United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5037 **September Term, 2018**

FILED ON: FEBRUARY 5, 2019

BRADLEY S. WATERMAN,
APPELLANT

v.

INTERNAL REVENUE SERVICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01823)

Before: GARLAND, *Chief Judge*, and GRIFFITH and WILKINS, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. 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 set out below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **VACATED**. It is **FURTHER ORDERED** that the case be remanded to the district court for further proceedings consistent with this judgment.

Bradley Waterman is a tax attorney admitted to practice before the Internal Revenue Service (IRS). In March 2014, an IRS Revenue Agent filed a Report of Suspected Practitioner Misconduct (the "Report") with the IRS's Office of Professional Responsibility (OPR), alleging that in the course of representing a client, Waterman had unreasonably delayed the prompt disposition of that client's case before the IRS.

OPR ultimately determined that the Report required no disciplinary action. Nevertheless, in September 2014, OPR sent Waterman a letter advising him that it would retain the administrative file containing the Report for 25 years, and that the Report could be taken into

account in any investigation that might follow. Waterman requested a copy of the Report from the IRS, and the agency provided him an "Explanation of Suspected Misconduct," which summarized the allegations in the Report but did not detail the specific conduct which led to the OPR referral.

Waterman filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking copies of the Report and "all documents prepared in connection with or otherwise relating to the Report." The IRS conducted a search for responsive documents and located 54 pages of relevant material. The IRS initially released 34 pages and withheld 20 pages in full. Waterman made an internal appeal to the IRS regarding its decision to withhold documents, but that appeal was denied.

Waterman then filed suit in the district court. The IRS subsequently located two additional responsive pages and released portions of other documents which had previously been withheld. Four documents totaling 16 pages remain at issue in this appeal.

The IRS filed a motion for summary judgment, arguing, *inter alia*, that the withheld documents were properly exempt from disclosure under FOIA Exemption 5, which permits an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). More specifically, the IRS argued that Exemption 5 applied as a result of the "deliberative process privilege," which shields records or portions of records that would reveal "the decision making processes of government agencies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks omitted). The IRS provided declarations describing the withheld documents and explained that they were both "predecisional" and "deliberative" in nature. Waterman filed an opposition and cross-motion for summary judgment. He also requested that the district court conduct an *in camera* review of the withheld documents. The district court denied Waterman's request for *in camera* review and granted the IRS's motion for summary judgment, concluding that the material was properly withheld under Exemption 5 because the documents fall under the deliberative process privilege.

This timely appeal followed. The district court had jurisdiction over Waterman's suit pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. We review grants of summary judgment de novo. *Juarez v. Dep't of Justice*, 518 F.3d 54, 58 (D.C. Cir. 2008).

Waterman argues that the withheld documents are not covered by the deliberative process privilege; that the district court erred in declining to review them *in camera*; and that the district court failed to make a finding whether portions of the withheld documents are reasonably segregable from the arguably exempt portions. Because we agree with Waterman that the district court did not make a sufficient finding on segregability, we remand on that issue without reaching his other arguments.

FOIA requires that agencies disclose "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). As a result of this "reasonably segregable" requirement, "before we will uphold the district court's conclusion that withholding of information is lawful under FOIA in the face of possible redaction, 'the district court must make specific findings of segregability regarding the documents to be withheld.'" *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (quoting *Sussman v. U.S. Marshall Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007)).

The district court's opinion granting summary judgment mentions segregability only once, and then only in a passing description of an IRS declaration. *See Waterman v. IRS*, 288 F. Supp. 3d 206, 209-10 (D.D.C. 2018) ("[T]he agency identified fifty-four pages of records that were responsive to Waterman's request, segregated and produced the non-exempt records and portions of records, and withheld the records determined to be exempt from FOIA's disclosure requirements."). It is true that the IRS employees who submitted declarations to the district court stated that they were familiar with the segregability requirement and "attempted to release every reasonably segregable nonexempt portion of every responsive document." The district court, however, did not adopt this declaration or otherwise refer to the requirement. The only relevant findings the court made were general in nature, concluding that "all of the IRS's withholdings were permissible under FOIA." *Waterman*, 288 F. Supp. 3d at 211.

That is insufficient. A district court "clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability." *PHE Inc. v. Dep't of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993) (emphasis added). No such finding was made. "While perhaps in theory we could conduct a further review in this court under our de novo standard, in the interest of efficiency we have long required the district court to make the first finding on the segregability question." *Stolt-Nielsen*, 534 F.3d at 734. Because the "district court approve[d] withholding without such a finding, remand is required." *Sussman*, 494 F.3d at 1116. In making a segregability finding, the district court may find it necessary or appropriate to examine the documents *in camera*. *Stolt-Nielsen*, 534 F.3d at 734-35.

For the foregoing reasons, we vacate the judgment of the district court granting the IRS's motion for summary judgment and remand the case to the district court for further proceedings consistent with this judgment.

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