

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LORI A. BOWER)
)
 Plaintiff)
)
 v.) Civil No. 03-224-B-W
)
 FOOD AND DRUG ADMINISTRATION)
)
 Defendant)

***ORDER ON FOOD AND DRUG ADMINISTRATION'S MOTION FOR STAY OF
PROCEEDINGS PENDING COMPLETION OF SEARCH AND PRODUCTION OF
DOCUMENTS
AND MOTION TO STAY BRIEFING ON PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT***

This is an action by Lori Bower under the Freedom of Information Act seeking the production of documents from the Food and Drug Administration (FDA) pertaining to a drug called Luvox. The FDA has filed a motion for a stay of these proceedings pending completion of its search and the production of the documents Bower requests in her action (Docket Nos. 17 & 18) and a motion to stay briefing on Bower's motion for summary judgment (Docket No. 19). Bower has filed an opposition to the motion for a stay of proceedings. (Docket No. 20.)

Discussion

The Freedom of Information Act (FOIA) provides that federal agencies must respond to document requests within twenty days. See 5 U.S.C. § 552(a)(6)(A). This standard, however, is subject to an exception, at the heart of this dispute. Subsection (a)(6)(C) provides:

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

5 U.S.C.A. § 552(a)(6)(C)(i). And subsection (ii) of that provision states:

For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

Id. § 552(a)(6)(C)(ii). This dispute boils down to whether the FDA has made a sufficient showing under subsections (i) and (ii).

In Open America v. Watergate Special Prosecution Force, the United States Court of Appeals for the District of Columbia interpreted section 552(a)(6)(C) to mean

that "exceptional circumstances exist" when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis, except those where exceptional need or urgency is shown, is compliance with the Act.

547 F.2d 605, 616 (D.C. Cir. 1976).

At least one court has concluded that Open America does not survive the 1996 amendments that saw the enactment of § 552(a)(6)(C)(ii)'s "exceptional circumstances" limitation. See Donham v. Dep't of Energy, 192 F.Supp.2d 877, 880 (S.D. Ill. 2002).

However, courts within the District of Columbia circuit still faithfully utilize the Open America paradigm as limited by subsection (ii). See, e.g., Appleton v. F.D.A., 254 F.Supp.2d 6, 9 n.3 (D.D.C 2003) (observing that Congress has made it clear that "exceptional circumstances" do not include delays stemming "from a predictable agency workload of requests ... unless the agency demonstrates reasonable progress in reducing its backlog of pending requests," noting Donham's view that Open America has been superseded). The First Circuit has not spoken on this point. I am of the view that the Open America inquiry with the overlay that an agency must demonstrate reasonable progress in reducing its backlog is the most tenable way for a federal court to weigh the interests of a FOIA requestor against the limitations faced by a requestee agency that must respond fairly to complex and numerous FOIA requests. I proceed in this manner not without reservations about the clear expectation of § 552(a)(6)(A) that requests be turned around in twenty days and the FDA's position here that it is entitled to take well over four years from the filing of Bower's request to produce the documents she seeks.

The FDA has carefully presented its case under the Open America framework and § 552(a)(6)(C)(ii). It states, with respect to the number of FOIA requests it receives and the inadequacies of its resources, that the department capable of responding to Bower's request is responding to what it describes as "enormous litigation demands"; it describes Bower's FOIA request as broad and complex; and represents that the FDA receives a great number of FOIA requests and the agency has made reasonable progress in reducing its backlog. With respect to its good faith and due diligence, the FDA explains that it is responding to the FOIA requests on a first-in, first-out basis and, with respect to Bower's claim in particular, it outlines the steps it has taken after it received her request on

September 29, 2003. Addressing Bower's request for expedited processing the agency determined that Bowers has not demonstrated a compelling need as that term is statutorily defined,¹ to justify expediting her request ahead of similarly complex request that were received by the FDA prior to Bower's.

In her opposition Bower disputes some of the representation that the FDA makes concerning how they have treated her requests, the content of conversation that she had with FDA personnel concerning the status of her request, and the implications for her request in light of the numbers provided by the FDA concerning the agency's backlog reduction.² I do not believe that her disputes undermine the essential elements of the FDA's case.

In its motion for a stay the FDA represents that Bower's action should be stayed until February 2008. In its reply to Bower's opposition the FDA states that recently the backlog effecting the Bower request's progression has been reduced because a pharmaceutical company has withdrawn more than one thousand of its outstanding requests. It now estimates that it requires a stay only until March 2007. (See FDA Reply at 6.) While I take at face value the FDA's showing as to the numbers of requests it faces, its efforts to reduce its backlog, and the resources it has available -- in view of Bower's pending FOIA suit in which she has already filed a motion for summary judgment -- I am

¹ "Compelling need" as applicable to Bower, as an individual seeking information on her own behalf, requires a showing of an imminent threat to her life or physical safety. 5 U.S.C. § 522(a)(6)(E)(v)(I). In her opposition to the motion to stay proceedings Bower states that she was bringing her request under subsection (E)(i)(II), which allows the agency to expedite processing of her request "in other cases determined by the agency" and that the FDA never properly responded to her request. The FDA responds that even viewed through the subsection (II) prism Bower's request would not warrant the exercise of the agency's discretion when it is weighed with other like, pending requests by requestor's involved in private litigation. Given that on the face of the statute the subsection (II) discretion seems to be uniquely within the requestee agency I do not believe that Bower has a leg to stand on here.

² In Bower's view and calculation the FDA should be able to reach her 2003 filed request by the end of 2004. The FDA points out that Bower's request has been put on the complex track due to the scope of the production sought. Accordingly, many requests that are easier to handle may be addressed by the agency before Bower's.

uncomfortable in leaving the FDA quite so much to its own, unmonitored devices and leaving Bower in a over two and one-half year vacuum going forward (on top of the nearly one full year that has expired since her filing of her FOIA request)

Accordingly, I will **GRANT** the stay of proceedings but require that the FDA report back to this Court and Bowers by March 30, 2005, as to the exact status of Bower's request and its estimated time for completion of its production of documents for Bowers. At that juncture the court can analyze whether it should put in place a more frequent schedule of reports and whether it is possible to implement a schedule for the turnover of documents to Bower as they become available. I also **GRANT** the FDA's motion to stay briefing on Bower's motion for summary judgment and that stay will proceed on the same track as the stay on proceedings.

CERTIFICATE

A. The Clerk shall submit forthwith copies of this Order to the parties in this case.

B. The parties shall submit any objections to this Order to the clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated August 30, 2004

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

BOWER v. FOOD AND DRUG
ADMINISTRATION

Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to:
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None

Date Filed: 12/30/03
Jury Demand: None
Nature of Suit: 895 Freedom of
Information Act
Jurisdiction: U.S. Government
Defendant

Cause: 05:552 Freedom of Information Act

Plaintiff

LORI A BOWER

represented by **LORI A BOWER**
172 ROCKY SHORE DRIVE
ORRINGTON, ME 04474
PRO SE

V.

Defendant

**FOOD AND DRUG
ADMINISTRATION**

represented by **DAVID R. COLLINS**
OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Fax : (207) 780-3304
Email: david.collins@usdoj.gov
ATTORNEY TO BE NOTICED