United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5053 **September Term, 2019**

FILED ON: MARCH 6, 2020

DINH TRAN,

APPELLANT

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02601)

Before: ROGERS and WILKINS, *Circuit Judges*, and SILBERMAN, *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. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded 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 judgment of the district court be **AFFIRMED**.

Dinh Tran appeals *pro se* the district court's grant of summary judgment to the Department of the Treasury ("Department") on Tran's claims arising under the Privacy Act, 5 U.S.C. § 552a ("Act"). Tran was an attorney-advisor in the Department. She requested a detail to a different office of the Department. To evaluate her qualifications, employees of that office requested and reviewed Tran's most recent performance appraisal. Tran contends that this disclosure violated the Act.

The district court properly determined that the disclosure falls within the Act's need-to-know exception, and we affirm on that ground. *See Tran v. Dep't of Treasury*, 351 F. Supp. 3d 130, 137-40 (D.D.C. 2019). The Act generally prohibits agencies from "disclos[ing] any record" without the consent of "the individual to whom the record pertains." 5 U.S.C. § 552a(b). The need-to-know exception permits agencies to disclose a record "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of

their duties." *Id.* § 552a(b)(1). In other words, the exception applies when "the official examined the record in connection with the performance of duties assigned to him and [when] he had to do so in order to perform those duties properly." *Bigelow v. Dep't of Def.*, 217 F.3d 875, 877 (D.C. Cir. 2000).

The disclosure of Tran's performance appraisal fits within this exception. As an initial matter, the disclosure was intra-agency for purposes of the Act, which defines "agency" by reference to the Freedom of Information Act to "include[] any executive department." *See* 5 U.S.C. §§ 552a(a)(1), 552(f)(1). Every individual who reviewed Tran's performance appraisal was an employee of the executive department that maintained it: Treasury. As to the need for the record, every employee who accessed Tran's performance appraisal needed to know whether Tran had the requisite skillset for a detail, in order to perform properly his or her duty to evaluate Tran as a prospective detailee. Tran's performance appraisal contained information relevant to that inquiry. Tran fails to identify any genuine dispute of material fact; accordingly, the district court properly granted the Department's motion for summary judgment. *See* FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Our position would not change even were we to consider an email that was not submitted as evidence in the district court, which Tran filed in this court as one of several supplemental exhibits. Tran states that she inadvertently omitted from the district court record an email from Bruce Meneely, Deputy Division Counsel, to Debra Moe, Division Counsel, Appellant's Reply Br. 33 (citing email (Feb. 17, 2016)), where Meneely stated that Tran's resume and performance appraisal were attached and field office managers who had interviewed Tran did not support the detail. The district court cited this portion of a deposition transcript in its opinion. *Tran*, 351 F. Supp. 3d at 134; *see Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co.*, 743 F.2d 932, 944 n.55 (D.C. Cir. 1984) (citing FED. R. APP. P. 10(e)). Still, no reasonable juror could conclude that any Department employee improperly examined Tran's performance appraisal. Otherwise, the record on appeal is limited to "the original papers and exhibits filed in the district court," the transcript of any proceedings, and the docket sheet. FED. R. APP. P. 10(a).

Tran's contention on appeal that "the need-to-know exception applies only where an applicable statute, rule, or regulation . . . requires such disclosure," Appellant's Reply Br. 13; *see also* Appellant's Br. 21-27, was not raised in the district court, and this court ordinarily does not consider arguments raised for the first time on appeal. *See, e.g., District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). In any event, Tran's interpretation of the Act is unsupported by the statutory text and is unpersuasive for that reason alone. Further, it lacks support in precedent or legislative history.

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 petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk