UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE T. HOWELL, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:04-cv-00479 (JDB)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully submits this reply to defendant's opposition to plaintiff's cross-motion for summary judgment.[1] For the reasons stated below and in plaintiff's cross-motion for summary judgment, plaintiff is entitled to have his presentence investigation report ("PSR") made available to him for copying under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Accordingly, defendant's motion to dismiss or in the alternative for summary judgment should be denied, and plaintiff's cross-motion for summary judgment should be granted.

ARGUMENT

1. Defendant Violates FOIA by Refusing to Make Non-Exempt Documents Available For Copying.

Defendant concedes that plaintiff's PSR is subject to disclosure under FOIA, and defendant has not invoked any FOIA exemption to justify its refusal to produce the document for

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[1] Although captioned "Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss," the brief filed by defendant on October 29, 2004, docket no. 16, responded to plaintiff's combined opposition to defendant's motion to dismiss and cross-motion for summary judgment, filed September 29, 2004, docket no. 14.

copying. Instead, defendant claims that it satisfies FOIA by allowing plaintiff to see his PSR from time to time under the procedures set forth in Program Statement No. 1305.05, even though the Program Statement explicitly forbids plaintiff from "obtaining or possessing" a copy of his PSR. Defendant claims that FOIA requires only that it grant plaintiff access to his PSR, but not an opportunity to obtain a copy. Defendant is wrong.

Defendant claims that "access to records will satisfy the requirement under FOIA to make records *available* to the individual," Defendant's Reply at 5 (emphasis in original), but in the cases defendant cites for support, the requested documents were made available *for copying*.[2] For example, the Court in *Ogelsby* found that the agency fulfilled its FOIA obligation by providing records for the requester's review in the agency's public reading room. *Ogelsby v. United States Dep't of the Army*, 920 F.2d 57, 70 (D.C. Cir. 1990). However, when agencies make records available in their public reading rooms, that means they are "available for public inspection and copying." 5 U.S.C. § 552(a)(2). Similarly, in *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1066-67 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989), the Court held that copies of the requested documents had to at least be made available in an agency reading room, even though the agency was not required to mail copies to the requester. *See also Tax Analysts,* 492 U.S. at 151 n.12 (agency could satisfy its FOIA obligations by making the requested documents "*available for copying* in the public reference facility that it maintains") (emphasis added);

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[2] Defendant ignores the discussion of these cases at pages 11-13 of plaintiff's opposition and cross-motion for summary judgment, and instead claims that plaintiff relies solely on *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988). *Julian* establishes that an inmate is entitled to his or her PSR under FOIA, but to support his position that FOIA entitles requesters to obtain *copies* of documents, plaintiff relied on *Ogelsby, Tax Analysts, Mandel Grunfeld,* and other cases, as well as FOIA itself.

Mandel Grunfeld & Herrick v. United States Customs Serv., 709 F.2d 41, 42 (11th Cir. 1983) (affirming district court's decision declining to order agency to duplicate and mail requested documents where the agency had made the documents available "for inspection and *copying*") (emphasis added); *Nolen v. Rumsfeld*, 535 F.2d 890, 891-92 (5th Cir. 1976) (FOIA requires that agency make the requested records "available for inspection *and copying*" but does not require delivery) (emphasis added). Likewise, when the court in *Lead Industries* ruled that an agency need not disclose copies of documents already published in the Federal Register, the requester had the ability to obtain and possess its own copy of the records. *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 86 (2d Cir. 1979).

Defendant also relies on several unreported decisions in an attempt to support its claim that it has not withheld plaintiff's PSR. Defendant cites an unpublished order from the Clerk of the Eighth Circuit in *United States v. Sanders*, C.A. 02-2764 (8th Cir. Nov. 21, 2002) (copy attached to defendant's motion to dismiss), summarily denying an inmate's motion to retain a copy of his PSR while his conviction was on direct appeal, but the order contains no indication that the issue before the court concerned FOIA. Similarly, defendant cites *Smith v. LeBlanc*, 2003 WL 23101806 (D. Minn. December 30, 2003), which is an order denying plaintiff's objections to a magistrate's report and recommendation denying class certification and a request for a temporary restraining order. *Smith* did not involve FOIA. Defendant also cites *Bicaksiz v. Bureau of Prisons*, Civ. No. 02-4565 (D.N.J. March 12, 2003), but defendant did not attach a copy of the order, and none is available on WestLaw or PACER.

Finally, defendant cites *Starchild v. Federal Bureau of Prisons*, 1991 WL 35525 (D.D.C. 1991), a decision that does not apply to this case on either the facts or the law. First, the

information sought by the requester in *Starchild* was the results of an HIV test. The Court noted that the test results, "negative" or "positive," could meaningfully be conveyed to the requester without providing a physical copy of the source document. In contrast, the PSR at issue here is more voluminous than a test result, and the refusal to allow a copy to be made significantly impairs plaintiff's ability to make use of the information. Second, *Starchild* rests on the Court's observation that "under the FOIA, a requester of information may not dictate the format in which the information is disseminated," *id.* at *3, but *Starchild* was decided before FOIA section (a)(3) was amended to provide that an agency "shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Thus, *Starchild* cannot support defendant's theory.

2. Because FOIA Requires That Non-Exempt Documents Be Made Available For Copying, Defendant's Reasons For Violating FOIA Are Irrelevant.

