

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERIC WHITEHURST,

Plaintiff

v.

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.

Civil Action No. 96-572 (GK)

FILED

FEB 05 1997

Clerk, U.S. District Court
District of Columbia

ORDER

This matter is before the Court on Defendants' Motion to Stay Proceedings and Plaintiff's Cross-Motion to Expedite Release of Plaintiff's FOIA and Privacy Act Requests. Having considered both Motions, oppositions thereto, supporting memoranda, and the entire record herein, Defendants' Motion is denied and Plaintiff's Motion is granted.

I. Background

This case began in May 1993, when Plaintiff submitted seven letters to the Director of the Federal Bureau of Investigation ("FBI") requesting records concerning himself under the Freedom of Information Act ("FOIA") and Privacy Act ("May 1993 Request"). In October 1995, Plaintiff made a number of additional document requests ("October 1995 Request"). All of these requests sought access to documents relating to Plaintiff's allegations of FBI misconduct and allegations of whistleblower retaliation against him by the FBI. In March 1996, having received none of the requested documents after nearly three years, Plaintiff filed this lawsuit. To date, Dr. Whitehurst has received none of the records he

requested.

Plaintiff Frederic Whitehurst, a supervisory special agent ("SSA") in the Laboratory Division of the FBI, is the FBI's leading forensic chemist on matters relating to bomb residue analysis. He has worked for the FBI since 1982. Since 1982, Dr. Whitehurst has made a number of very serious allegations that call into question the scientific integrity of the FBI crime lab and the thousands of prosecutions that rely on evidence it has processed. Dr. Whitehurst has made allegations that certain FBI examiners who testify in criminal cases are not qualified to perform the testing and analysis of the evidence involved in those cases, that certain examiners slant their scientific conclusions to favor the prosecution's case, and that certain units within the FBI's laboratory maintain insufficient scientific protocols and procedures.

In addition to raising these allegations through both internal FBI complaints and communications with the Department of Justice ("DOJ") Inspector General ("IG"), Dr. Whitehurst has made these allegations public through contacts with members of the U.S. Congress, the news media, and defense attorneys. Dr. Whitehurst has made broad allegations that both FBI and DOJ employees acted to cover up crime laboratory misconduct. Dr. Whitehurst has also provided testimony critical of the FBI in several individual high profile cases, including the World Trade Center bombing criminal prosecution and the O.J. Simpson criminal prosecution.

Dr. Whitehurst has sought access to documents pertaining to

himself and his whistleblower allegations, his medical records and records of psychological testing, and documents relating to what he alleges to be retaliatory action against him for his whistleblowing. The FBI, which has released none of these documents to Dr. Whitehurst, now seeks to stay these proceedings. Defendants offer no specific date for the processing of Plaintiff's Requests, but instead move for an open-ended stay "until [the FBI] processes plaintiff's requests." Def.'s Mot. at 14.¹ Plaintiff opposes such a stay and seeks to expedite the release of these documents because, inter alia, the requested information may affect thousands of criminal cases, may raise serious questions about the integrity of the FBI and the criminal justice system, and there is widespread and exceptional media interest in the requested information.

II. Discussion

A. Defendants' Motion to Stay Proceedings

Under FOIA, an agency may obtain additional time to process records when the agency can show that "exceptional circumstances" exist and that it is exercising due diligence in processing a FOIA request. 5 U.S.C. § 552(a)(6)(C). In Open America v. Watergate

¹ Although Defendant specifies no specific date by which it estimates it will have processed Plaintiff's Requests, the declaration it offers in support of its Motion states that "it will take at least three years and eight months from the date of receipt of plaintiff's requests before they reach their turn in the queue to be assigned for processing." Kloss Decl. ¶ 27. According to this estimate, Plaintiff's May 1993 Request would be "assigned for processing" in January 1997; his October 1995 Request would not be assigned for processing until June 1999. No prediction is made as to how long such "processing" will take. Kloss Decl. ¶¶ 27-29.

Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976), our Court of Appeals held that in order to establish the existence of such "exceptional circumstances," an agency must show that it

is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests.

Defendants attempt to demonstrate such exceptional circumstances by pointing to the high volume of cases that must be processed by the FBI's Freedom of Information and Privacy Acts Section, the large backlog of such cases, and the considerable strains placed upon the limited resources of that office. Defendants argue that they have exercised "due diligence" in attempting to make the most of their limited resources by reorganizing FOIA and Privacy Act requests, seeking additional funding, and reallocating and retraining existing personnel.

The Defendants' arguments ring hollow given the fact that many of the documents requested by Dr. Whitehurst have already been reviewed by the FBI in different contexts and released to many different people and entities. It can hardly be said that processing Dr. Whitehurst's requests would either entail an exceptional amount of work, or that the FBI has exercised due diligence, when it has failed to release to Dr. Whitehurst large amounts of material that have already been reviewed and released to other parties.²

² It is significant that the FBI does not deny that it has already released many of the documents requested by Dr. Whitehurst.

It should be noted that the FBI's motion for a stay pursuant to Open America was also denied by Judge Richey of this Court in a similar case where the documents subject to a FOIA request had already been reviewed by the agency. Electronic Privacy Information Center v. Federal Bureau of Investigation ("EPIC"), 865 F. Supp. 1 (D.D.C. 1994). Because Plaintiff's allegations about the FBI crime laboratory are relevant to a significant number of criminal trials, documents relating to his allegations of misconduct have been released to attorneys in numerous cases yet not to Dr. Whitehurst himself. Dr. Whitehurst's own medical records and records of his psychological testing have similarly been reviewed and released to prosecutors and defense attorneys in cases where Dr. Whitehurst testified, such as the O.J. Simpson and World Trade Center bombing trials. The FBI has also released to third parties involved in those cases information relating to an investigation, conducted by the FBI's Office of Professional Responsibility ("OPR"), of Dr. Whitehurst's 1993 contacts with Congress. The FBI is not entitled to a stay of these proceedings when more than three years have elapsed and the agency has failed to release numerous documents it has already reviewed and cleared for release to others.

