United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5275 **September Term, 2015**

FILED ON: JANUARY 21, 2016

STEPHEN WHITAKER,
APPELLANT

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00316)

Before: BROWN, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

J U D G M E N T

This appeal was considered on the record and the briefs of the parties. *See* FED R. APP. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the grant of summary judgment be affirmed.

On October 3, 1980, a DC-3 aircraft left Madrid, Spain with two American pilots at the controls, Harold William Whitaker and U.S. Army Major Lawrence Eckmann. The aircraft and crew would never be seen again. Years later, Harold Whitaker's son, appellant Stephen Whitaker, began filing Freedom of Information Act (FOIA) and Privacy Act requests aimed at piecing together the events surrounding that tragic flight. This suit challenges the handling of his requests by the Central Intelligence Agency (CIA) and the State Department (Department).

Appellant's initial request to the CIA sought information concerning whether his father, other individuals, and various aircraft were "employed or contracted by the CIA for service in Central America or elsewhere." J.A. 24. The CIA issued a *Glomar* response, refusing to confirm or deny the existence or non-existence of responsive records. Appellant tried again, requesting all records linked to him or his father. Following an administrative appeal, the CIA located twelve responsive records related to the processing of appellant's FOIA request. The agency

released portions of those records, but withheld the bulk under the deliberative process and attorney client privileges. *See* 5 U.S.C. § 552(b)(5).

Appellant had somewhat better luck with the State Department, which released a variety of documents related to his father's disappearance under FOIA. However, the Department refused to process appellant's request for his father's records under the Privacy Act, consistent with the executive's longstanding interpretation of the Act to preclude next-of-kin from exercising the access rights of the deceased. *See* Privacy Act Guidelines, 40 Fed. Reg. 28,948, 28,951 (July 9, 1975).

Continuing his quest, appellant sued the agencies in federal district court. In March 2014, the court granted in part and denied in part the agencies' motion for summary judgment. *See Whitaker v. CIA*, 31 F. Supp. 3d 23 (D.D.C. 2014). The court later granted summary judgment on the remaining issues, dismissing the case with prejudice. *See Whitaker v. CIA*, 64 F. Supp. 3d 55 (D.D.C. 2014). This appeal challenges only the grant of summary judgment with respect to (1) the CIA's invocation of the deliberative process privilege and (2) the State Department's refusal to process the Privacy Act request for records concerning appellant's father.[1] Reviewing the matter de novo, *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1111–12 (D.C. Cir. 2007), we affirm.

First, the CIA properly invoked the deliberative process privilege. That privilege flows from FOIA Exemption (b)(5). *See* 5 U.S.C. § 552(b)(5). To fall under the privilege's penumbra, documents "must be both pre-decisional and deliberative." *Abtew v. U.S. Dep't of Homeland Sec.*, No. 14-5169, 2015 WL 9286818, at *2 (D.C. Cir. Dec. 22, 2015). Pre-decisional documents are those "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "And a document is deliberative if it is 'a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.'" *Abtew*, 2015 WL 9286818, at *2 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

The record in this case—including the CIA's affidavit and the *Vaughn* index—supports the CIA's application of the privilege. The twelve documents at issue pre-dated the CIA's ultimate disposition of appellant's requests and reflect the "give-and-take" at the core of the deliberative process privilege. *See* J.A. 64 (characterizing the documents as "predecisional deliberations by [CIA] personnel regarding the nature of information retrieved, the scope of legal exemptions, the application of exemptions to particular material, or making recommendations related to final Agency determinations"). That is enough to resolve the matter.

[1] The Statement of Issues section of appellant's brief purports to raise two other issues concerning the release of segregable material. *See* App. Br. 1–2. Because the brief never expands on either issue, they are waived. *See Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) ("Simply listing the issues on review without briefing them does not preserve them.").

Second, the State Department did not err in refusing to search for records concerning appellant's father under the Privacy Act. The access provision of the Privacy Act, 5 U.S.C. § 552a(d)(1), permits "any individual to gain access to his record or to any information pertaining to him which is contained in" an agency's system of records. It is a limited mandate. That provision "give[s] parties access only to their own records, not to all information pertaining to them that happens to be contained in a system of records." *Sussman*, 494 F.3d at 1121. To the general rule that individuals may only access their own records, the statute provides a single exception: parents and legal guardians may exercise the access rights of those deemed legally incompetent. *See* 5 U.S.C. § 552a(h). Aside from these contextual cues, the statutory text is silent as to whether next-of-kin or third parties may exercise access rights on behalf of the deceased.

Shortly after the Act's enactment, the Office of Management and Budget (OMB) promulgated Guidelines interpreting the Act to forbid third parties from exercising the access rights of deceased individuals. *See* 40 Fed. Reg. at 28,951. Because "Congress explicitly tasked the OMB with promulgating guidelines for implementing the Privacy Act . . . we therefore give the OMB Guidelines 'the deference usually accorded interpretation of a statute by the agency charged with its administration.'" *Sussman*, 494 F.3d at 1120 (quoting *Albright v. United States*, 631 F.2d 915, 920 n.5 (D.C. Cir. 1980)).

Appellant attacks this line of precedent as inconsistent with the Supreme Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004). That is incorrect. *Doe*, decided some three years before *Sussman*, read the Privacy Act's civil damages provision to require proof of actual damages in order to recover. *See id.* at 616. To be sure, that conclusion ran contrary to the Guidelines. *See id.* at 633 (Ginsburg, J., dissenting). But the Court did not hold that the Guidelines were not entitled to deference. The majority opinion simply found unpersuasive OMB's "unelaborated conclusion" with respect to actual damages. *Id.* at 627 n.11. Justice Ginsburg's dissenting opinion referenced the Guidelines' contrary reading without, as the majority noted, "claim[ing] that any deference [was] due." *Id.* Because *Doe* did not decide the issue, *Sussman* appropriately followed circuit precedent in deferring to the Guidelines. This panel has no authority to change course. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ginsburg, J., concurring) (noting that circuit precedent "binds us unless and until overturned by the court en banc or by Higher Authority").

To escape the Guideline's grip, appellant asks the court to invoke judicial estoppel based on what he views as the government's conflicting positions in *Doe* and this case. But judicial estoppel is plainly not warranted where, as here, appellant points to "other litigation with other parties, not a past phase of this case." *Abtew*, 2015 WL 9286818, at *3. And surely the government cannot be faulted in this litigation for "invoking . . . binding Circuit precedent that supported [its] clients' positions." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010).

We affirm the district court.

Pursuant to D.C. CIRCUIT RULE 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk