

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

FILED

DEC 04 2015

U.S. DISTRICT COURT-WVND
MARTINSBURG, WV 25401

DENNIS FINBARR MURPHY
(pro se)

Plaintiff

CIVIL ACTION DOCKET NO.

3:15cv 133

V.

U.S. Customs and Border Protection (CBP)

Defendant

COMPLAINT FOR
INJUNCTIVE RELIEF

COMPLAINT

The plaintiff brings this action against the Defendant, United States Customs and Border Protection, to compel compliance with the Freedom of Information Act, 5 U.S.C. – 552 (“FOIA”). Grounds therefore, the plaintiff alleges as follows:

JURISDICTION AND VENUE

- .1. The 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) and 28 U.S.C. -1331
- .2. Venue is proper in this district pursuant to 5 U.S.C. – 552 (a) (4) (B) and 28 U.S.C. -1391 (e) (1)

PARTIES

- .3. The Plaintiff had been employed under a federal contract as an armed security guard at the CBP’s Advanced Training Center in Harpers Ferry, WV until his termination in September 2014. The Plaintiff filed an EEO complaint against the CBP alleging he was subjected to disparate treatment and discriminated due to his religion and the race and religion of his wife being different from the federal employee managers at the CBP who presided over his termination without cause. The plaintiff filed his FOIA request ten months ago in the hope of obtaining in a timely manner relevant documents in support of his EEO complaint before such documents were lost, deleted, forgotten or destroyed.
- .4. The Defendant is an agency of the United States Government with a facility located in Harpers Ferry, West Virginia where the requested documents and persons

possessing knowledge of such documents are located. CBP Headquarters is located in Washington, D.C. The Defendant has custody, possession and control of the documents sought by the plaintiff. The Defendant is an agency within the meaning of 5 U.S.C. – 552 (f)(1)

STATUTORY FRAMEWORK

.5. The Freedom of Information Act (“FOIA”) requires federal government agencies to release requested agency records to the public unless one or more statutory exemptions apply. 5 U.S.C. – 552 (a) (3) (A).

.6. Agency records are subject to FOIA if the agency created or obtained them and the agency controlled them at the time of the FOIA request is made. U.S. Department of Justice v. Tax Analysis, 492 U.S. 136, 144-145 (1989).

.7. An agency has twenty (20) working days after receipt of the FOIA request in which to determine whether to comply with the request. 5 U.S.C. – 552 (a) (6)(A) (i). If the agency fails to respond, this court has jurisdiction upon receipt of a complaint to review, *de novo*, the agency’s failure to respond and order the production of any agency records improperly withheld from the requestor. 5 U.S.C. – 552 (a) (4)(B)

STATEMENT OF FACTS

.8. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C.- 552 et seq., for injunctive and other appropriate relief, and seeking the immediate processing and release of agency records, emails, notes etc. requested by the plaintiff from the U.S. Customs and Border Protection (CBP).

.9. The Plaintiff had been employed under a federal contract as an armed security guard at the CBP’s Advanced Training Center in Harpers Ferry, WV until his termination in September 2014. The Plaintiff filed an EEO complaint against the CBP alleging he was subjected to disparate treatment and discriminated due to his religion and the race and religion of his wife being different from the federal employee managers at the CBP who presided over his termination without cause.

.10. The Plaintiff submitted a FOIA request on February 5, 2015, for release records (i.e.- emails, documents, memos, handwritten notes, photos etc.) that either specifically mentioned the plaintiff by name or referred to the plaintiff by a pronoun or referred to the plaintiff by his prior position as a federal contractor working for the CBP. The Plaintiff submitted his FOIA request electronically via email to the CBP. On that same day the Plaintiff received the following electronic reply:

“On Thu, 2/5/15, CBPFOIA@cbp.dhs.gov CBPFOIA@cbp.dhs.gov>
wrote:

From: CBPFOIA@cbp.dhs.gov <CBPFOIA@cbp.dhs.gov>
Subject: FOIA Request CBP-2015-016550 Submitted
To: "celtsgreen@yahoo.com" <celtsgreen@yahoo.com>
Date: Thursday, February 5, 2015, 1:32 PM

This message is to confirm your request submission to the FOIA online application: [View Request](#). Request information is as follows:

