

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5082**September Term, 2019****1:19-cv-00465-RCL****Filed On: August 7, 2020**

Russell DeWayne Lukas,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Henderson, Tatel, and Katsas, Circuit Judges**ORDER**

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Lukas first claimed that the Federal Communications Commission ("FCC") failed to timely act on his application for review of the FCC's Wireline Competition Bureau's partial rejection of his request under the Freedom of Information Act ("FOIA"). This claim sought equitable relief for a procedural violation of FOIA, a claim cognizable under Payne Enters., Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988), and its progeny. Such a claim is available even when a FOIA lawsuit seeking the release of documents would otherwise be moot. Id. at 491. However, Lukas did not adequately plead such a claim: Lukas did not allege that the FCC had a "policy or practice" of failing to timely act on applications for review in FOIA cases. See id.

Lukas next sought a declaration that the Universal Service Administrative Company ("USAC") is not an agency for purposes of FOIA and that the documents he sought from USAC were therefore not agency records, but he has forfeited any challenge to the district court's dismissal of this claim by failing to address it in his opposition to the FCC's motion for summary affirmance. See, e.g., United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

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Finally, Lukas challenged the FCC's invocation of FOIA Exemption 4 to justify the withholding of certain information. The district court granted the FCC summary judgment on this claim, concluding that Lukas failed to overcome the presumption of good faith that attached to the FCC's declaration concerning its invocation of Exemption 4. See, e.g., SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Lukas does not challenge this conclusion. He instead contends that the district court was required first to answer questions he posed: whether USAC is an agency for FOIA purposes and whether the records he sought were agency records. If they are, that leaves us with the district court's unchallenged conclusion that Lukas failed to overcome the presumption of good faith. And if they are not, Lukas has pleaded himself out of court—he would then not be entitled to seek these documents at all under FOIA. See Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 646 F.3d 924, 926 (D.C. Cir. 2011). Either way, then, this claim fails.

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. Rule 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Manuel J. Castro

Deputy Clerk