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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 03-8023 AHM (RZx) Date February 6, 2006

Title LAHR V. NATIONAL TRANSPORTATION SAFETY BOARD, *et al.*

DOCKETED ON CM
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BY 077

Present: The Honorable A. Howard Matz

Stephen Montes	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
No Appearance	No Appearance

Proceedings: In Chambers

Plaintiff H. Ray Lahr moves for leave to file a second amended complaint (SAC) to (1) add the National Security Agency (NSA) as a defendant and (2) add a claim for relief for a new, recently denied Freedom of Information Act (FOIA) request for records generated *after* the Central Intelligence Agency (CIA) released its "zoom-climb" conclusion on November 17, 1997.

The Court GRANTS Plaintiff's motion.

I. INTRODUCTION

TWA Flight 800 crashed on July 17, 1996. On November 17, 1997, the government released its "zoom-climb" hypothesis to the public via a widely broadcast CIA-narrated video animation. On November 10, 2000, Plaintiff H. Ray Lahr submitted a FOIA request to the CIA for all records that served as the basis of that conclusion. The CIA rejected the request, claiming that it had merely incorporated the conclusion of the National Transportation Safety Board (NTSB) into its video animation. The NTSB, in turn, claimed that it did not have any such records. On October 8, 2003, Lahr submitted a new FOIA request for the same records to the CIA. His request, or at least a portion of it, was later referred to the National Security Agency (NSA). The CIA and NSA failed to respond within twenty working days as required by.5 U.S.C. § 552(a)(6)(A)(i). On November 6, 2003, Lahr filed this FOIA suit against the NTSB and CIA.[1]

[1]The fact that Lahr's suit initially named only the CIA and NTSB as defendants suggests that he was unaware that his request had been referred to the NSA.

On June 8, 2004, the NTSB moved for summary judgment. On August 16, 2005, the CIA also moved for summary judgment, including summary judgment as to certain records that the CIA had created as part of the analysis that continued *after* the release of the video animation. Both motions are under submission.

Lahr now moves for leave to file a second amended complaint (SAC). He does so for two reasons. First, he seeks to add the NSA as a defendant. On November 7, 2005, the NSA sent Lahr a letter denying his October 8, 2003 FOIA request. The parties dispute whether the denial was with respect to a specific record or Lahr's entire request. On November 16, 2005, Lahr appealed. The NSA has failed to respond.

Second, Lahr seeks leave to amend to add records that he contends are not previously encompassed by his prior FOIA requests—specifically, the CIA-generated zoom-climb records created *after* the November 17, 1997 release of the video animation (hereinafter, the "post-11/17/97 records"). Lahr claims that the CIA attached post-11/17/97 records to the Second Buroker Declaration it filed in support of its Motion for Summary Judgment. Lahr asserts that he was previously unaware of these records. On September 13, 2005, Lahr submitted a new FOIA request to the CIA for the post-11/17/97 records. The CIA failed to respond within twenty working days.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 15(a), "leave to amend shall be freely given when justice so requires." This rule "is to be applied with extreme liberality." *Morongo Band of Mission Indians v.* Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). In considering whether to grant leave to amend, the Court is to consider the following factors: (1) undue delay, (2) bad faith, (3) futility of amendment, (4) prejudice to the opposing party, and (5) whether leave to amend has previously been granted. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir.), *cert. denied* 502 U.S. 956, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991); *Sisseton-Wahpeton Sioux Tribe v. U.S.*, 90 F.3d 351, 356 (9th Cir.), *cert. denied* 117 S.Ct. 516, 136 L.Ed.2d 405 (1996). The party opposing the motion bears the burden of showing why amendment should not be granted. *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 666-67 (Fed. Cir. 1986) (applying Ninth Circuit law). "The crucial factor is not length of delay, but prejudice." *Pend Oreille Public Utility Dist. No. 1*, 926 F.2d at 1511. "Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in

bad faith, it is an abuse of discretion to deny leave to amend." *Id.*

III. DISCUSSION

Defendants make two arguments in opposition: (1) that Lahr failed to meet and confer before filing this motion to amend in violation of Local Rule 7-3 and (2) that Lahr's motion should be denied because the matters that would be added to this action (*i.e.*, the addition of the NSA as a defendant and the FOIA claim regarding the post-11/17/97 records) are superfluous in light of certain assurances that Defendants have already provided. Neither argument is persuasive.

First, the record shows that counsel for Plaintiff, John H. Clarke, emailed counsel for Defendants on October 23, 2005, suggesting that the parties submit a joint stipulation that Lahr's earlier FOIA requests encompassed the post-11/17/97 records. In that email, Clarke states: "If you do not agree to the proposed stipulation (or rewording it if you prefer), kindly treat this email as the initiation of discussions under L.R. 7-3 precedent to filing a motion for leave to amend the complaint to include responsive records generated after the public release of the CIA-produced video animation." *See* Clarke Reply Decl., Exh. A. Defendants refused to stipulate. Accordingly, Clarke's email constituted the initiation of discussions under Local Rule 7-3.

Second, Defendants have *not* provided adequate assurances to Lahr that his earlier FOIA requests encompassed post-11/17/97 records. Counsel for Defendants, David M. Glass, did send Clarke an email stating: "I am writing to confirm that the CIA will release any portion of those records that it is found to have withheld without justification by the final court to address the issue in this action." This email, however, does not constitute adequate assurance. It does not specifically address whether the CIA will release *post-11/17/97* records. Moreover, that Defendants (1) refused to accept Clarke's proposed joint stipulation regarding the post-11/17/97 records and (2) opposed the present motion to amend, indicates that Defendants are not prepared to be bound, in writing, to what they in their opposition papers claim to have already promised. Furthermore, even assuming Defendants' email would somehow be binding as to post-11/17/97 records, it is unclear how Defendants' "promise" therein renders Lahr's claim against the NSA unnecessary. Indeed, it is not even clear whether the NSA is withholding a single record—*i.e.*, "Item #83," *See* Mot., Ex. B.—or additional, non-CIA records that would also be responsive to Lahr's FOIA request. Defendants contend that

Lahr's prior requests include not only their own "zoom-climb" records, but those of the NSA as well. Yet the NSA is not presently a party to this action. This Court would not have jurisdiction over any NSA-generated records unless Lahr is allowed to add the NSA as a defendant.

Finally, Defendants have not argued, let alone demonstrated, that Lahr has unduly delayed filing this motion to amend, that he has acted in bad faith, that his proposed claim against the NSA is futile, or that Defendants will suffer prejudice should the motion be granted.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's motion for leave to amend.[2] Plaintiff's "Proposed Second Amended Complaint" is deemed to have been filed with the Court.

Initials of Preparer _____

[2]Docket No. 75.