

UNITED STATES DISTRICT COURT
For the Northern District of Illinois –
Eastern Division

Jacqueline Stevens

Plaintiff

vs.

United States Department of Health and
Human Services et al.

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Civil Case No.: 22-cv-05072
Judge: Honorable M. Kennelly

PLAINTIFF’S SUPPLEMENTAL BRIEFING IN RE: ICE’S PROPOSED ‘500-PAGE-A-MONTH-PROCESSING’ PROPOSAL

As ordered by the Court, Plaintiff hereby submits this supplemental brief in opposition to Defendant ICE’s ‘500 pages-a-month-processing’ proposal (hereinafter ‘500 pages proposal’) to address (1) the Court’s authority to impose a production schedule different than the one proposed by ICE and (2) the propriety of applying 500-page-per-month processing in this matter, as follows:

I. ICE ‘500 PAGES PROPOSAL’ VIOLATES THE TEXT AND SPIRIT OF FOIA.

A. The 500 pages proposal reflects a pattern and practice of Immigration and Customs Enforcement deliberately misrepresenting its FOIA operation budgetary needs in requests of Congress, thus unlawfully obstructing the effective operation of 5 U.S.C. § 552.

When Congress extended the original ten-day FOIA deadline to twenty business days, it did so by insisting the 20-day limit should have teeth, recognizing that “[l]ong delays in access can mean no access at all,” and urging agencies to “respond to requests in a timely manner.” *See* H. REP. NO. 104-795, at 16-23, as reprinted in 1996 U.S.C.C.A.N. 3459, 3466. The complex and detailed Congressional pronouncements pertaining to proper and timely processing of FOIA requests do not allow agencies to disregard their statutory obligations and violate the Act --routinely and intentionally- claiming lack of resources or increased backlogs. Rather, it is incumbent on agencies to

“inform Congress of the additional resources needed to fully comply with the FOIA.” H. REP. NO. 104-795, as reprinted in 1996 U.S.C.C.A.N. 3448, 3472.1.

Despite the unambiguous language of the Act, since approximately 2010 Defendant ICE has taken the position that 5 U.S.C. § 552(a)(6)(A)(i) does not impose an affirmative obligation or require the agency to make determinations on FOIA requests within the 20-business day statutory timeframe. This position permeates ICE FOIA standard operating procedures, its written internal rules, and its uniform practice pertaining to responding to FOIA requests and retrieving and processing of responsive documents.¹

ICE persistently submits budget requests with substantial understatements of the costs for technologies and staff necessary to meet its statutory FOIA obligations, unlike ICE funding requests for programs that require similar information technology and staffing, such as data mining and digital record analysis for surveillance purposes.² ICE staffing and expenditures reported in annual DHS

1 ICE’s representative Catrina Pavlik-Keenan acknowledged persistent and substantial backlogs in 2018: she averred a “dramatic increase in the ICE FOIA Office’s workload over the course of three years” due to the “referrals received from USCIS.” (Case 1:18-cv-000302, August 6, 2018, ECF # 25, Pavlik Decl ¶10.) She also described known staffing shortages to explain why the “ICE FOIA Office typically cannot process more than 500 pages per month for each case.” *Id.* ¶15. Despite the known backlog, in its budget request for FY2017 ICE included no request for increase in funding for FOIA operations, “Congressional Budget Justification FY 2017—Volume II,” pt ii, p. 10, https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf. Five years later nothing has changed.

2 Of the \$6.7 billion Congress appropriated for ICE in 2017, ICE spent just \$6.45 million on FOIA operations and proposed an increase to just \$9.627 million for FY 2018 and FY 2019. Department of Homeland Security, “U.S. Immigration and Customs Enforcement, Budget Overview, Congressional Justification, FY2019,” p. 24, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>. Over the last several years, ICE has continued to fund its FOIA office at .01% of its total expenditures, even though this level is demonstrably inconsistent with Congress’s specific mandates on the production of public records within specific deadlines of days, not years. ICE does not break out its FOIA request in its FY 2018 budget, but does note that FOIA requests are likely to “triple from 2014 levels.” However, FY2018 data published in the FY2019 request indicates ICE requested an increase of just one-third, not 300%. ICE does not break out its request for FOIA funds in its FY2021 budget. In its budget for FY2020, ICE notes the increase in FOIA requests but does not

FOIA annual reports show ICE in FY2019 had 60.75 full-time employees or equivalents (“FTEs”), and then cut the staffing to 57 in FY2020.³ For FY2021, the most recent year on which the DHS has produced data, ICE had 57.7 FTEs.⁴ These annual reports on ICE’s FOIA operations are produced pursuant to 5 U.S.C. (e)(1), including 5 U.S.C. (e)(1)(O) (“the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.”). Congress thus insured that courts would have available data to evaluate the merits of agencies claiming special circumstances and unforeseen budget shortfalls. The record here clearly shows that the only reason ICE lacks resources for complying with the FOIA statute is the agency’s intent in avoiding compliance.

