

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE T. HOWELL, III,)
)
 Plaintiff,)
)
 v.) Civil Action No. 04-0479 (JDB)
)
 U.S. DEPARTMENT OF JUSTICE,)
)
 Defendant.)
 _____)

**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT, AND IN SUPPORT OF
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court’s Order of August 25, 2005 [#32], Plaintiff submits this supplemental memorandum.

Plaintiff George T. Howell, III, is a prisoner who brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to obtain a copy of his presentence investigation report and statement of reasons (PSR). Although defendant concedes that FOIA requires disclosure of the requested records and that no FOIA exemptions apply, defendant insists that FOIA requires only that it allow Mr. Howell an opportunity to view his PSR. Because defendant refuses to provide Mr. Howell a copy of the requested records or an opportunity to make a copy, Mr. Howell brought this case to compel compliance with FOIA.

Mr. Howell has filed memoranda arguing that defendant violates FOIA by refusing to make non-exempt records available for copying. *See* Pl.’s Opp. to Def.’s Mtn. to Dismiss or for Summ. J., and in Supp. of Pl.’s Cross-Mtn. for Summ. J. [#14 & #22] at 10-13; Pl.’s Reply to

Def.'s Opp. to Pl.'s Cross-Mtn. for Summ. J. [#23] at 1-4. Mr. Howell will not repeat those arguments here, but incorporates them by reference.

In addition, the same issue presented in this case was recently addressed in *Matsey v. U.S. Dep't of Justice*, 2005 WL 1017867 (D.D.C. 2005). *Matsey* rejected defendant's argument "that access to records is all that is required under FOIA," *id.* at *3, based on "the 1996 amendment to FOIA, which added the requirement 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.'" *Id.* at *4 (quoting 5 U.S.C. § 552(a)(3)(B)). *Matsey* also noted the decision in *United States v. Pugh*, 2003 WL 21640504 (4th Cir. 2003), that, "'under FOIA, an inmate is entitled to a copy of his or her own PSR.'" *Id.* (quoting *Pugh*). Thus, *Matsey* held that the plaintiff had "stated a claim for relief under FOIA, as amended in 1996, by alleging that DOJ improperly refused to make his PSR available for copying," and denied defendant's motion to dismiss for failure to state a claim. *Id.*¹

Although this case turns on whether a FOIA requester has a right to obtain a copy of non-exempt documents, Defendant's Supplemental Memorandum focuses almost entirely on defending Program Statement (PS) 1351.05, "which prohibited Federal inmates from obtaining or possessing copies of their PSRs." Def. Supp. Mem. [#35] at 3. Defendant's focus on PS

¹The Court in *Matsey* dismissed the case for failure to exhaust administrative remedies because the initial FOIA request did not conform strictly with the agency's FOIA regulations—the plaintiff in *Matsey* sent his FOIA request to the Warden of the facility where he was incarcerated and where the requested document was located and not to BOP headquarters in Washington. *Id.* at *7. Mr. Howell's FOIA request suffers from no such procedural shortcoming and defendant has not suggested otherwise.

1351.05 is misplaced. If FOIA requires that non-exempt documents be provided to the requester or made available for copying, defendant's reason for violating FOIA is irrelevant.

Moreover, *Rodley v. Lappin*, No. 03-0918 (D.D.C. Feb. 1, 2005) (Kessler, J.), invalidated PS 1351.05 because it was not subjected to notice-and-comment rulemaking under the Administrative Procedure Act (APA). Despite defendant's protestations that "[t]he decision in *Rodley* is in error," Def. Supp. Mem. [#35] at 7, *Rodley* provides an additional reason why reliance on PS 1351.05 cannot excuse defendant's failure to comply with FOIA.

The crux of defendant's argument is that a prison administrator always has authority to restrict possession of legal materials for security reasons; thus, a Warden can simply declare that the requested material is contraband and prohibit an inmate from obtaining or possessing records that otherwise would be available under FOIA. Defendant then argues that PS 1351.05 does not conflict with FOIA because defendant has not hidden from Mr. Howell the contents of his PSR—it has only denied him "convenient access because he cannot possess or retain a copy." *Id.* at 8. There is an apparent fact dispute regarding the nature of the access defendant is willing to provide Mr. Howell.² But the fact dispute regarding Mr. Howell's ability to view his PSR is not material to Mr. Howell's cross-motion for summary judgment, because Mr. Howell's motion rests on the undisputed fact that defendant has denied Mr. Howell an opportunity to obtain a document that FOIA requires defendant to provide him. In contrast, the fact dispute is material

² In the Statement of Material Facts filed with his Motion for Summary Judgment, plaintiff stated 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. Statement of Material Facts ¶¶ 30-32, attached to Pl.'s Opp. [#14]. In contrast, defendant claims that Mr. Howell "may review his PSR as many times as he likes and he may take notes. Arguably, he may even copy it. He just cannot maintain continuous possession of it." Def. Supp. Mem. [#35] at 8.

to *defendant's* motion for summary judgment, which rests on the theory that defendant can satisfy FOIA by affording Mr. Howell sufficient opportunities to see his PSR, even while prohibiting him from obtaining or possessing a copy of it.

Indeed, Mr. Howell seeks a copy of his PSR so that he can spend sufficient time with the document to make meaningful use of the information it contains in preparing legal challenges to his sentence or conditions of incarceration. Howell Decl. ¶ 2, attached to Pl.'s Opp. [#14]. Contrary to defendant's assertions, Mr. Howell does not claim that FOIA requires that inmates have an unlimited "ability to possess copies of the PSR while in their cells or in the general prison population," nor does Mr. Howell demand that his PSR be "ready for review twenty-four hours a day." Def. Supp. Mem. [#35] at 9 & 12. Rather, Mr. Howell has argued that "[a] lawful rule could regulate when and where inmates used and stored their presentence reports, such as permitting their use in the prison library, rather than having a single sweeping prohibition." Pl.'s Opp. [#14] at 25.

Finally, defendant argues that, even if it has violated FOIA, "no prospective relief should issue in this case," or any such relief should be "narrowly drawn" to prevent any adverse impact on prison operations. Def. Supp. Mem. [#35] at 12 (citing the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)). But defendant has never alleged that Mr. Howell's PSR contains *any* information that might threaten prison safety, nor has it claimed that portions of Mr. Howell's PSR need to be redacted. Thus, defendant's assertion that "no prospective relief should issue in this case" is without foundation.

Dated: October 11, 2005

Respectfully submitted,

/s/

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