

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG)
and)
DAVID BURNHAM)
)
Plaintiffs,) Civil Action No. 1:00CV00211 PLF
)
v.)
)
DEPARTMENT OF JUSTICE)
)
Defendant.)
_____)

**RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7.1(h), Plaintiff hereby submits the following statement response to Defendants’ Statement of Material Facts As To Which There Is Not Genuine Dispute.

1. The Defendants’ statement of facts does not provide a basis for summary judgment in the Department’s favor because it merely lists the exemptions that the Department has asserted without identifying facts or record citations to support these claims. See Statement of Facts ¶ 75. The Department has the burden of proving that these exemption claims are supported by admissible evidence, and its motion for summary judgment can be denied based on the failure to identify such proof. Moreover, for reasons set forth in Plaintiffs’ Motion for Partial Summary Judgment and accompanying statement of material facts, the undisputed facts show that the Department has improperly withheld information that is not covered by the exemptions that it cites as a matter of law.

2. Defendants' statement of facts overwhelmingly consists of statements concerning the Department's release and re-release of database records and documentation, the Department's continual shift in position over the past two years in the course of filing three summary judgment motions that were either withdrawn or stricken due to errors, and the EOUSA's multiple searches for records, some of which were conducted only recently to comply with court orders and challenges to the adequacy of the EOUSA's prior searches. See Defendants' Statement of Material Facts ¶¶ 11-74. In general, these facts are not material to the disputes that remain in this case because Plaintiffs are not challenging the search for records completed by the Department in July 2002. Moreover, these facts do not support a claim for summary judgment in favor of the Department because (1) the Department has withheld information and, unless it proves that the information has been properly withheld, its response to the FOIA requests is still incomplete; and (2) this Court has already entered a judgment directing the Department to release erroneously withheld records, Doc. No. 76, Order of September 25, 2001, and the Department's production of records following that directive shows that it has belatedly complied with the Court's mandate -- not that it is entitled to summary judgment in its favor.

Plaintiffs dispute many of the statements of fact in this portion of the Defendants' statement, principally because the Department has omitted facts or

mischaracterized events to minimize the scope and impact of its errors.¹ However, these disputes are not material to the issues that are presented at this stage of the litigation.

3. Paragraphs 12, 23, 30, 37, and 67, of Defendant's Statement are inaccurate insofar as these paragraphs state that the EOUSA sent letters to plaintiffs that "stated that very large requests, i.e., 'Project Requests,' are processed in a separate group, and that these requests take approximately nine months to process." The Exhibits cited as evidence for this assertion show that the letters do not contain any language regarding how the EOUSA processes "very large requests," and do not define "Project Requests" as "very large requests." Defendants' Exhibits 2, 14, 17, 22, 27.

¹ Plaintiffs prior papers in this litigation show that during the course of this action the Department made exemption claims based on inaccurate declarations concerning the contents of the records, withheld records that did not fall within its exemption claims, and sought summary judgment before searching for and releasing many of the records covered by Plaintiffs' requests. See, e.g., Doc. No. 41, Plaintiffs' Motion to Strike Andrea Hoffman's Declaration Submitted in Support of Motion for Summary Judgment; Doc. No. 59, Plaintiffs' Motion for Leave to File Supplemental Memorandum and Declaration in Support of Plaintiff's Motion for Partial Summary Judgment. Defendant either omits any reference to these errors or obscures them with mischaracterizations. For example, Defendants' statement asserts that data was re-released to implement a "new method of redaction" and "better method of identifying ongoing investigation" See, e.g., Defendants' Statement of Material Facts, ¶ 42. The evidence already before the Court from Plaintiff's challenges to the Department's prior motions to summary judgment shows that the "better method" was necessary because the Department previously had withheld records that were not exempt from disclosure even under its legal theory. The "new method of redaction" was the method that the Department committed to use in connection with this data in June 1999, but failed to implement in this litigation until over a year after it began releasing database records. The Department also characterizes its re-release of data to correct prior errors as a "discretionary release of certain fields," id. ¶ 56, when part of the data released was information that the Department withheld based on claims of personal privacy. Personal privacy claims are not "discretionary," and the Department abandoned its claims here because they were indefensible on the merits.

4. Paragraph 76 of Defendants' statement is inaccurate in that it asserts that Plaintiffs' FOIA requests for the FY 1994-1997 databases are not among the requests for which Plaintiffs have requested a waiver of fees. The December 8, 1999 letter attached as Exhibit 12 to Defendants' Exhibits confirms that Plaintiffs requested waiver of fees in their original FOIA requests, and identified these original requests to the EOUSA when it agreed to re-release the FY74-FY97 database records after conceding that it had previously withheld information that was not exempt from disclosure under the FOIA. See also First Declaration of Susan Long ¶¶ and Exhibits 6.

In addition, Paragraph 81 of the Statement is incomplete because the cited declaration adds the qualification that the EOUSA has not assessed fees "[t]o date," and makes no commitment about whether the EOUSA may assess fees in the future. Davis Decl. ¶ 82. Paragraph 78 of the Statement is inaccurate because TRAC has never received or proposed the fee described. See Fourth Declaration of Susan Long ¶ 21 (filed May 30, 2001); Plaintiffs' Exhibit 16 at 3.

5. Paragraph 14 of the Department's Statement is inaccurate insofar as it suggests that the letter dated October 29, 1999 was solely a denial of the Plaintiffs' April 15, 1999 request for the mid-year 1999 data. The letter, Defendants Exhibit 8, does not mention the April 15, 1999 request and states a general position that the EOUSA

would not release data before the end-of-the-fiscal-year verification because it contended that such data was exempt from disclosure under 5 U.S.C. § 552(b)(5).

Respectfully submitted,

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