B. The Court has authority and should order that ICE complete the “determination” mandated by FOIA.

request any increase in its budget to address these. Department of Homeland Security, “U.S. Immigration and Customs Enforcement, Budget Overview, Congressional Justification, FY2020,” ICE-O&S -22, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf. In its fy2021 budget request, ICE indicates no increase in requests for expenditures for its FOIA operations, Department of Homeland Security, “U.S. Immigration and Customs Enforcement, Budget Overview, Congressional Justification, FY2021.” https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement_0.pdf. And the FY2022 budget request includes a small increase of \$782,000. Department of Homeland Security, “U.S. Immigration and Customs Enforcement, Budget Overview, Congressional Justification, FY2022,” ICE–O&S–12, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf. The most recently published DHS report on component FOIA processing shows that ICE had a backlog of 2,180 “simple” requests and 1,737 “complex” requests, granted requests for expedited processing in just 91 cases, and met the statutory deadline for these in no more than six. (ICE breaks out the response days by “1-20” and not the statutory ten days). Ibid, pp. 25, 24.

³ DHS 2019 Freedom of Information Act Report to the Attorney General and the Director of the Office of Government Information Services. February 2020 at https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf

⁴ DHS 2021 Freedom of Information Act Report to the Attorney General and the Director of the Office of Government Information Services. February 2022. <https://www.dhs.gov/sites/default/files/2022-03/FY%2021%20DHS%20Annual%20FOIA%20Report.pdf>.

It is undisputed that Prof. Stevens submitted a FOIA/PA request to ICE seeking the production of Pascal Charpentier's "A-file" as an expedited request. Once a person makes a FOIA request, "an agency usually has 20 working days to make a 'determination'" as to the request. *Citizens for Resp. and Ethics in Washington v. Fed. Election Commn.*, 711 F.3d 180, 189 (D.C. Cir. 2013) ("CREW") (citing 5 USC § 552(a)(6)(A)(i)). "[I]n order to make [this] 'determination' ... the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW*, 711 F.3d at 188. Here upon receiving Plaintiff's FOIA/PA request Defendant ICE did not rule on the request to expedite and did not make the mandated "determination". These undisputed facts would entitle Plaintiff to a judgment in her favor on this issue: "Where, as here, the agency has not yet issued a determination and the statutory deadline has passed, it has violated FOIA." *American Oversight v. US Dep't of State*, 414 F. Supp. 3d 182, 186 (D.D.C. 2019).

To moot the Preliminary Injunction requested, Defendant now states that only on 2 November 2022 –37 days after the commencement of this litigation-- did ICE task three of its components to gather and review documents. (12/29/22 Pineiro Decl ¶12). HSI, OPLA, and ERO completed the "search" on 10 November 2022. (*Id.* ¶¶13-15) To this day ICE has not, however, "determined" nor "communicated" to Plaintiff or this Court "the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents." ICE provides no explanation for its refusal to comply with the scope and timing of the 'determination' mandated by the Act, nor a rationale for triggering an extension for "unusual circumstances" for any of Plaintiff's requests.

In FOIA Congress specifically provided that "[an agency can extend that 20-working-day timeline to 30 working days if unusual circumstances delay the agency's ability to search for, collect,

examine, and consult about the responsive documents." *CREW*, 711 F.3d at 188. (citing 5 U.S.C. § 552(a)(6)(B)). ICE offers no support as to why it is entitled to postpone the "determination" process from the "unusual circumstances" 30 days period to 2+ years. Nor does it provide authority that the Court has jurisdiction to extend the "determination" period past the 30-day timeline provided by the Act.

C. The Court has authority to compel that ICE produce documents "promptly."

Plaintiff readily acknowledges that "a 'determination' does not require actual *production* of the records to the requester at the exact same time that the 'determination' is communicated to the requester. Under the statutory scheme, a distinction exists between a "determination" and subsequent production." *CREW*, 711 F.3d at 188. Once a determination is made, "FOIA requires that the agency make the records 'promptly available.'" *Id.* Accordingly, the agency has "some additional time to physically redact, duplicate, or assemble for production the documents that it has already gathered and decided to produce." *Id.* at 189. Exactly how much time is facts and context dependent, but the DC Circuit has indicated that it would "typically" be "within days or a few weeks of a 'determination,' not months or years." *Id.*; *see also Seavey v. Dep't of Justice*, 266 F. Supp. 3d 241, 244 (D.D.C. 2017); *see also* 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i).

