of "reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." § 552(4)(E)(i). ATF does not seek judgment on Moore's claim for costs, only noting that it "reserves its right to object to any petition filed by Plaintiff for costs." ECF No. 9-1 at 6. Accordingly, Moore may move for an award of costs within 21 days of the date of the Order accompanying this opinion. The Court will reserve judgment on whether he is entitled to costs until the issue has been fully briefed.¹²

¹² Moore is cautioned that attorneys' fees are not available to *pro se* plaintiffs. See *Kay v. Ehrler*, 499 U.S. 432, 435, 111 S. Ct. 1435, 1436-37, 113 L. Ed. 2d 486 (1991).

III. Conclusion

For the reasons stated above, the defendant's motion for summary judgment will be granted.

June 6, 2014
Date


William D. Quarles, Jr.
United States District Judge