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

Jacqueline Stevens	}	
	}	
Plaintiff	}	
	}	Civil Case No.: 22-cv-05072
vs.	}	Judge: Honorable M. Kennelly
	}	
United States Department of Health and Human Services et al.	}	

PLAINTIFF'S OPPOSITION TO EOIR'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNTS I & III

Plaintiff Jacqueline Stevens, by her counsel of record, hereby opposes Defendant EOIR's Motion for Summary Judgment and separately moves for summary judgment pursuant to Fed. R. Civ. P. 56 for the reasons stated in its combined summary judgment response and memorandum in support of its cross-motion for summary judgment, the response to Defendant EOIR's LR 56.1 Statement, and Plaintiff's LR 56.1 Statement of Undisputed Material Facts, which were filed contemporaneously herewith.

Respectfully Submitted by

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is about unlawful agency action impeding a professional researcher's access to agency records that shed light on egregious violations of the rights of individuals who are United States citizens at birth or have derived United States citizenship but who are nevertheless treated as "aliens" and detained and deported without due process and a meaningful opportunity to establish their United States citizenship claims for lack of access to documents and records exclusively within the custody and control of the federal government. Through the Freedom of Information Act ("FOIA"), Congress sought "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Friends of Animals v. Bernhard*t, 15 F. 4th 1254, 1260 (10th Cir. 2021) (citing *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978)). The very purpose of FOIA is to "allow citizens to learn what their government is doing and how it is being done*." Nuclear Watch New Mexico v. U.S. Dep't of Energy, Nat'l Nuclear Sec. Admin.,* 2007 WL 9729204 at *2 (D.N.M. Sept. 19, 2007). Yet Defendants implement FOIA by arbitrarily and capriciously disregarding Plaintiff's requests and routinely refuse to comply with the time frames established by Congress for processing requests for records. Unless this Court exercises its statutory and/or inherent authority to rein in this administrative overreach, the Defendants will continue to disregard FOIA as enacted and in the process delay and/or avoid oversight and accountability. *Electronic Priv. Info. v. Department of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006) (*EPIC*).

II. STANDARD FOR ADJUDICATION UNDER RULE 56.

To prevail on a summary judgment motion, the moving party must demonstrate that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

FOIA lawsuits are typically resolved on cross-motions for summary judgment. *Reliant Energy Power Generation v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). Although a FOIA case involves agency action, no deference is due to agency reasoning or decision-making; rather the Court reviews agency's handling of a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). The FOIA was meant to be a "disclosure statute," not a "withholding statute." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011). Thus, in evaluating any FOIA summary judgment motion, "two guiding principles apply. First, FOIA is to be broadly construed in favor of disclosure. Second, its exemptions are to be narrowly circumscribed*." Trentadue v. Integrity Comm*., 501 F.3d 1215, 1226 (10th Cir. 2007). In other words, "disclosure, not secrecy, is [FOIA's] dominant objective." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted); *Dept. of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) ("The FOIA's "basic purpose reflect[s] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." (quoting S. Rep. No. 89-813, at 3 (1965)). The FOIA includes exemptions from disclosure, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361, or that the exemptions "must be 'narrowly construed,'" *Milner, 131 S. Ct. at 1262,* citing *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982); *see also EPIC v. Dept. of Homeland Security*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005). The FOIA was meant to be a "disclosure statute," not a "withholding statute." *Milner*, 131 S. Ct. at 1262.

III. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE FIRST COUNT OF THE COMPLAINT AGAINST DEFENDANTS DHS, ICE, CBP, HHS, AND EOIR.

"It is well-settled that the "issues on summary judgment are framed by the Complaint." *Rodriguez v. Countrywide Homes,* 668 F.Supp.2d 1239 (E.D.Cal.2009); *Cole v. CRST, Inc.*, 150 F. Supp. 3d 1163, 1169 (C.D. Cal. 2015). Here, Plaintiff's first cause of action pleads Defendants' failure to act within the timeframe mandated by the Act. (ECF #1¶¶101-03).

The FOIA statute requires that an agency make a determination on a FOIA request within twenty business days unless the agency invokes an additional ten-day extension for requests involving "unusual circumstances." 5 U.S.C. §§ 552(a)(6)(A)(i). This time limitation may be extended to 30

days in "unusual circumstances" upon written notice to the requester. 5 U.S.C. § 552a(a)(6)(B)(i). If the agency must "search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request," or the request involves a "need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request" these are unusual circumstances to justify an extension of time. 5 U.S.C. § 552(a)(6)(B)(iii); *Allen v. Fed. Bureau of Prisons*, 263 F. Supp. 3d 236, 241 (D.D.C. 2017). Thus, by factoring in both the possible involvement of multiple components and the volume of potentially responsive records in allowing only additional 10 days extension, the Act clearly forecloses agency reliance on such factors to delay making the determination mandated by the Act beyond the statutory deadlines. *Id*.