Defendants seek to distinguish the instant case from EPIC on the grounds that the FBI did not review and release the documents Dr. Whitehurst requested for a "self-serving purpose." The reason for Defendants' review of the requested documents is, however, irrelevant. The fact that the FBI has already reviewed and

released the documents Dr. Whitehurst requested, for whatever purpose, means that Defendants cannot now argue that they require an indefinite stay before releasing the documents to Dr. Whitehurst himself.

Defendants also argue that "very few of the documents plaintiff seeks have been redacted for FOIA exemptions, or the equivalent." Defs.' Mem. in Opp'n to Pl.'s Mot. to Expedite Processing of FOIA Requests and in Further Support of Defs.' Mot. to Stay FOIA Proceedings at 11. Regardless of whether the documents released by the FBI have been reviewed specifically for FOIA exemptions, the fact that they have been reviewed by the agency for any purpose means that the agency is not entitled to a stay under Open America, since release of the documents no longer requires a "word-by-word, paragraph-by-paragraph review of the information" as was required in Open America. EPIC, 865 F. Supp. at 2 (citation omitted).

B. Plaintiff's Motion to Expedite Processing of FOIA Requests

Plaintiff argues that he is entitled to expedited release of the documents he requested because he meets the criteria DOJ has established for expediting FOIA requests. FOIA requests may be processed expeditiously if "(1) the information requested is exceptionally newsworthy; and (2) the information sought involves 'questions about the government's integrity.'" EPIC, 865 F. Supp. at 2 (citing Memorandum from United States Dep't of Justice, Office of Public Affairs (Feb. 3, 1994)). Dr. Whitehurst's request meets both of these criteria.

Plaintiff has provided ample evidence that the information he

requests has been the subject of intense media scrutiny, notwithstanding Defendants' contention that it is not aware of such media interest. Plaintiff has offered evidence that he and his allegations have been featured in hundreds of newspaper and magazine articles, as well as major television news coverage. Furthermore Plaintiff's allegations clearly call into question the integrity of both the FBI and the criminal justice system. Because of the intense media interest in the information Plaintiff requests and the fact that the public's confidence in the integrity of the criminal justice system and the FBI are at stake, Plaintiff has satisfied the criteria for expediting FOIA requests.

Defendants argue that some of the documents Dr. Whitehurst requested from the FBI were not within the FBI's control at the time that Dr. Whitehurst made his Requests, and therefore are not subject to expedited processing. The documents that Defendants claim fall into this category were either obtained or generated by the DOJ Office of the IG ("OIG") and the DOJ Criminal Division's FBI Laboratory Task Force ("Task Force"). The OIG is currently investigating Dr. Whitehurst's allegations. The Task Force was created in January 1996 to advise prosecutors around the country about these allegations and coordinate DOJ's efforts to ensure that prosecutors provide all possible exculpatory or impeachment material relating to the Whitehurst allegations to defense counsel as required by Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The OIG makes available to the Task Force both documents created by its own investigation and documents that the OIG has obtained from the FBI. To the extent that any documents Dr. Whitehurst seeks were generated by the OIG

and not within the control of the FBI at the time Dr. Whitehurst made his Requests, such documents are not subject to expedited processing.

Defendants also argue, however, that additional documents provided by the FBI to the Task Force are not subject to expedited processing because they have not yet been redacted specifically for FOIA purposes. This claim does not, however, justify further delay in responding to Dr. Whitehurst's Requests. To the extent that the FBI has released documents responsive to Dr. Whitehurst's requests to the OIG or the Task Force, and such documents have been reviewed for any purpose, they must be processed and released to Dr. Whitehurst on an expedited basis. If necessary, these documents may be reviewed and redacted to protect privacy and law enforcement concerns but any such processing must be expedited. Accordingly, it is this ^{4th} ~~3rd~~ day of February, 1997, hereby

ORDERED that Defendant's Motion to Stay Proceedings is denied; and it is further

ORDERED that Plaintiff's Motion to Expedite Release of his FOIA Requests is hereby granted as to documents generated by the FBI and within the FBI's control, subject to the following terms:

1. By February 21, 1997, Defendants shall release to Plaintiff:
 - a. All previously processed documents turned over to prosecutors or criminal defense attorneys;
 - b. All of Plaintiff's personnel and medical files and all files concerning the 1993 Office of Professional Responsibility ("OPR") investigation of Plaintiff.

2. Defendants shall be under a continuing obligation to release to Plaintiff any documents that have been released or processed for release to any other person, including but not limited to prosecutors, criminal defense attorneys, media persons, members of the U.S. Congress and their staffs.
3. Defendants shall expedite the immediate release to Plaintiff of material it has previously released into the public domain in regard to Plaintiff's 1993 and 1995 FOIA requests.
4. Within 30 days of the date of this Order, Defendants shall process and release all other material requested in Plaintiff's 1993 FOIA Request.
5. Within 45 days of the date of this Order, Defendants shall process and release all other material requested in Plaintiff's 1995 FOIA Request.
6. No later than May 15, 1997, the parties shall submit to the Court a status report as to the remaining issues in this case.


Gladys Kessler
United States District Judge

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