If, as here, the agency fails to make the determination within the statutory timeframe (within 20 working days, or 30 working days in unusual circumstances), the requestor may sue to enforce compliance with the statute. *See* 5 USC § 552(a) (6)(C); *CREW*, 711 F.3d at 188-89; *Daily Caller v. US Dept. of State*, 152 F. Supp. 3d 1, 10 (DDC 2015) (failure to meet the statutory deadline to make a determination "serves primarily as a means to obtain immediate judicial supervision over an agency's response to an outstanding FOIA request."). It is well settled that the Court then has the authority to oversee and supervise the agency's progress in responding to the request. *Rubman v. US Citizenship*

& *Immigr. Serv.*, 800 F.3d 381, 386 n.1 (7th Cir. 2015); *CREW*, 711 F.3d at 189; *Clemente v. Fed. Bureau of investigation*, 71 F. Supp. 3d 262, 269 (DDC 2014) (a court "may use its equitable powers to require the agency to process documents according to a court-imposed timeline."); *Elec. Priv. Info. Ctr. v. Dept. of Justice*, 416 F. Supp. 2d 30, 37-38 (DDC 2006) ("FOIA, as amended, envisions the courts playing an important role in guaranteeing that agencies comply with its terms."); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

This Court, thus, "may use its equitable powers to require the agency to process documents according to a court-imposed timeline." *Clemente*, 71 F. Supp. 3d at 269; *Forum v. U.S. Dep't of Homeland Sec.*, 297 F. Supp. 3d 183, 186 (D.D.C. 2018). In devising a remedy for violation of the Act the Court must be guided by the fact that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses." *Id.*

D. Once FOIA litigation begins, an agency may further extend its response time only by means of the 'exceptional circumstances' safety valve contained 5 USC § 552(a)(6)(C)(i)

Congress specified in 5 U.S.C. § 552(a)(6)(C)(i) as follows:

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.

Defendant ICE has not invoked the safety valve provision, *Appleton v. Food Drug Admin.*, 254 F. Supp.2d 6, 8 (D. DC 2003), nor has requested an *Open America* stay, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *Elec. Frontier Found. v. Dep't of Justice*, 517 F. Supp.2d 111, 113 (D. DC 2007). Even if the Court is to consider the "500-page Proposal" as an implicit request for an *Open America* stay, ICE has failed to meet its burden to show both the existence of "exceptional circumstances" and that it has acted with due diligence.

The *Open America* court explained that the "exceptional circumstances" referred to in 5 USC § 552(a)(6)(C)(i) exist when an agency "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the [20 day] time limit of subsection (6)(A)[.]" *Id.* at 616. However, in the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), Congress limited the meaning of "exceptional circumstances" to exclude "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." *Ctr. for Pub. Integrity v. United States Dep't of State*, No. 05-2313, 2006 US Dist. LEXIS 22281, at *6 (D. D.C. April 24, 2006) (citing 5 USC § 552(a)(6)(C)(ii)). "It also has been recognized, based on the legislative history, that other circumstances in addition to FOIA request backlogs may be a basis for finding exceptional circumstances, including `resources being devoted to . . . the number of requests for records by courts or administrative tribunals.'" *Id.* at *6-7 (citing *Wilderness Soc'y*, 2005 US Dist. LEXIS 20042, at *21 which cited HR Rep. No. 104-795, at 24 (1996), reprinted in 1996 USCCAN 3448, 3467). Here, ICE asserts that it manages "161 active FOIA litigations as of the date of this declaration and of which approximately 65 have rolling productions", Pineiro Decl ¶6, but offers no details or even makes an assertion that it is making progress in reducing its backlog or that the 65 rolling litigation productions are "in excess of that anticipated by Congress." The Court cannot and should not absolve ICE from the burden imposed by Congress in the safety valve provision.

II. THE 500-PAGES PROPOSAL IS ARBITRARY AND CAPRICIOUS.

First, ICE's administrative efficiency arguments and justifications are without merit. In the name of reducing its own FOIA litigation problem, ICE's self-professed 500-page processing per month approach only ensures that requesters who are not willing to roll with ICE's interminable

FOIA delays and seek judicial review, are penalized for exercising the exact judicial remedy Congress fashioned to combat agency's delays and unreasonable withholding of responsive documents. Moreover, it unreasonably and capriciously determines the pages it be to released each month. For instance, in a different FOIA case, ICE recently stated it would be releasing 1,800 pages/month.⁵ Such decisions, all rooted in the deliberate underfunding of FOIA operations, penalize those requestors who seek more than 500 pages of records. A requester like professor Stevens must wait at least a year for every 6,000 potentially responsive "records", and if the records requested end up more voluminous than anticipated, for example – many thousands of documents, she may have to wait for a decade. ICE does not claim that retrieving the single A-File that the agency must maintain by statute for every non-citizen, is truly a burdensome obligation on the agency; rather Defendant desires a court-sanctioned practice of only processing 500 pages per month for each FOIA litigation as an administrative convenience. Such an arbitrary approach and reading of the text and spirit of the Act is absurd. Because ICE prefers not to be sued for non-compliance with its FOIA obligations, Professor Stevens must wait two more years to just receive the documents and then engage in a few more years of litigation to challenge the excessive and unlawful withholding of the documents she needs to complete her work.