"[I]n order to make a 'determination' and thereby trigger the administrative exhaustion requirement, 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 I*, 711 F.3d at 188. Here it is undisputed that Defendant ICE, DHS, CBP, HHS, and EOIR failed to make the required "determination" with the timeframe prescribed by the statute and thus have violated a mandatory duty imposed on them by FOIA. (Plaintiff's LR56.1 Statement, Facts # 7, 10, 13, 16, 18, 21, 24, 26, 28, 30, 32). Courts have found 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.'" *Clemente v. FBI*, 71 F.Supp.3d 262, 268-69 (D.D.C. 2006) (quoting *Elec. Privacy Info. Ctr. v. DOJ*, 416 F.Supp.2d 30, 35 (D.D.C. 2006)); *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)); *Seavey v. Dep't of Justice*, 266 F. Supp. 3d 241, 245-46 (D.D.C. 2017); *Villanueva v. United States Dep't of Justice*, 19-23452-CIV-CANN/OSULLIVAN, at *6-7 (S.D. Fla. Dec. 13, 2021). As shown by Plaintiff's Statement of Undisputed Facts, Facts # 7, 10, 13, 16, 18, 21, 24, 26, 28, 30, 32 there is no genuine issue of material fact as to whether each Defendant failed to timely make a determination on Plaintiff's 10 FOIA requests, Professor Stevens is entitled to summary judgment.

IV. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE SECOND COUNT OF THE COMPLAINT AGAINST DEFENDANTS DHS, ICE, CBP, HHS, AND EOIR.

Because Defendants have failed to make the requisite determination required by FOIA Defendant are withholding the records requested by Plaintiff in violation of the Statute. Since there is no genuine issue of material fact as to whether each Defendant failed to timely make a determination on Plaintiff's 10 FOIA requests, Pltf' LR 56.1 Statement, Facts 7, 10, 13, 16, 18, 21, 24, 26, 28, 30, 32, Professor Stevens is entitled to summary judgment on Count II: "the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." (5 U.S.C. § 552(a)(4)(B)).

Defendants may argue that complying with the statutory periods is not practicable and that they are acting reasonably. The record refutes such assertions. For example, requests 2020-00435-FOIA-OS and 2020-HQFO-00215 remain pending since December 2019; seven months after the Complaint was filed HHS, DHS, and CBP have not produced the records. Under U.S.C. § 552(a)(6)(C)(i), after the suit is filed, an agency may obtain a stay of proceedings from the court in order to gain more time to complete its processing. Such stays, however, may only be granted if the agency can show that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." *Id.* § 552(a)(6)(C)(i) — (iii); *Open America v. Watergate Special Prosecution Force,* 547 F.2d 605, 610-16 (D.C. Cir. 1976)' *Seavey*, 266 F.Supp.3d at 244 ("The Court then has the authority to oversee and supervise the agency's progress in responding to the request."). "[O]nce in court, an agency may further extend its response time by means of the 'exceptional circumstances' safety valve. That provision says that if exceptional circumstances exist and an agency 'is exercising due diligence in responding to the request,' a court may grant the agency 'additional time to *complete its review* of the records.'" *CREW I*, 711 F.3d at 188 (quoting 5 U.S.C. § 552 (a)(6)(C)(i) (emphasis in original). "This Court 'may use its equitable powers to require the agency to process documents according to a time-imposed timeline.'" *Id*. (quoting *Clemente*, 71. F.Supp.3d at 269). Here seven months into the litigation, Defendants have not requested a stay yet continue to withhold the responsive records. The Court should find that Defendants have knowingly waived the

right to seek a "safety valve" stay and order Defendants to comply with the statute and produce the records within 60 days or justify the need for a longer production period. *See United States v. Irby*, 558 F.3d 651, 655 (7th Cir. 2009) (explaining the distinction between waiver and forfeiture); *Nuclear Watch New Mexico*, 2007 WL 9729204 at *3 ("A bona fide request for production of documents under FOIA must be honored in a timely fashion or the purpose of the Act is vitiated.").

Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *Cigar Ass'n of Am. v. FDA*, 436 F. Supp. 3d 70, 84 (D.D.C. 2020). Here, Defendants have failed to and cannot provide the requisite justification for their refusal to process properly filed FOIA requests as mandated by FOIA.