Once the Court determines that defendant's refusal to permit plaintiff a copy of his PSR is an improper withholding of an agency record, defendant should be ordered to comply with FOIA. Defendant, however, argues that it seeks to improve prison security by providing an "alternative form of access" for PSRs through the procedures of Program Statement 1305.05. Defendant asserts that the Court should defer to the expertise of prison administrators and allow defendant to curtail plaintiff's rights under FOIA. The Court should reject defendant's claim that it can unilaterally opt out of FOIA.

FOIA's nine exemptions cover *all* permissible exceptions to the release of information. Defendant does not rely on any of the exemptions. To allow defendant to create its own "alternative form of access" that is less than what FOIA itself requires — inspection and copying — would undermine the statutory scheme by allowing agencies to withhold or limit access to

information that was not exempted by Congress. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 & n.61 (D.C. Cir. 1981) (en banc) (FOIA already reflects the balancing of interests Congress believed appropriate) (citing *Lesar v. Dep't of Justice*, 636 F.2d 472, 486 n.80 (D.C. Cir. 1980)). Therefore, defendant's argument that its FOIA obligations are different from those of other agencies because it operates in the prison context is without merit.

3. Defendant's Reliance on Program Statement No. 1305.05 Cannot Support Its Motion for Summary Judgment.

a. The Program Statement is invalid.

Program Statement No. 1305.05 is invalid because it did not undergo notice-and-comment rulemaking. (The rule is also arbitrary and capricious because it fails to differentiate between dangerous and non-dangerous PSRs, and fails to segregate dangerous from non-dangerous portions of PSRs.) Defendant contends that the Program Statement is interpretive rather than substantive, and thus not subject to notice-and-comment rulemaking requirements, because it merely clarifies how prison wardens should exercise discretion delegated to them under existing rules and statutes. However, as explained previously, defendant's policy conflicts with FOIA, the Supreme Court's decision in *Julian*, and the defendant's own FOIA regulations. Plaintiff's Opp. and Cross-Motion at 22-23. Because it changes rather than clarifies existing law, it is a rule, not an interpretive statement. *Croplife America v. Envtl. Prot. Agency*, 329 F.3d 876, 881 (D.C. Cir. 2003). Similarly, the Program Statement does not instruct local prison wardens in exercising discretion they lawfully possess, because wardens do not have the power to withhold PSRs under FOIA without relying on a statutory exemption. In addition, the policy goes farther than simply cabining warden discretion. The policy is a blanket prohibition on the

release of PSRs by prison staff that does not call for the exercise of discretion. Such binding norms are rules. *Croplife America*, 329 F.3d at 881.

b. Plaintiff seeks a copy of his PSR under FOIA, not the "alternative form of access" provided by the Program Statement.

Defendant asserts that plaintiff is somehow at fault for having not utilized the informal procedure of Program Statement No. 1305.05 to access his PSR. Defendant's Reply at 3. However, plaintiff sought a copy of his PSR under FOIA, which is different from pursuing the opportunity to view his PSR from time to time under the terms of defendant's Program Statement. *See* Plaintiff's Opp. and Cross-Motion at 4-6 (describing the differences between the informal procedures for viewing PSRs and the separate process for requesting a copy of a PSR under FOIA). Because plaintiff is entitled to a copy of his PSR under FOIA but not under the Program Statement, defendant's description of the nature of inmates' access to their PSRs under the Program Statement has no bearing on this case.

c. Defendant makes contradictory assertions about the nature of its "alternative form of access."

Defendant concedes that the Program Statement explicitly prohibits plaintiff from "obtaining or possessing" a copy of his PSR "at the risk of being subject to disciplinary action for possession of contraband." Defendant's Reply at 2. Thus, because FOIA requires that non-exempt agency records be made available for inspection and copying, the Program Statement procedures cannot satisfy FOIA. However, defendant attempts to have it both ways by submitting a declaration from plaintiff's case manager asserting that plaintiff could utilize Program Statement procedures to hand-copy his PSR word-for-word. *Id.* at 4, quoting Patton Decl. ¶ 4. Defendant's contradictory statements about the nature of its "alternative form of

access" cannot support its claim for summary judgment, because to the extent that permission for an inmate to make and possess a hand-copy of his or her PSR is left to staff discretion, rather than established by prison policy, it cannot satisfy FOIA.

Moreover, there are apparent fact disputes regarding the frequency, duration, and quality of inmates' access to their PSRs under the Program Statement process.[3] These fact disputes are not material to plaintiff's motion for summary judgment, which rests on the undisputed fact that defendant has denied plaintiff the opportunity to obtain a copy of his PSR but has not asserted any FOIA exemption. However, the fact disputes are material to defendant's motion for summary judgment, which rests on the theory that if FOIA requires non-exempt documents to be made available for inspection but not for copying, defendant's policy satisifies FOIA by affording plaintiff sufficient opportunity to inspect his PSR.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss or in the alternative for summary judgment should be denied, and plaintiff's cross-motion for summary judgment should be granted.

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[3] In the statement of material facts filed with his motion for summary judgment, plaintiff asserted that he can view his PSR only about twelve times per year for five to ten minutes each time, and that he is not permitted to hand-copy his PSR in its entirety. *Id.* ¶¶ 30-32. Defendant submitted a declaration from plaintiff's case manager claiming that requests to review PSRs are usually accommodated within a week. Patton Decl. ¶ 3. Although the case manager conceded that "staff availability may limit the viewing time on a particular occasion," he asserted that he "will work with the inmate to provide as much time as is necessary for him to review his documents, including arranging multiple appointments for such viewing if needed." *Id.* ¶ 4. Plaintiff's case manager also asserted that he does not "prohibit the word-for-word copying of documents in the file." *Id.*

Dated: November 24, 2004

Respectfully submitted,

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