

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

EMPOWER OVERSIGHT
WHISTLEBLOWERS & RESEARCH,

Plaintiff,

v.

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

No. 1:21-cv-1370 (RDA/TCB)

JOINT STATEMENT

Pursuant to this Court’s Order of April 7, 2022 (Dkt. No. 12), the parties respectfully submit this joint statement setting forth their respective positions on whether E.D. Va. Local Rule 16(B) applies to this matter and whether Plaintiff’s claims may be resolved on summary judgment.

Plaintiff’s Position

Discovery. The plain language of E.D. Va. Local Rule 16(A) states that certain express categories of cases (“Proceedings upon a defendant’s default and matters involving habeas corpus petitions, other pro se prisoner petitions, bankruptcy proceedings, condemnation cases, forfeitures, and reviews from administrative agencies, are not subject to the provisions of this Local Rule”) are exempt from the E.D. Va. Local Rule 16(B) initial pretrial conference and order and scheduling order requirements. Plaintiff Empower Oversight’s Freedom of Information Act (“FOIA”) claims

do not fall within any of these narrowly defined exemptions from E.D. Va. Local Rule 16(B) coverage.¹

E.D. Va. Local Rule 16(A) then goes on to state, after listing all of the exemptions from coverage, “but the judge to whom *any such case* is assigned may, in his or her discretion, follow the procedure outlined herein in whole or in part in any case.” (emphasis added). As worded, E.D. Va. Local Rule 16(A) only grants the Court discretion to apply Local Rule 16(B) to the delineated list of cases that otherwise would be exempt from E.D. Va. Local Rule 16(B) coverage. E.D. Va. Local Rule 16(A) does not grant the Court authority to completely exempt categories of cases not already expressly identified in E.D. Va. Local Rule 16(A). Therefore, applying the plain language of E.D. Va. Local Rule 16(A), this FOIA case is not exempt from the requirements of E.D. Va. Local Rule 16(B).

As the SEC accurately notes below, discovery in FOIA cases is substantially more limited than in typical civil litigation. That limitation has both a substantive component and a timing component. With regard to substance, courts ordinarily permit discovery only as to “the scope of the agency’s search and its indexing and classification procedures.” *Heily v. Dep’t of Commerce*,

¹ The enumerated exemption of “review from administrative agencies” does not apply here. Plaintiff’s claims in this case arise under FOIA and not the Administrative Procedure Act (“APA”) to which the enumerated exemption in E.D. Va. Local Rule 16(A) refers. Under Empower Oversight’s substantive FOIA claims, “the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B). This is contrary to the burden in a generic APA case which remains on the plaintiff to demonstrate that an agency action subject to review is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” based on an entire agency record. 5 U.S.C § 706(2)(A). Because there is no “agency record” in a FOIA case as in an APA case and plaintiffs have no way to otherwise challenge the sufficiency of any agency’s search or an agency’s indexing or classification procedures set forth in declarations specially created by the agency to support a motion for summary judgment, discovery is appropriate and FOIA cases should not be exempt from E.D. Va. Local Rule 16(B) even if a substantive FOIA claim could somehow be construed as an APA-based “review from administrative agencies.”

69 F. App'x 171, 174 (4th Cir. 2003). As for timing, discovery in FOIA cases typically occurs only after the Government files a motion for summary judgment. *Mullen v. U.S. Army Criminal Investigation Command*, No. 1:10-cv-262, 2011 WL 5870550, at *3 (E.D. Va. Nov. 22, 2011). In the SEC's view, these general principles require that the Court exempt this FOIA case from E.D. Va. Local Rule 16(B), in its entirety. Empower Oversight, however, submits that under applicable law discovery concerning the scope of the SEC's search for documents and indexing and classification procedures are proper subjects of discovery and, as such, E.D. Va. Local Rule 16(B) applies.

