White v. Department of Justice et al

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS WILLIAM A. WHITE, Plaintiff, v. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES MARSHALS SERVICE, FEDERAL BUREAU OF PRISONS and BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, Defendants.

Case No. 16-cv-948-JPG-DGW

MEMORANDUM AND ORDER This matter comes before the Court on the defendant Department of motions

, and did not respond properly to some of his requests for 552 (Docs. 38 & 50). White has responded to the respective motions (Docs. 43 & 54). The DOJ has replied to one of s (Docs. 48), and White has replied to that reply (Doc. 52). The Court also § first summary judgment motion (Doc. 46). The DOJ

has responded to the motion (Doc. 49), and White has replied to that response, withdrawing some of the bases for his sanctions request (Doc. 53). As a preliminary matter, White first summary judgment motion a request for summary judgment on the same claims and others. The Court

Including more than one type of filing in a single document is not usually accepted by the Court

because, as in this case, it is confusing. Additionally, construing a request in a responsive filing as a new motion threatens to open up briefing ad infinitum because each new request could commence a parade of sur-reply briefs disguised as regular responses. Here, the DOJ clearly did fashion more akin to a reply brief without discussion or citation to evidence that would be

appropriate in a resp really a sur-reply not permitted by the Court under Local Rule 7.1(c) is equally devoid of material appropriate to s a summary judgment motion and directs the Clerk of Court to terminate it (Doc. 43). The Court will allow White an additional brief period to file a motion for summary judgment on the merits to advance his arguments with respect to the claims involving the ATF and BOP. The Court now turns to the substance of the summary judgment motions. I. Summary Judgment Standard 56(a); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Spath -Ind.,

Inc., 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Chelios v. Heavener, 520 F.3d 678, 685 (7th

Cir. 2008); Spath, 211 F.3d at 396. The initial summary judgment burden of production is on the moving party to show the

Court that there is no reason to have a trial. Celotex, 477 U.S. at 323; Modrowski v. Pigatto, 712 F.3d 1166, 1168 (7th Cir. 2013). Where the non-moving party carries the burden of proof at trial, the moving party may satisfy its burden of production in one of two ways. It may present evidence that affirmatively negates an essential element of the non- see Fed. R. Civ. P. 56(c)(1)(A), or it may point to an absence of evidence to support an essential element of the non- see Fed. R. Civ. P. 56(c)(1)(B). Celotex, 477 U.S. at 322-25; Modrowski, 712 F.3d at 1169. Where the moving party fails to meet its strict burden, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. Cooper v. Lane, 969 F.2d 368, 371 (7th Cir. 1992). In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. Celotex, 477 U.S. at 322-26; Anderson, 477 U.S. at 256-57; Modrowski, 712 F.3d at 1168. A genuine issue of material fact is not demonstrated by the mere Anderson, 477 U.S. at 247, or by Matsushita Elec. Indus. Co. v. Zenith Radio Corp. fair-minded jury could Anderson, 477 U.S. at 252.

II. FOIA Generally White brings this lawsuit under FOIA, which the Seventh Circuit Court of Appeals recently described generally:

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L.Ed.2d 159 (1978). Toward that end, FOIA in accordance with [the agen 552(a)(3)(A). The Robbins Tire, 437 U.S. at 220, 98 S. Ct. 2311. Agencies are, however, permitted to withhold records under nine statutory exemptions and three special exclusions for law-enforcement records. See 5 U.S.C. § 552(b)-(c). Rubman v. United States Citizenship & Immigration Servs., 800 F.3d 381, 386 (7th Cir. 2015). White challenges under FOIA fall into three categories:

the a

failed to respond within the time periods set forth in FOIA, or exceeded the permitted requests for clarification from the requesting party; the agency incorrectly denied having responsive records; and the agency improperly withheld responsive records pursuant to two statutory exemptions

regarding invasion of personal privacy.

