United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5270 **September Term, 2018**

FILED ON: APRIL 19, 2019

JEHAN AGRAMA,

APPELLANT

v.

INTERNAL REVENUE SERVICE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00751)

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

JUDGMENT

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 October 2015, Jehan Agrama received two notices from the Internal Revenue Service (IRS) asserting that for the tax years 1982-2004, she had failed to properly report her ownership interest in a foreign corporation by filing IRS Form 5471. Agrama disputes that she in fact has such an interest, and in February 2016, she 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 her case. The IRS searched Agrama's IRS file and provided some responsive documents. The IRS also withheld some documents, asserting that they fell under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because their disclosure would interfere with an ongoing investigation.

In April 2016, Agrama filed suit in the district court, challenging the IRS's decision to

withhold responsive documents. After Agrama filed suit, more responsive documents were discovered, and the IRS produced some of the pages that had previously been withheld, including a translated copy of an 83-page report prepared for the Italian government by an Italian investigator, Gabriella Chersicla ("Chersicla Report").

Before the district court, Agrama argued that the IRS's search was inadequate, pointing to the fact that none of the records produced by the IRS indicate how IRS agents in the United States received the Chersicla Report. Agrama also challenged the IRS's reliance on Exemption 7(A), arguing that the IRS had not sufficiently explained how disclosure of the withheld documents would compromise any ongoing investigations. The IRS submitted declarations from the IRS officials who conducted the search for responsive documents, explaining what records systems had been searched, averring that they were unaware of "any other records system likely to maintain records responsive to plaintiff's request," and asserting that the withheld documents "contain information relevant to a law enforcement matter which is not yet concluded." Over Agrama's objection, the district court granted a motion by the IRS to submit an additional declaration and a 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 agency's search for responsive files was adequate and 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 review 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 challenge to the adequacy of the IRS's search for records responsive to her FOIA request. In order to demonstrate adequacy, an agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Typically, that burden is met by a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.*

The IRS provided such affidavits here, and Agrama does not dispute that the IRS acted in good faith. Rather, Agrama argues that the IRS failed to "follow through on obvious leads to discover requested documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999). Specifically, Agrama argues that the IRS should have searched the files of the IRS's Tax Attaché in Italy, which is charged with receiving tax records from the Italian government. Agrama speculates that because the Chersicla Report was originally produced by the Italian government, the IRS office in Italy charged with requesting documents from the Italian government might have documents that explain how the Report was received by the IRS.

Agencies are not, however, "required to speculate about potential leads." *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). Here, based on detailed public and *ex parte* declarations that describe the scope and nature of the IRS's search for responsive documents, we are satisfied that the agency made its search in "good faith" and "using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. We require no more. "[A]dequacy—not perfection—is the standard that FOIA sets." *DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015).

Finally, Agrama argues that the district court erred in holding that the IRS properly withheld four 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 her interest in a foreign corporation 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