Empower Oversight points to *Heily v. Dept. of Commerce*. In that *pro se* case, the District Court permitted interrogatories and depositions by the plaintiff, after a stay on discovery expired, into "factual disputes challenging the adequacy of the agency's search for documents and the adequacy of the index prepared by the agency describing its reasons for withholding any documents." 69 F. App'x at 174. The same scope of discovery should apply here – limited to the adequacy of the SEC's search for documents and the adequacy of any indexing or classifications prepared by the SEC.

Given the speed of the docket in this Court, Empower Oversight suggests that the Court require the SEC provide a supporting declaration sufficiently in advance of the date it files any motion for summary judgment. That should allow the parties to determine whether the SEC-provided declaration is thorough enough or whether there are outstanding factual issues that need to be resolved, as in *Heily*. If no factual issues exist, then the parties can settle (fostering judicial economy) or proceed to filing cross-motions for summary judgment on a fully developed factual record. If factual issues exist, then there is a pre-established framework and timeline for conducting discovery to resolve them. To that end, Empower Oversight requests that the Court

set a discovery schedule applying Local Civil Rule 16(B) limited to issues of scope of search and indexing and classification procedures now and not wait until after summary judgment has been filed to address this issue. Thus, Empower Oversight respectfully requests that the Court apply the plain language of E.D. Va. Local Rule 16(A) and apply E.D. Va. Local Rule 16(B) to this FOIA case.

Summary Judgment Schedule. Plaintiff Empower Oversight agrees with the SEC that to the extent summary judgment motions are appropriate in this case, the time is not yet ripe for setting a briefing schedule. As the SEC notes below, it has not produced all of the documents it claims are responsive to Plaintiff's FOIA requests. Depending on what documents the SEC produces and what exemptions (if any) the SEC relies upon, Plaintiff may need to amend/supplement its pleadings to assert additional claims under FOIA. Based on the foregoing and the SEC's representations concerning why a summary judgment schedule is not appropriate at this time because there is still outstanding document production to be made, Plaintiff Empower Oversight consents to a one time 30-day status report to be filed by the SEC. After that status report is filed, Empower Oversight will endeavor to reach agreement with the SEC on a proposed discovery and summary judgment briefing schedule.

Defendant's Position

Discovery. At issue in this matter are Plaintiff's claims that the U.S. Securities and Exchange Commission (the "SEC") failed to comply with FOIA's statutory deadlines and unlawfully withheld agency records in violation of FOIA. These are questions that can and should be decided on summary judgment and should be exempt from the procedure outlined in E.D. Va. Local Rule 16(B). *See, e.g., Hanson v. U.S. Agency v. Int'l Development*, 372 F.3d 286, 290 (4th Cir. 2004); *Wickwire Gavin, P.C. v. Def. Intelligence Agency*, 330 F. Supp. 2d 592, 596-97 (E.D.