White failed to exhaust his administrative remedies; White failed to state a viable FOIA theory; and White has abandoned or conceded certain claims. The Court will discuss each category of arguments

and its application to the facts in turn. With respect to the facts set forth below, motions in this order, it has viewed the evidence and all reasonable inferenced that can be drawn therefrom III. Exhaustion of Administrative Remedies Generally, before filing a lawsuit for violation of FOIA, a plaintiff must exhaust his administrative remedies. See Hoeller v. Social Sec. Admin. 2016); , 920 F.2d 57, 61 (D.C. Cir. 1990). Once he has

exhausted his administrative remedies, if he believes an agency has improperly withheld documents, he may file a federal lawsuit. See 5 U.S.C. § 552(a)(4)(B). Whether a plaintiff has exhausted his remedies may be connected to the timing of the FOIA provides that when an agency receives a

holidays) after the receipt of any such request whether to compl notify the requesting party of the reasons for the determination, the right to seek assistance from

the agency, the right to appeal the decision to the head of the agency, and the right to seek dispute resolution services. 5 U.S.C. § 552(a)(6)(A). If the agency fails to comply with this time limit, the requesting party is deemed to have exhausted his administrative remedies and may proceed directly to court. 5 U.S.C. § 552(a)(6)(C)(i); see Oglesby, 920 F.2d at 5 U.S.C. § 552(a)(6)(C) permits a requester to file a lawsuit when ten days [now extended to twenty days] However, if the agency cures its mistake by responding before the requesting party files a lawsuit,

the obligation to actually exhaust administrative remedies by appealing to the agency head is revived. Oglesby, 920 F.2d at 63-64. The DOJ argues that it is entitled to summary judgment on the following of Wh because he failed to exhaust his administrative remedies as required by FOIA: 1

Request No. 2017-0187 to the ATF in a letter dated November 27, 2016 and received by

the ATF on December 7, 2016. Am. Compl. Ex. D (Doc. 25-1 at 17-19; Doc. 38-1 at 4-8). In that letter, White requested disclosure under FOIA of records regarding himself; thirty-four groups, operations or organizations; and forty-eight individuals;

1 The DOJ makes passing reference to Request No. 2016-07558 to the BOP in a letter dated August 7, 2016, in the section of its first summary judgment motion summarizing the claims asserted against the BOP. It suggests White has failed to exhaust his administrative remedies as to that request. However, the DOJ does not request summary judgment on the claim affiliated with that request in its motions, so the Court does not discuss it in this order.

A request to the FBI containing thirty-two items in a letter dated December 1, 2016. Am.

Compl. Ex. E(a)(i) (Doc. 25-1 at 20-21; Doc. 50-1 at 60-62). The request was broken down into subcomponents, which were assigned the following request numbers:

Request No. Subject Freedom of Information Act/Privacy Act FOIPA 1365354-000

James Porrazzo, likely of Boston, Massachusetts; Joshua Caleb Sutter aka David Woods aka Tyler Moses aka Shree Shree Kaliki-Kaliki Mandir aka Stephen Brown aka Thugee Behram; Jilian Hoy aka comrade Morrison aka Jayalita Devi Dasi; John Paul Cupp; Jason Adam Tonis of Elizabeth, New Jersey; Kevin Walsh; Zaid Shakar al-Jishi; Emily Rotney: Chris Hayes; Kent McLellan; August Kreis III; Brett Stevens; David Lynch; FBI-JTTF Agent and New York City Police Detective Peter Zaleski FOIPA 1365415-000 FOIPA 1365422-000 New Bihar Mandir Temple FOIPA 1365431-000 Manchuoko Temporary Government FOIPA 1365410-000 New Resistance FOIPA 1365412-000 Green Star FOIPA 1365432-000 US Juche Study Group FOIPA 1365418-000 US Songun Study Group FOIPA 1365425-000 United Juche Front of North America FOIPA 1365426-000 Swords of Songun FOIPA 1365433-000 Russian Defense League NFP-65643 Any person, or, entity in Lexington, SC, claiming affiliation