- Tracking Number: CBP-2015-016550
- Requester Name: Dennis F. Murphy
- Date Submitted: 02/05/2015
- Request Status: Submitted
- Description: To: U.S. Customs and Border Protection
FOIA Officer
90 K Street NE, 9th Floor
Washington, D.C. 20229-1181
FOIA Officer/Public Liaison: Sabrina Burroughs
FOIA@hq.dhs.gov
Phone: 202-325-0150
Fax: 202-325-0230 "

.11. By the end of April of 2015 the Plaintiff had not received any other reply or information from the Defendant. The Plaintiff contacted the office of U.S. Senator Shelley Moore Capito seeking assistance. Senator Capito's office contacted CBP headquarters in Washington, D.C. seeking the status of the Plaintiff's FOIA request.

.12. On May 21, 2015, Michael J. Yeager, Assistant Commissioner, Office of Congressional Affairs for the CBP authored a letter of reply to Senator Capito's inquiry made on the Plaintiff's behalf. In his letter Yeager stated, "***CBP processes requests in the order in which they are received. We shall act with all due diligence to process this request as soon as possible***".

.13. At the time of this writing the Plaintiff has waited 10 months and not received any of the documents requested in his FOIA request nor has he received since May 2015 any form of notification from the CBP regarding the processing of his FOIA request.

CAUSE OF ACTION

First Cause of Action (Production Under the FOIA)

.14. Plaintiff asserts, repeats and incorporates by reference paragraphs 1 thru 13.

15.. Plaintiff properly requested records within Defendant's control and possession in accordance with FOIA.

.16. Plaintiff is entitled under FOIA to access the requested records.

.17. Defendant wrongfully withheld the requested records in violation of FOIA.

.18. Plaintiff exhausted his administrative remedies with regard to the wrongfully withheld records.

Second Cause of Action (Violation of Administrative Procedure Act)

.19. Plaintiff asserts, repeats and incorporates by reference paragraphs 1 thru 13.

.20. Plaintiff properly requested records within Defendant's control and possession in accordance with FOIA.

.21. Plaintiff is entitled under FOIA to access the requested records.

.22. Defendant's failure to respond to Plaintiff's FOIA request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act (APA). Defendant's failure to timely respond is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law, all in violation of APA. 5 U.S.C.- 552 et seq.

With the passage of time the documents desired by the Plaintiff are ever more likely to be deleted, lost, forgotten, destroyed or become inaccessible much to the detriment of the Plaintiffs cause. Plaintiff is being irreparably harmed by reason of Defendant's unlawful withholding of requested records and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

WHEREFORE, Plaintiff respectfully requests that the court:

(1) order Defendant's to conduct needed searches for any and all responsive records to the Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;

(2) order Defendants to produce, by a certain date, any and all non-exempt records responsive to Plaintiff's FOIA request;

(3) enjoin Defendants from continuing to withhold any and all non-exempt records responsive to the Plaintiff's FOIA request;

(4) grant Plaintiff an award of litigation cost reasonably incurred in this action pursuant to 5 U.S.C - 522 (a)(4)(E) and (5); and

(5) grant Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

Dennis F. Murphy 12-4-2015

Dennis Finbarr Murphy (*pro se*)
639 Michelle Drive
Hedgesville, WV 25427

(301) 407-6258

DEC 04 2015

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of indexing the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

DENNIS FINBARR MURPHY

(b) County of Residence of First Listed Plaintiff BERKELEY
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

PRO SE

DEFENDANTS

U.S. CUSTOMS AND BORDER PROTECTION

County of Residence of First Listed Defendant JEFFERSON
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

3:15cv133

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---|--------------------------------|---|--------------------------------|--------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> PTF 1 | <input type="checkbox"/> DEF 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> PTF 4 | <input type="checkbox"/> DEF 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	PROPERTY RIGHTS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
			IMMIGRATION	SOCIAL SECURITY
			<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				FEDERAL TAX SUITS
				<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
TITLE 5 USC - 552, FREEDOM OF INFORMATION ACT (FOIA)
 Brief description of cause:
FAILURE OF CBP TO COMPLY WITH FOIA REQUEST

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 12-4-2015 SIGNATURE OF ATTORNEY OF RECORD: Dennis F. Murphy (Pro Se)

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____