Va. 2004) (Cacheris, J.); *Virginia-Pilot Media Cos., LLC v. Dep't of Justice*, 147 F. Supp. 3d 437, 443, 451 (E.D. Va. 2015). Because discovery is only “sparingly granted” in FOIA cases, there is no need for an initial pretrial conference or scheduling order, as E.D. Va. Local Rule 16(B) provides, that would address and govern discovery. *See Pub. Citizen Health Res. Grp. v. Food & Drug Admin.*, 997 F. Supp. 56, 72 (D.D.C. 1998), *aff'd in part, rev'd in part on other grounds*, 185 F.3d 898 (D.C. Cir. 1999); *Wheeler v. Cent. Intelligence Agency*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (“Discovery is generally unavailable in FOIA actions.”); *Cole v. Rochford*, 285 F. Supp. 3d 73, 77 (D.D.C. 2018) (collecting cases); *Williams Mullen v. U.S. Army Criminal Investigation Command*, 2011 WL 5870550, at *3 (E.D. Va. Nov. 22, 2011) (vacating discovery order issued under E.D. Va. Local Rule 16(B) because “absent unusual circumstances” pre-discovery summary judgment is not “appropriate” and setting summary judgment briefing schedule); *see also Empower Oversight Whistleblowers & Research v. Nat'l Insts. of Health*, No. 1:21-cv-1275-LMB-JFA, Order, Dkt. No. 26 (E.D. Va. Apr. 8, 2022) (vacating initial discovery scheduling order and setting summary judgment briefing schedule); *id.*, Order, Dkt. No. 28 (E.D. Va. Apr. 8, 2022) (cancelling initial pretrial conference in light of the court’s vacatur of its initial discovery order). Indeed, even where discovery does proceed in a FOIA action, it is generally allowed only *after* the government has filed a motion for summary judgment on a Plaintiff’s claims. *Williams Mullen*, 2011 WL 5870550, at *3; *Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (finding that “courts routinely delay discovery until after summary judgment in [FOIA] cases”); *Unrow Human Rights Impact Lit. Clinic v. U.S. Dep't of State*, 2014 WL 12810521, at *1 (D.D.C. July 25, 2014) (“Discovery prior to a court’s evaluation of the parties’ summary judgment arguments may lead to the disclosure of documents that would otherwise be protected from disclosure by one of the FOIA exemptions.”). In this routine FOIA action, the parties have not yet submitted motions

for summary judgment, and there is no basis for discovery at this stage. Accordingly, the procedures set forth in E.D. Va. Local Rule 16(B) are unnecessary here.

Summary Judgment Schedule. Although it is the SEC's position that this matter can appropriately be resolved through summary judgment, it cannot yet propose a briefing schedule because a small subset of responsive records is subject to the SEC's confidential treatment procedure, *see* 17 C.F.R. § 200.83, and thus the SEC has not yet determined to what extent they can be released.

Specifically, the SEC found records responsive to three of the six FOIA requests that are at issue in this action. The SEC has released to Plaintiff the substantial majority of the responsive records it has located and that can be released in full or in part, totaling 1,296 pages. The only remaining records to be released contain information that the law firm Simpson Thacher & Bartlett ("STB") sent to the SEC and that may be subject to confidential treatment pursuant to 17 C.F.R. § 200.83. Under the regulation, a party that requests confidential treatment for information submitted to the SEC will have an opportunity to substantiate a confidential treatment request if that purportedly confidential information is responsive to a FOIA request, *see* 17 C.F.R. §200.83(d); to provide further information within 10 days of receiving the SEC's preliminary decision on the confidentiality request; to appeal an adverse final decision on the confidentiality request to the SEC's General Counsel within 10 days of receiving the final decision, *see* 17 C.F.R. § 200.83(e)(1); and finally, to appeal an adverse decision of the SEC's General Counsel to a federal district court within 10 days, 17 C.F.R. § 200.83(e)(5). A timely appeal to the General Counsel or a district court under 17 C.F.R. § 200.83(e)(1) or (5) stays the release of the information for which a request for confidential treatment has been made.

Two separate sets of information are subject to this process, totaling 186 pages. For both sets of information, the SEC has already requested, and STB has already provided, substantiation information. For one set, the SEC has already provided notice of its preliminary decision on the request for confidentiality. For the second, the SEC anticipates issuing its preliminary decision in the coming days. Pursuant to its regulations, however, the timing of when the SEC will be able to release the records containing information for which STB seeks confidential treatment is highly dependent on whether STB decides to avail itself of the appeal procedures set forth in the regulations and the outcome of any such appeal. Accordingly, the SEC respectfully requests that this Court order it to provide a status report every 30 days to update the Court on the 186 pages subject to this process. Once the request for confidential treatment process ends, and the SEC is able to make any final release of records subject to that process, the SEC will promptly notify the Court and will endeavor to reach agreement with Plaintiff on a proposed summary judgment briefing schedule.

Date: April 19, 2022

Respectfully submitted,

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