with the government of North Korea; Any person, or, entity, in Lexington. SC, claiming affiliation with al-Qaeda or, any related group; Any person. or, entity. in Boston, MA, New York. or, Lexington, SC, claiming affiliation with Alexander Dugin, The D s Republic, or, the Luhansk a sting operation run out of the Pahlevi Building in New York, NY, by informants , supposedly the Iranian Major General Khosrowdad twin , Princess Ashraf of frame is at least 2008 to present; FBI-JTTF infiltration of Korean language classes in the New York City Area. FOIPA Request No. 1357558-000/001 to the FBI in a letter dated August 29, 2016. Am.

Compl. Ex. E(a)(ii) (Doc. 25-1 at 22; Doc. 50-1 at 22-23). letter) was assigned this request number.

None of the claims based on these requests were case, filed August 25, 2016. White attempted to add these claims in an Amended Complaint,

which he signed and placed into the prison mail system, along with a motion for leave to file the on July 14, 2017, and the Clerk of Court filed the Amended Complaint on July 17, 2017 (Doc. 25).

The DOJ believes White failed to exhaust his administrative remedies on each of these claims. It is undisputed that the respective agencies responded to each request, albeit late, before the Amended Complaint was filed on July 17, 2017, and that White did not administratively appeal those responses before the Amended Complaint was filed. The DOJ believes that, under Oglesby, since it cured its failure to respond before White Amended Complaint was filed, White was obligated to actually exhaust his administrative remedies before filing suit. White concedes he did not actually exhaust his administrative remedies following the argues he constructively exhausted his administrative remedies when the agencies did not respond to him within the twenty-day response period. At that point, he attempted to amend his complaint before the agencies actually responded. He believes the Court should deem the Amended Complaint to have been filed on January 16, 2017, when he tendered it to the Court along with a motion for leave to file it. In his view, the Amended Complaint was filed in the window noted by Oglesby between when an agency fails to comply mplies. In this

window, he argues, he has constructively exhausted his administrative remedies and may file suit. The DOJ has not convinced the Court that White failed to exhaust his administrative remedies on these claims. When the agencies failed to comply with the twenty-day response deadline, White drafted the Amended Complaint, signed it, placed it into the prison mail system on January 16, 2017, along with a motion for leave to file it. Although the Court did not allow him to file the Amended Complaint until July 2017, after the agencies responded to his requests, the Court

deems his Amended Complaint filed the day he tendered it to the Court, not the date the Court allowed it to be filed. See Moore v. State of Ind., 999 F.2d 1125, 1131 (7th Cir. 1993) (holding that because a party has no control over when court decides whether to allow amendment, amended pleading is deemed filed when properly filed motion for leave to amend is filed and proposed amendment is tendered to the court); Williams v. American Equip. & Fabricating Corp., No. 09- federal and state court that a complaint is deemed filed as of the time it is submitted to a court

together with a request for ; compare Schillinger v. Union Pac. R. Co. pleading deemed filed when tendered, if allowed to be filed, applies to federal claims). Further, under the mailbox rule, White prison official to be sent to the Court. Houston v. Lack, 487 U.S. 266, 276 (1988).

The combination of these rules leads to the conclusion that White should be deemed filed on January 16, 2017, the day he placed his motion for leave to amend his

complaint, along with his proposed Amended Complaint, in the prison mail system to be sent to the Court. Oglesby does not require actual exhaustion where White filed his claims before the agencies responded. It would have required actual exhaustion only if the agency had responded before White filed suit on his claims. However, because White tendered his Amended Complaint before any agency response, Oglesby does not apply. Because the DOJ has not carried its burden of showing it is entitled to judgment as a matter actually exhaust his administrative remedies on the aforementioned requests.

IV. Viable FOIA Theory The DOJ argues that it is entitled to summary judgment on the following claim because White failed to allege conduct that violates FOIA:

Request No. 2013-11705 to the BOP in a letter dated August 3, 2013, and received by the

BOP on August 19, 2013 (Doc. 38-2 at 6). In that letter, White requested disclosure of records in its possession regarding his imprisonment in the BOP from October 17, 2008, to April 20, 2011, and from June 8, 2012, to the present. He also proposed four categories within that broad request for the agency to prioritize if there were an excessive number of records. The BOP responded to this request in a letter dated January 13, 2014 (Doc. 38-2 at 10). With the letter, the BOP released twenty- fourteen of which had redactions that the BOP claimed were justified by statutory exemptions involving third-party privacy. It did not indicate it was withholding any documents in their entirety. White

administratively appealed this decision. In the appeal, he challenged the redactions and complained that the set of documents produced was incomplete because it did not include internal communications, and maintenance records. finding that the redactions were justified and that the BOP had conducted an adequate, reasonable

search for relevant records. The DOJ asks the Court for summary judgment on this c was provided with a response but fails to challenge the adequacy of the search or the validity of the Mot. Summ. J. 8 (Doc. 38 at 8). The foregoing quoted material is summary judgment on this claim, which could be rejected summarily for failure of adequate support. See Puffer v. Allstate Ins. Co., 675 F.3d 709, waived). Nevertheless, the Court looks at the substance of the position.

ontained twenty-six pages and did not account for other responsive pages it failed to produce. White contends his prison file is larger than twenty-six pages and includes unproduced documents such as, for example, documents that were attached in an exhibi summary judgment

responsive documents was justified because two specific sub- reasonably describe the documents he sought or fell within the exemption for private third-party agency has waived these positions by failing to assert them in the administrative process. He also

faults the BOP for failing to inform him what additional information was needed in his request that

improperly ; (2) withheld Kissinger v. Reporters Comm. for Freedom

of the Press, 445 U.S. 136, 150 (1980) (quoting 5 U.S.C. § 552(a)(4)(B)). Agency records may be found to be improperly withheld if the agency failed reasonably calculated to uncover all relevant documents Stimac v. U t of Justice, 991 F.2d 800, 1993 WL 127980, at *1 (7th Cir. 1993) he issue is not whether other documents may exist, but rather whether the search for undisclosed documents was adequate. Matter of Wade, 969 F.2d 241, 249 n. 11 (7th Cir. 1992). Records may also be found to be improperly withheld if the agency misapplies a statutory exemption. See, generally, Solar Sources, Inc. v. United States, 142 F.3d 1033 (7th Cir. 1998) (reviewing the application of certain exemptions). litigant is proceeding pro se, Haines v. Kerner, 404 U.S. 519, 520 (1972); Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998), the Court believes White has, albeit obliquely, articulated a challenge to the adequacy of the search performed by the BOP. He asserts that his FOIA gency denies having any responsive records, . Compl. (Doc. 25 at 9). This can be construed as an assertion did not locate other responsive documents about which White is aware and which were known by

the agency and available to it search was reasonable, the Court has no occasion to consider that question. Similarly, White alleged in the Amended Complaint that his FOIA challenges include subjects of request being withheld pursuant to [third-party privacy exemptions] where exceptions to the exemptions apply. Am. Compl. (Doc. 25 at 10). This can be construed as an argument that the BOP improperly applied statutory third-party privacy exemptions to justify redacting information

from the produced documents. Since the DOJ makes no argument in its motion that the BOP properly observed the exemptions, the Court has no occasion to consider that question. Because the DOJ has not demonstrated it is entitled to judgment as a matter of law on Request No. 2013-11705, the Court will deny this part of its motion for summary judgment. V. Abandoned/Conceded The DOJ argues that it is entitled to summary judgment on the following claim because White has either abandoned or conceded his claims:

Request No. 2017-01269 to the BOP in a letter dated November 20, 2016, and received on

November 28, 2016. Am. Compl. Ex. B(b)(i) (Doc. 25-1 at 10; Doc 38-2 at 41). In that

letter, White requested disclosure of the visitor/entry logs for the eleventh floor SHU at the Metropolitan Correctional Center from January 1, 2011, to April 20, 2011; and FOIPA Request No. 1362476-000 to the FBI in a letter dated November 20, 2016. Am.

