United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5256 **September Term, 2018**

FILED ON: APRIL 19. 2019

FRANK AGRAMA,

APPELLANT

v.

INTERNAL REVENUE SERVICE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00716)

Before: ROGERS and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

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 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 **AFFIRMED**.

In January 2016, Frank Agrama received nineteen notices from the Internal Revenue Service (IRS) asserting that for the tax years 1982-2014, he had failed to properly report his ownership interests in a number of foreign corporations by filing IRS Form 5471. Agrama disputes that he had such interests, and in February 2016, he filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking "each and every document . . . contained in the administrative files of the Internal Revenue Service relating to proposed Form 5471 penalty liabilities" for his case. In March, the IRS sent a letter to Agrama's attorney indicating that the agency would be unable to provide the requested information within the twenty-day deadline imposed by FOIA. *See id.* § 552(a)(6)(A)(i). In April, Agrama filed suit in the district court seeking an order requiring the IRS to "disclose the requested records in their entireties."

The IRS uncovered thousands of responsive records in the course of its search. The agency

released 3,590 pages in full to Agrama, but withheld 118 pages in part, 1,055 pages in full, and 15,150 "additional records" consisting of an undisclosed number of pages. The IRS submitted declarations from the IRS officials who conducted the search for responsive documents, asserting that the withheld documents fell under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because the documents contained information "relevant to . . . the investigation into [Agrama's] possible liability for penalties" and that their disclosure "may reasonably be expected to interfere with the ongoing investigation and enforcement proceedings by prematurely revealing the examining Agents' evidence and strategy, revealing the nature, direction, scope, and focus of their case." Over Agrama's objection, the district court granted a motion by the IRS to submit an additional declaration and brief *ex parte*. Relying on both the public and *ex parte* declarations, the district court subsequently granted the IRS's motion for summary judgment and denied Agrama's cross-motion for summary judgment, concluding that the withheld documents were exempt from disclosure under FOIA.

This timely appeal followed. The district court had jurisdiction over Agrama'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 the district court's decision to receive evidence and briefing *ex parte* for abuse of discretion, *Labow v. U.S. Dep't of Justice*, 831 F.3d 523, 533 (D.C. Cir. 2016), and its grant of summary judgment de novo, *id.* at 527.

First, we consider Agrama's argument that the district court abused its discretion in allowing the IRS to submit materials *ex parte*. Agrama specifically challenges the district court's decision not to review the actual documents that were withheld, but to instead review an IRS brief and a declaration from an IRS agent describing the documents and the search that he conducted, both of which were filed *ex parte*. It is true that FOIA only expressly authorizes district courts to conduct *in camera* review of withheld documents, 5 U.S.C. § 552(a)(4)(B), but we have held that federal courts in FOIA cases have the inherent authority to accept other kinds of materials *ex parte*, *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983). Ultimately, a district court has "broad" discretion to accept submissions *ex parte* when the district judge believes that such a filing "is needed in order to make a responsible de novo determination on the claims of exemption." *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam)) (internal quotation mark omitted). Here, the district court acted within its discretion in concluding that there was good cause for permitting *ex parte* submissions, as requiring the IRS to produce further "public justification would threaten to reveal the very information for which a FOIA exemption is claimed." *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984).

Next, we consider Agrama's argument that the district court erred in holding that the IRS properly withheld thousands of responsive documents under FOIA Exemption 7(A), which exempts law enforcement records from disclosure when production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Agrama claims that the IRS has not met its burden to demonstrate "how" disclosure of the withheld records would interfere with law enforcement proceedings. While the IRS's public disclosures on this point are cursory, we have held that "there are occasions when extensive public justification would threaten to reveal

the very information for which a FOIA exemption is claimed." *Lykins*, 725 F.2d at 1463. This is one such occasion. Based on the IRS's public and *ex parte* disclosures, we are satisfied that the IRS has met its burden of demonstrating that disclosure of the withheld records might "reveal the scope and direction of the investigation and could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses." *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

Agrama resists this conclusion by arguing that the IRS notices asserting he has interests in foreign corporations are evidence that the agency has completed its investigation. This argument lacks merit. Even if the investigation has progressed to the point that the IRS can assert Agrama needs to file a particular form, this does nothing to rebut or undermine the IRS's declaration that the investigation remains active. *See Juarez v. U.S. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008) (holding that a FOIA plaintiff's speculative arguments about the progress of an investigation did not overcome an agency affidavit asserting that the investigation was ongoing).

For the foregoing reasons, we affirm the decision of the district court granting the IRS's motion for summary judgment and denying Agrama's cross-motion for summary 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