Student Briefs

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al., Plaintiffs, v. SECURITIES AND EXCHANGE COMMISSION, et al., Defendants.	77 Civ. 3110

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT BY THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION

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PRELIMINARY STATEMENT

On June 27, 1977, Joel Harnett, Save Our City, Inc., and Gordon Marshall 1/ filed this action against the Securities and Exchange Commission (the "Commission") and the Executive Office of the President of the United States (the "Executive Office"). This memorandum, filed on behalf of the defendant Commission in support of its motion to dismiss the complaint, will not discuss allegations of the complaint relating to the defendant Executive Office unless pertinent to the Commission's motion to dismiss.

1/ According to the complaint, Mr. Harnett is an "announced candidate" for Mayor of the City of New York (Complaint ¶1). Save Our City, Inc., is alleged to be a Not For Profit Corporation organized under the laws of the State of New York, which apparently supports Mr. Harnett's candidacy (id. at ¶¶2 and 3; see also id. at Exhibit A). Mr. Marshall seems to be appearing pro se "as a resident and citizen of the City of New York" and as attorney for the other plaintiffs (id. at ¶4).

In this action, the plaintiffs demand a judgment:

> "(a) enjoining the * * * Commission * * * from withholding any records and reports concerning the investigation by the * * * Commission into and relating to the sale of municipal bonds and securities of the City of New York; and
>
> "(b) ordering the * * * Commission * * * to produce and deliver to the plaintiffs any and all records and reports of the * * * Commission * * * concerning the investigation by the * * * Commission into and relating to the sale of municipal bonds and securities of the City of New York; and
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> "(c) ordering the * * * Commission * * * to immediately deliver all such records and reports to this Court for examination 'in camera' by this Court to determine whether such records and reports or any part thereof should be withheld under any of the exemptions set forth in subsection (b) of Title 5 United States Code Annotated Section 552 * * *."

The plaintiffs further demand "all reasonable attorneys' fees and other litigation costs reasonably incurred in this action under and pursuant to Title 5 United States Code Annotated Section 552(E) [sic]."

For the reasons set forth below, the Commission moves that this action be dismissed, that the Court find the action to have been instituted frivolously and in bad faith, and that the Commission be awarded the costs of defending this action, including reasonable attorney's fees.

STATEMENT OF FACTS

This action has arisen from nothing more than an exchange of correspondence among the named parties in which no request for specific records was ever made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. This fact clearly appears from the pertinent portions of the corres-

pondence cited in the complaint (¶¶27-38) and set forth below.

On April 18, 1977, the plaintiff Gordon Marshall sent the following letter to Harold M. Williams, the Chairman of the Commission:

> "I would appreciate your furnishing to me by return mail a copy of the SEC Report on the results of its investigation of the sale of New York City bonds and securities and whether or not such sale and the practice involved in the disclosure of city financial information is deemed to have been a deception of the public.
>
> "In view of the fact that a mayoralty campaign is about to begin, I think that I and the other citizens of New York should be the beneficiary of the results of your investigation in order to intelligently be able to exercise our voting franchise and privilege.
>
> "I call upon you pursuant to the 'Sunshine Laws' to make such disclosure of your reports on such subject matter to me by return mail." 2/

On May 6, 1977, Harvey L. Pitt, General Counsel to the Commission, sent a letter to the plaintiff Marshall, in which he stated:

> "On May 2, 1977, I discussed your letter with you, and advised you that it is not appropriate for me to offer you a specific date on which the results of the Commission's New York City investigation will be made public. As I also assured you, however, the Commission is cognizant of many of the concerns expressed in your letter, and that the staff is making every effort to expedite the investigation." 3/

On May 11, 1977, the plaintiff Marshall responded with a letter to Mr. Pitt, in which he merely requested a response from Chairman Williams:

2/ See Complaint ¶27.

3/ See id. at ¶28.