V. EOIR HAS FAILED TO SHOW THAT IT CONDUCTED A REASONABLE SEARCH IN RESPONSE TO PLAINTIFF'S REQUESTS.

Defendant EOIR asserts in a conclusory fashion that "it was reasonable for EOIR to interpret Stevens's request (sic) as being limited to the records of proceedings for the individuals at issue." (Def. Motion at 6-7). *First*, each of the requests filed with EOIR identifies the records requested as follows:

> This request includes but is not limited to all memoranda, notes, reports, email messages, and all other system records or communications associated with or pertaining to [individual] generated or received by EOIR. *This also includes the record of proceedings for his immigration hearing(s), as well as any digital or audio recordings of prior hearing(s).*

Plaintiff, thus, made clear she was seeking all records the agency had "generated" or had "received" regarding a specifically named non-citizen who had been placed in removal proceedings under section 1229a of the Immigration and Nationality Act. Defendant provides no reason why it was reasonable to ignore the request for "memoranda, notes, reports, email messages, and all other system records or communications" the agency made or received with respect to the subject of each request. Of note: EOIR comprises the immigration court and the Board of Immigration Appeals and its sole function is to preside over and decide (1) removability; (2) applications for relief from removal; and (3) administrative appeals. *See* 8 U.S.C. 1229a.

Second, the term "record of proceedings" has a well-defined regulatory meaning. 8 C.F.R. § 1240.9, titled "Contents of record" provides:

> The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

Thus, the record of proceedings means only the official court file. *See Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1156 (C.D. Cal. 2018) (explaining that the "A–File", is "a comprehensive immigration file maintained by the Department of Homeland Security, and the Record of Proceedings, the immigration court file maintained by the Executive Office for Immigration Review."). What Plaintiff requested was not only the official court files but all non-privileged internal memos, notes, emails, scheduling notes, ECAS, CASE records, etc. that the agency maintains in addition and outside of the official court file.

Equally unveiling and disingenuous is the suggestion that performing a search beyond the record of proceedings may involve many immigration courts. Not so. EOIR maintain its records by Alien number which is a unique number assigned to a non-citizen when they first come into contact with an immigration agency either through apprehension, entry, immigrant visa application, or application for immigration benefit before USCIS.[1] The A-number follows the individual throughout their journey within the immigration bureaucracy. Pursuant to 8 C.F.R. § 1003.11 a single court has administrative control over the ROP:

> An administrative control Immigration Court is one that creates and maintains Records of Proceedings for Immigration Courts within an assigned geographical area. All documents and correspondence pertaining to a Record of Proceedings shall be filed with the Immigration Court having administrative control over that Record of Proceeding and shall not be filed with any other Immigration Court. A list of the administrative control Immigration Courts with

[1] On occasion, a second A number is assigned but it will correspond to an alias.

> their assigned geographical areas will be made available to the public at any Immigration Court.

Moreover, a non-citizen cannot choose the immigration court in which their case is pending; the decision to initiate removal proceeding is within the DHS exclusive authority; the Notice to Appear is filed based on the residence of the non-citizen or the place of his custodial detention; and venue could be changed only upon a motion by the non-citizen or ICE at which time the entire Record of Proceeding is transferred to the venued court. *See Juarez v. Holder,* 599 F.3d 560, 566 (7th Cir.2010)("[T]he decision when to initiate removal proceedings is committed to the discretion of immigration authorities." (citing *Reno v. Am.-Arab Anti—Discrimination Comm.,* 525 U.S. 471, 489, (1999)); *Campos v. Nail*, 43 F.3d 1285, 1289 (9th Cir. 1994) ("Although motions to change venue are left to the sound discretion of the immigration judge, an arbitrary refusal to change venue can be a violation of the statutory right to a reasonable opportunity to attend and present evidence at the deportation hearing."). Accordingly, a search of emails, case notes, scheduling and case administration system could easily be done by A-number and/or the name of the non-citizen. The agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested," but, at the same time, it need not "search every record system." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

But EOIR's motion for summary judgment has an additional flaw. Agencies have "an obligation under FOIA to conduct an adequate search for responsive records," *Edelman v. SEC*, 172 F. Supp. 3d 133, 144 (D.D.C. 2016), and "[a]n inadequate search for records constitutes an improper withholding" under the statute, *Schoenman v. FBI*, 764 F. Supp. 2d 40, 45 (D.D.C. 2011). Here, EOIR admits that it did not perform a search for responsive records; instead, it just requested the official record of proceedings that each of the responsible court must maintain in the ordinary course of conducting removal proceedings. "The adequacy of an agency's search is measured by a standard of reasonableness and is dependent upon the circumstances of the case." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (internal quotation marks and citations omitted). An agency "fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search

was reasonably calculated to uncover all relevant documents." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (citations and internal quotation marks omitted). A search need not be exhaustive. *See Miller v. U.S. Dep't of State,* 779 F.2d 1378, 1383 (8th Cir. 1995). "The issue in a FOIA case is not whether the [agency's] searches uncovered responsive documents, but rather whether the searches were reasonable." *Moore v. Aspin*, 916 F.Supp. 32, 35 (D.D.C. 1996) (citations omitted). Although an agency need not deploy every conceivable search term it must use terms reasonably calculated to locate responsive records. *See Agility Public Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015) ("Where the search terms are reasonably calculated to lead to responsive documents, the Court should not 'micro manage' the agency's search."); *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009) ("[Agencies have] discretion in crafting lists of search terms that they believe[] to be reasonably tailored to uncover documents responsive to the FOIA request."). But here, the agency declaration does not identify any search term used or whether it even attempted to search any of its systems of record beyond locating the administrative control court and requesting the official court file (i.e., the Record of Proceedings).

To prevail on summary judgment, the agency must submit affidavits that "denote which files were searched,' [and] by whom those files were searched, and [that] reflect a 'systematic approach to document location." *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 144 (D.D.C. 2015) (quoting *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)); *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006); *Oglesby*, 920 F.2d at 68. Where as here, "a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Valencia-Lucena*, 180 F.3d at 326 (citation omitted).

Not only did EOIR not search for emails, notes, and correspondence pertaining to the subject of each FOIA request, it overlooked that Plaintiff sought "all documents generated" by EOIR. The requests can only reasonably be construed to encompass FOIA processing records, and, as other courts have recognized, FOIA is applicable to the FOIA process itself. *See Shapiro v. U.S. Dep't of*

Justice, 153 F. Supp. 3d 253, 276 (D.D.C. 2016). Because EOIR offers no meaningful explanation for why it did not search its FOIA Branch for records "related to responding to" Plaintiff's FOIA requests, the EOIR is not entitled to summary judgment. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) ("An agency . . . must revise its assessment of what is [a] "reasonable" [search] in a particular case to account for leads that emerge during its inquiry.").

VI. EOIR HAS FAILED TO SHOW THAT SCREENSHOTS OR A SUBSTITUTE REPRESENT THE GENERATION OF NEW RECORDS.

Defendant EOIR asserts that "[P]roducing screenshots would require EOIR to create new records. EOIR LR.56.1, Fact no. 49 citing to Ex. A (Santiago Decl.) ¶ 50. Defendant's position is violative of the 1996 e-FOIA amendments to the ACT. Congress passed the "Electronic Freedom of Information Act Amendments of 1996" to address the subject of electronic records for the first time ever in the text of the statute. The Amendments also addressed the subject area of time limits and agency backlogs of FOIA requests, among other procedural provisions. Specifically, the Amendments imposed and introduced a new form of "records" for the mandated reading rooms: agencies are required to use electronic information technology to enhance the availability of their reading room records. The Act mandates that for any newly created reading room records (i.e., "records created on or after November 1, 1996"), an agency must make them available to the public by "electronic means." 5 U.S.C. § 552(a)(2). The amendments also contain several provisions that pertain to the processing of FOIA requests for records in electronic form. The 1996 Amendments define the term "record" as including "**any information** that would be an agency record subject to the requirements of [the FOIA] **when maintained by an agency in any format, including an electronic format.**" 5 U.S.C. § 552(f)(2) (emphasis added). Thus, information maintained in electronic forms is subject to FOIA and, thus must be read to include data or information maintained in computer software or electronic platforms.

Moreover, the Amendments addressed the form and format in which a requested record is disclosed under the FOIA, requiring that "an agency shall provide the record in any form or format

requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Additionally, this new subsection of the Act provides that an agency "shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of the [FOIA]." *Id.* Taken together, these two provisions require agencies to honor a requester's specified choice among existing forms of a requested record (assuming no exceptional difficulty in reproducing an existing record form) and to make "reasonable efforts" to disclose a record in a different form or format when that is requested and the record is "readily reproducible" in that new form or format. Defendant makes no showing that it cannot produce screenshots or produce the information contained in its electronic databases in another format such as a report or searchable pdf. Cf. 5 U.S.C. § 552(a)(3)(C). The 1996 Amendments promote electronic database searches and require agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests. Defendant does not and cannot show that the requested database searches and productions involve new programming and database-retrieval efforts or that producing screenshots would "significantly interfere" with its computer systems' operations.

CONCLUSION

For the reasons stated above, Plaintiff's motion should be granted and judgment entered in her favor on Counts I and III of the complaint.

Date: 6/8/2023

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CERTIFICATE OF SERVICE

This pleading was served on Defendants' counsel of record by the CM/ECF electronic filing and service system.

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