Third, Defendant does not even acknowledge that the *Charpentier* request was made as an expedited request. Under FOIA, expediting a request requires the agency to process the request not "promptly" (as with normal request in which a determination is made) but "as soon as practicable." 5 U.S.C. § 552 (a)(6)(E)(iii). ICE does not explain how processing Plaintiff's request faster than other requests in litigation that are not filed as an expedited request is not practicable. Yet, It is the agency's

⁵ *Owen, Al Otro Lado, Mirmanian v. U.S. Immigration and Customs Enforcement*, case no. 22-0550-DSF-AFM, ECF # 80, p. 7, quoting ICE Opp'n filing.

burden to show that production on the schedule requested by the plaintiff is "truly not practicable." *Elec. Priv. Info. Ctr. v. Dep't of Just.*, 416 F.Supp.2d at 39; *Project S. v. United States Immigration & Customs Enf't*, 21-CV-8440 (ALC) (BCM), at *2 (S.D.N.Y. July 7, 2022)

Fourth, ICE also fails to explain how processing FOIA litigation requests --as opposed to those that do not lead to litigation -- at a faster pace would "inevitably hinder ICE FOIA's ability to process records for production in other matters." Although ICE claims that its FOIA litigation unit has to deal with 165 litigations and 65 "rolling productions" it does not provide any information as to the average number of documents—as opposed to records -- that must be processed per each of these 65 rolling production requests, the total number of pages in the pending litigations that have yet to be processed, or that processing a single "expedited" request at a faster rate would materially slow down the processing of the other requests in litigation. This is particularly relevant here: the Charpentier request is for Mr. Charpentier's own A-File rather than for some sensitive information regarding third parties, potential trade secrets, or matters shared with the government in confidence. *Elec. Priv. Info. Ctr.*, 933 F. Supp. 2d at 48-49 (noting that the amount of classified information is relevant to determining the pace at which the agency should proceed).

Fifth, ICE may argue that courts, including the 7th Circuit, have affirmed the 500-page per month policy implemented by the FBI. *White v. Fed. Bureau of Investigation*, No. 20-1798, 2021 WL 1118087 (7th Cir. Mar. 24, 2021). In *White* the 7th Circuit affirmed an order upholding the FBI regulation and published practice of processing only 500 pages per month for large requests observing that the "ultimate likelihood of success is far too low. He challenges only the denial of his request that the FBI release 55,000 pages of documents immediately." *Id.* The Court observed that under § 552(a)(6)(D)(1), agencies may develop regulations "for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests." *Id.* And the

Department of Justice has done so, allowing agencies such as the FBI to "designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request." 28 C.F.R. § 16.5(b). According to said regulation, the FBI has established a formal policy for requests exceeding 500 pages of documents is one of those contemplated tracks that allows for measured production of large FOIA requests. *Id.* at *4. No such formal policy has been implemented by ICE: by its own declaration, the 500-pages per month processing applies only to cases in litigation. The *White* court ruled that "the district court permissibly ruled that the FBI's application of its policy did not warrant an injunction. The policy does not prohibit all requests for immediate release of large amounts of documents. Rather, FOIA, 5 USC § 552(a)(6)(E), and the DOJ's regulations, 28 CFR § 16.5(e), allow for expedited production if the requester's safety is in danger, the public's need to know about governmental activity is urgent, or widespread media interest raises questions about the government's integrity. *Id.* at 16.5(e)." *Id.* at *4-5. The Court thus specifically distinguished the very type of request involved in this case. That in *White* "the district court reasonably concluded that the FBI was not improperly withholding documents by following its statutorily permissible policy and producing documents at 500 pages per month", this holding does not sanction every agency to adopt a 500-page processing rule. Nor does *White* or any other court to Plaintiff's counsel's knowledge have sanctioned penalizing requesters who elect to avail themselves of the judicial review and supervision afforded by the Act.

Accordingly, the Court should order ICE to process her request as soon as practicable which by definition must be at a significantly faster rate than the 500 pages per month the agency applies to all other non-expedited requests in litigation. In the alternative, the Court should order ICE to produce, not just process 500 pages per month, as the *White* court held was permissible.

Respectfully Submitted by

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CERTIFICATE OF SERVICE

This pleading was served on all parties entitled to notice by the CM/ECF filing system on 1-17-2023.

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