> "I am further disappointed in that your letter under date of May 6, 1977 is completely unresponsive. I did take note of the fact that you no longer claim that the investigation is still in progress.
>
> * * *
>
> "In the meantime, I would appreciate a meaningful reply from Chairman Williams to my letter of April 18, 1977." 4/

Shortly thereafter, on May 20, 1977, Mr. Pitt sent a further letter to the plaintiff Marshall, in which he informed Mr. Marshall:

> "I am replying to your letter of May 11, 1977, in order to set the record straight on the following points:
>
> "1. The letter you received from me on May 6, 1977, was fully consistent with any and all oral discussions you have had with me and members of the Commission's staff;
>
> "2. Your earlier letter received a complete and responsive reply from me, and received the attention to which it was entitled;
>
> "3. Your letter, dated May 11, 1977, purports to take 'note of [certain] fact[s] * * *.' Your interpretations of my letter are solely your own, and my silence does not connote acquiscence in them * * *.
>
> "Since no purpose would be served by further, extended, discussions of these matters, I trust that

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4/ See id. at ¶34. Mr. Marshall's statement, in his May 11, 1977, letter, that Mr. Pitt did not "claim that the investigation is still in progress" is, quite simply, inexplicable in view of the statement in Mr. Pitt's letter of May 6, 1977, that the Commission's "staff is making every effort to expedite the investigation."

this will terminate your correspondence with us." 5/

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED SINCE IT CONCLUSIVELY DEMONSTRATES ON ITS FACE THAT THE PLAINTIFFS HAVE NEITHER PURSUED NOR EXHAUSTED THE PRESCRIBED ADMINISTRATIVE REMEDIES.

This action was commenced solely under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, 6/ and relies solely upon that Act in invoking the jurisdiction of this Court. 7/ The plaintiffs have alleged that Mr. Pitt's

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5/ See id. at ¶35. In addition to his correspondence with the Commission, the plaintiff Harnett had written a letter to the President of the United States on May 5, 1977, in which he requested the President to "direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977." See id. at ¶¶36 and 37 and Exhibit A. That letter was referred by the Executive Office to the Commission's Office of Consumer Affairs, which informed Mr. Harnett, by letter dated May 20, 1977, that his letter had been referred to the Commission's Division of Enforcement for their consideration. See id. at ¶38 and Exhibit B.

6/ Complaint ¶5.

7/ Id. at ¶6. This Court would have no other ground for jurisdiction to compel the Commission to release the material which the plaintiffs seek. Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), provides that: "The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person has violated * * * any provision of this chapter * * * [and] [t]he Commission is authorized, in its discretion, to publish information concerning any such violations * * *." Moreover, any information or documents acquired during the course of such an investigation shall remain confidential unless the Commission determines that disclosure would not be contrary to the public interest. See 17 CFR 240.0-4. As this Court has previously held, it may not "influence [the Commission's] exercise of discretion" in withholding or publishing such information. Securities and Exchange Commission v. Republic National Life Ins. Co., 383 F. Supp. 436, 438 (S.D. N.Y., 1974). Cf. International Waste Controls, Inc. v. Securities and Exchange Commission, 362 F. Supp. 117 (S.D. N.Y.), affirmed per curiam, 485 F.2d 1238 (C.A. 2, 1973).

letter of May 6, 1977, "was not responsive to the request for information by * * * [the] plaintiff [Marshall] pursuant to" the Freedom of Information Act, 8/ and that, accordingly, the plaintiff Marshall "shall be deemed to have exhausted his administrative remedies * * *." 9/

But, the plaintiffs have made no request in conformance with the requirements of the FOIA. That Act requires that "each agency, upon any request for records which * * * reasonably describes such records and * * * is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. 552(a)(3) (emphasis added).

The Commission's rules under the FOIA require, consistent with the Act itself, that any request for records "reasonably describes" the records to which access is sought. 17 CFR 200.80(a)(3). In addition, the Commission's procedures for requesting copies of documents pursuant to 5 U.S.C. 552(a)(3) are set forth at 17 CFR 200.80(d)(2) as follows:

> "Requests for copies of Commission records may be made either in person at the public reference room or by mail addressed to the Securities and Exchange Commission, Public Reference Section, Washington, D.C. 20549. Each request for information under the Freedom of Information Act should be clearly and prominently identified by means of a legend on the first page, such as 'Freedom of Information Act Request.' In addition, if sent by mail or otherwise submitted in an envelope or other cover, the front

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8/ Id. at ¶¶29-31.

9/ Id. at ¶32. See also id. at ¶33 (concluding that this Court has "immediate and exclusive jurisdiction for the ruling requested").

> of such envelope or cover should be clearly and prominently marked by a legend such as 'Freedom of Information Act Request.'"