Compl. Ex. E(a)(v) (Doc. 25-1 at 25; Doc. 50-1 at 50-51). In that letter, White requested Office and its work with the FBI (¶ 3 of the November 20, 2016, letter). requests, and White had indicated a desire not to pursue his claims based on these requests any

more. With respect to the BOP request, White asks the Court in his summary judgment response to dismiss the associated claim. With respect to the FBI request, White has asked the Court in a separate motion to voluntarily dismiss the associated claim. Because White has not objected to

ese claims as an admission of the merits of the motion. See Local Rule 7.1(c). Indeed, the motion appears to have merit in light of the fact that White has affirmatively expressed a desire not to pursue these claims further. Accordingly, the

VI. Motion for Sanctions White asks the Court to sanction the DOJ, the ATF, the BOP and their counsel for withdrawn several bases for his request, leaving only the following representations or positions:

requested and that withholding documents on that basis was justified; defending a statement by the ATF about what records it has in its possession; and that The DOJ maintains its statement and positions are not sanctionable and instead amount simply to disagreements with White about the law and its application to the facts of this case.

Sanctions may be available under Federal Rule of Civil Procedure 11(c) or 28 U.S.C. § a signature is a certification that the filing is not frivolous and is not presented for an improper purpose, Fed. R. Civ. P. 11(b). The Court may sanction an attorney or a party that is responsible for a filing that violates Rule 11(b). Fed. R. Civ. P. 11(c)(1). Under § 1927, an attorney who unreasonably and vexatiously multiplies proceedings can be personally liable for the excess costs and fees incurred because of the

conduct. See IDS Life Ins. Co. v. Royal Alliance Assocs., Inc., 266 F.3d 645, 653 (7th Cir. 2001). that, although not all the legal positions presented in the motion have merit, they are not frivolous

and have not been presented for an improper purpose. Instead, they have been presented as

Additionally, factual statements White claims the DOJ has wrongfully endorsed are subject to interpretation that could render them accurate or presenting a genuine issue of fact. In these circumstances, the Court finds that the DOJ has not presented anything to unreasonably or vexatiously multiply the proceedings. rants sanctions under either Rule 11(c) or § 1927. VI. Conclusion For the foregoing reasons, the Court:

DIRECTS the Clerk of Court to terminate

his summary judgment response brief (Doc. 43); ORDERS that White shall have up to and including February 23, 2018, to file a new

motion for summary judgment on the merits to advance his arguments with respect to the remaining claims involving the ATF and BOP;

GRANTS in part and DENIES in part ons for partial summary

judgment (Docs. 38 & 50). The motions are GRANTED to the extent they seek summary judgment on the following claims:

o Request No. 2017-01269 to the BOP in a letter dated November 20,

2016, and received on November 28, 2016. Am. Compl. Ex. B(b)(i) (Doc. 25-1 at 10; Doc 38-2 at 41); and o FOIPA Request No. 1362476-000 to the FBI in ¶ 3 of a letter dated

November 20, 2016, seeking records regarding the Seminole County, . Am. Compl. Ex. E(a)(v) (Doc. 25-1 at 25; Doc. 50-1 at 50-51). The motions for partial summary judgment are DENIED in all other respects. DENIES and DIRECTS the Clerk of Court to enter judgment accordingly at the close of the case. IT IS SO ORDERED. DATED: January 19, 2018 s/ J. Phil Gilbert J. PHIL GILBERT DISTRICT JUDGE