Yet, not only were the plaintiff Marshall's "requests" not addressed to the Commission's Public Reference Section, nor "clearly and prominently identified * * * as [a] Freedom of Information Act Request,'" the correspondence nowhere even referred to the Freedom of Information Act; 10/ nor did the request identify what particular records were being requested. 11/ Likewise, the plaintiff Marshall in his letter of May 11, 1977, failed to indicate either any intention to have his first letter treated as a request under the FOIA or to appeal the denial of access to documents as required

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10/ See Complaint ¶¶27 and 34. The plaintiff Marshall's ambiguous reference to "the Sunshine Laws" in his first letter (see id. at ¶27) can only be construed to refer to the Government in the Sunshine Act, Pub. L. 94-409 (Sept. 3, 1976), codified at 5 U.S.C. 552b, which, although declaring "the policy * * * that the public is entitled to the fullest practicable information regarding the decisionmaking process of the federal government," relates to the conduct of agency meetings, and not the disclosure of documents.

11/ Rather than being a request for access to any particular records, Mr. Marshall's letter would appear to be more reasonably interpreted as a request that the Commission promptly conclude, and compile and issue a final report on, its pending investigation. Mr. Marshall's reference, in his correspondence, to a Commission "report," can only be construed as a request for a copy of a final report of investigation if and when issued. Mr. Marshall, until this suit was instituted, never indicated any interest in having access to the entire contents of records contained therein, except for a final report of investigation. Accordingly, at most, the plaintiffs can sue only to compel production of such final "report"--a record that did not exist when the request was made (as Mr. Pitt's reply clearly indicated), and does not exist now.

by the Act and the Commission rules. 12/

The Commission does not insist on formalistic compliance with its rules relating to requests made pursuant to the FOIA; so long as a person can be understood to be seeking access to some specific record or records, rather than making a generalized inquiry such as was made by Mr. Marshall, the request will not be rejected merely because it fails to invoke the FOIA, or was directed to the wrong office of the Commission. But, a cognizable request for specified records must be presented; this the plaintiffs herein failed to do. Accordingly, the plaintiffs in this action are "bound by the general rule requiring exhaustion of administrative remedies when Congress

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12/ See 5 U.S.C. 552(a)(3)(B) and 552(a)(6). The Commission's rules, set forth at 17 CFR 200.80(d)(6) require, inter alia, that:

> "Any person who has been notified * * * that his request for inspection of a record or for a copy has been denied, or who has received no response to a request for a record or copy within ten days * * * after his request was received by the Commission's staff, may appeal the adverse determination or the failure to respond by applying for an order of the Commission determining and directing that the record be made available.
>
> "The application shall be in writing, shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by a legend such as 'Freedom of Information Act Appeal,' and shall identify the record in the form in which it originally requested.
>
> "The application should be delivered to the Office of the Freedom of Information Act Officer or sent by mail to the Securities and Exchange Commission, Public Information Officer, Washington, D.C. 20549."

has clearly provided an administrative procedure which is capable of resolving the controversy in question." Marrone v. U.S. Immigration and Naturalization Service, 500 F.2d 418, 420 (C.A. 2, 1974). Application of this rule in this instance requires the dismissal of the suit, since "[b]oth the FOIA * * * and the [agency's rules] provide an orderly and swift agency procedure for review of FOIA requests." Santa Belarus, Inc. v. National Labor Relations Board, 409 F. Supp. 271, 273 (E.D. Wisc., 1976) (citations omitted). 13/

The strict time limits placed on federal agencies by the FOIA require that a request under the Act at least be presented to an agency in an identifiable form. The FOIA provides that agencies shall make an initial determination of a request within ten working days of receipt and a determination of a subsequent appeal within 20 working days of receipt, 5 U.S.C. 552(a)(6)(A), subject to certain permissible extensions of the time in which the agency must respond, 5 U.S.C. 552(a)(6)(B). And, "[a]ny person making a request to any agency for records under paragraph * * * (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such

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13/ In Tuchinsky v. Selective Service System, 418 F.2d 155, 158 (C.A. 7, 1969), the court required compliance with agency regulations requiring a person initially to request certain information from appropriate local selective service boards--a requirement far more burdensome than any imposed by the Commission's regulations involved herein. Holding that only through exhaustion of administrative remedies is the judicial process available for suit, the court noted that "[t]he exhaustion of remedy rule is not satisfied by leapfrogging over any substantive step in the administrative process." Yet here, the plaintiffs have attempted to "leapfrog" the administrative process in its entirety, by refusing to present, to the agency, any cognizable request for specific records under the Act.

request if the agency fails to comply with the applicable time limit provisions of this paragraph." 5 U.S.C. 552(a)(6)(C).

In this regard, the plaintiffs must have first made a proper request to an agency, reasonably describing the records sought, and otherwise in substantial conformance with applicable agency rules. Otherwise, FOIA suits will come to the courts, like this one, without the agency ever having had an opportunity to consider whether the Act requires disclosure of any records sought by the plaintiff. It is undoubtedly for this reason that the District Court for the District of Columbia Circuit has stated: "Although plaintiffs claim that the Freedom of Information Act * * * confers jurisdiction on this Court, that Act requires that plaintiffs make specific requests in accord with published agency procedures." Aviation Consumer Action Project v. Civil Aeronautics Board, 370 F. Supp. 945, 947 (D. D.C., 1972) (emphasis supplied) (citations omitted). See also Jaffess v. Secretary, Dept. of Health, Education and Welfare, 393 F. Supp. 626, 629 (S.D. N.Y., 1975).

As this Court has held, mere requests for information or unspecified documents, such as the request made by the plaintiffs herein, "do not constitute exhaustion of remedies under the [Freedom of Information] Act." Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 714 n. 26 (S.D. N.Y., 1976). Judicial intervention is premature until the plaintiffs have pursued and exhausted the agency's appeal procedures. See Santa Belarus, Inc. v. National Labor Relations Board, supra, 409 F. Supp. at 273.

In this action, the complaint sets forth the "requests" made to the Commission by the plaintiffs. That correspondence clearly evidences: (1) their

complete failure to identify adequately any specific records to which access was desired; (2) their complete failure to comply with the published procedures of the Commission for submitting requests for records under the Freedom of Information Act; and (3) their complete failure to comply with the published procedures of the Commission for pursuing an appeal from an initial adverse determination. The plaintiffs, at least one of whom appears to be a member of the bar of this Court and another who aspires to the highest office of this Nation's largest city, cannot be excused from compliance with the most rudimentary of administrative procedures. In their failure to observe the basic requirements of the Freedom of Information Act and the Commission's rules, the plaintiffs are seeking an order from this Court to compel production of documents without ever having afforded the Commission, qua Commission, an opportunity to consider their request. 14/

II. THIS ACTION IS FRIVOLOUS AND WAS INSTITUTED IN BAD FAITH; THE COURT SHOULD AWARD THE COMMISSION ITS COSTS IN DEFENDING THE ACTION, INCLUDING REASONABLE ATTORNEY'S FEES.

As we have noted, the plaintiffs herein are not unsophisticated laymen, whose failure to follow clearly prescribed administrative procedures before resorting to the Court should be excused. Rather, a more reasonable explanation

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14/ In this Memorandum, the Commission has not addressed the issue of whether any of the exemptions from compelled disclosure contained in the FOIA might be applicable to such records as the plaintiff should subsequently identify and request access. Of course, the fact that the investigation in question is, as Mr. Pitt indicated, an active law enforcement matter, compels the conclusion that one or more of the FOIA's exemptive provisions are available if the Commission chooses to assert them. See Title Guarantee Co. v. National Labor Relations Board, 534 F.2d 484 (C.A. 2, 1976).

of the plaintiffs' conduct in this matter is that they are attempting to use the processes of this Court, as they have used the Commission, for the purpose of obtaining publicity to further a local political campaign. 15/ Although the general American rule is that, in the absence of specific statutory authority for the award of fees, each party to a litigation bears his own attorney's fees, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly or for oppressive reasons.'" Hall v. Cole, 412 U.S. 1, 5 (1973); accord, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975).

The "bad faith" test enunciated by the Supreme Court is satisfied where a party knowingly asserts a frivolous claim of defense. See, e.g., Carter v. Noble, 526 F.2d 677, 678-679 (C.A. 5, 1976). By any reasonable criterion, this premature action is patently frivolous and was instituted in bad faith; accordingly, the Court should, in ordering the dismissal of this action, award the Commission the costs of defending this action, including reasonable attorney's fees.

15/ After Mr. Pitt's initial response, the plaintiffs issued a press release on behalf of the candidacy of Mr. Harnett which seriously distorted Mr. Pitt's letter of May 6, 1977 (see supra, p. 3), in several respects. See Complaint ¶35. Having attempted to involve the Commission and its officials in this local political campaign, the plaintiffs now appear determined to do the same thing with this Court.

CONCLUSION

The plaintiffs have failed either to pursue or to exhaust their administrative remedies under the Freedom of Information Act and the Commission's rules thereunder. The complaint should therefore be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure since this Court lacks jurisdiction over the subject matter under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), and because the plaintiffs have failed to state a claim upon which relief can be granted.

The Court should further find that the action is frivolous and was instituted in bad faith, and should award the Commission its costs of defending the action, including reasonable attorney's fees.

Respectfully submitted,

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