

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 RESPONSE TO EOIR’S LR 56.1
STATEMENT OF UNDISPUTED FACTS

Plaintiff, Jacqueline Stevens, submits the following Response to Defendants’ statement of material facts pursuant to Local Rule 56.1 of the United States District Court for the Northern District of Illinois.

Jurisdiction and Venue

1. This is an action brought under the Freedom of Information Act (FOIA), and the court has subject matter jurisdiction under 5 U.S.C. § 552 and 28 U.S.C. § 1331. Answer ¶ 3.

RESPONSE: Undisputed.

2. Venue is proper in this district because plaintiff Jacqueline Stevens resides in this district. Answer ¶ 4.

RESPONSE: Undisputed.

Parties

3. Plaintiff Jacqueline Stevens is a professor at Northwestern University. Answer ¶5.

RESPONSE: Undisputed.

4. Defendant Executive Office of Immigration Review, or EOIR, is a component of

the federal government from whom Stevens has sought information via FOIA. Answer ¶¶ 18, 75.

RESPONSE: Undisputed.

EOIR's FOIA Program

5. EOIR is responsible for conducting immigration court proceedings, appellate reviews, and administrative hearings. Ex. A (Santiago Decl.) ¶ 5.

RESPONSE: Undisputed.

6. EOIR consists of three components: (1) the Office of the Chief Immigration Judge, which is responsible for managing the numerous immigration courts throughout the United States, where immigration judges adjudicate individual cases; (2) the Board of Immigration Appeals, which primarily conducts appellate reviews of immigration judges' decisions; and (3) the Office of the Chief Administrative Hearing Officer, which adjudicates immigration-related employment cases. Ex. A (Santiago Decl.) ¶ 5.

RESPONSE: Undisputed.

7. When EOIR's FOIA office receives a request for a record of immigration proceedings, the office generally designates the request as a "Simple Request (Track 2)." Ex. A (Santiago Decl.) ¶ 7. (An "expedited" request for such a record would be designated as "Track 1" and would move to the front of the Track 2 queue. Id.)

RESPONSE: Undisputed to the extent that the factual assertions in Fact 7 are contained in the Santiago Declaration.

8. When EOIR's FOIA office receives a request for a record of immigration proceedings, office personnel identify the record's location by entering the "alien" registration number, or A number, the person at issue's name, or both into a database called "Case Access System for EOIR," also known as CASE. Ex. A (Santiago Decl.) ¶ 8.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 8 are contained in the Santiago Declaration. **Disputed** to the extent that the Declaration suggests that searching CASE satisfies the requirements imposed on the agency by FOIA. Defendant fails to describe the agency's general file system and the type of records maintained in the various databases.

Defendant's failure to describe each of their recordkeeping schemes and the specific databases in which information is stored makes it impossible to determine whether Defendant has searched the specific databases within each component likely to contain all responsive records. *Vietnam Veterans v. DHS*, 8 F. Supp. 3d 188, 221 (D. Conn. 2014); *Eberg v. Dep't of Def.*, 193 F. Supp. 3d 95, 109 (D. Conn. 2016)

9. CASE is the electronic case manager for EOIR's immigration courts, Board of Immigration Appeals, and staff. Ex. A (Santiago Decl.) ¶ 8.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 9 are contained in the Santiago Declaration.

10. Once located, if the record of proceedings is a hard-copy file, it must be individually ordered from: (1) one or more of the 15 National Archives Record Center's Federal Records Centers, which are long-term storage facilities located throughout the United States; (2) one of 72 immigration courts or immigration adjudication centers; or (3) EOIR headquarters, if the record resides with the Board of Immigration Appeals. Ex. A (Santiago Decl.) ¶ 9.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 10 are contained in the Santiago Declaration.

11. The immigration courts and the Board of Immigration Appeals are the record custodians of records of proceedings and are responsible for providing the records to EOIR's FOIA office, regardless of whether the record is physically located with the immigration courts or Board of Immigration Appeals or has been sent to a Federal Records Center. Ex. A (Santiago Decl.) ¶ 9.

RESPONSE: Undisputed.

12. Occasionally, EOIR can request a scanned copy of a record of proceedings from

EOIR's off-site contractor if the record was previously scanned. Ex. A (Santiago Decl.) ¶ 9.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 12 are contained in the Santiago Declaration.

13. Once EOIR's FOIA office receives the record of proceedings, the office sends the record to an off-site contractor for scanning. Ex. A (Santiago Decl.) ¶ 10.

RESPONSE: Undisputed.

14. EOIR instituted off-site contractor scanning in response to the huge volume of FOIA requests that EOIR receives each year, as EOIR receives more FOIA requests each year than all other Department of Justice components combined. Ex. A (Santiago Decl.) ¶ 10.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 14 are contained in the Santiago Declaration

15. Assuming the requester has provided a proper certificate of identity, EOIR sends the entire contents of the record of proceedings to the requester unredacted. Ex. A (Santiago Decl.) ¶ 10.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 15 are contained in the Santiago Declaration.

16. An exception to the process described above pertains to digital audio recordings of an immigration proceeding. Ex. A (Santiago Decl.) ¶ 1. If such a recording is available, it resides in CASE and is accessible electronically. Id. (If the hearing was held at a time when cassette tapes were used to record hearings, then the tape would be located within the hard-copy record. Id.)

RESPONSE: Undisputed.

17. If a record of proceedings exists electronically in CASE, then an attorney of record or accredited representative can access the record by logging into the online portal. Ex. A (Santiago Decl.) ¶ 12.

RESPONSE: Undisputed.

18. Due to the large volume of incoming records, significant delays can occur between

the time the record is received by EOIR's FOIA office and the time it is sent to the requester. Ex. A (Santiago Decl.) ¶ 13.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 18 are contained in the Santiago Declaration but irrelevant. **Disputed** in all other respects. FOIA mandates specific timelines and standards within which an agency must provide a determination on a properly submitted FOIA and produce responsive records. The Act also provides an extension of the standard response time and a safety valve process. An agency is not free to ignore the mandatory language of the Act based on self-serving assertions of "large volume of incoming records".

19. EOIR's FOIA office generally handles records of proceedings on a "first-in, first out" basis, unless the request has been granted expedited processing, and requests that have been granted expedited processing are handled on a "first-in, first-out" basis along with the other requests that have been granted expedited processing. Ex. A (Santiago Decl.) ¶ 13.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 19 are contained in the Santiago Declaration.

20. Requests for records of proceedings comprise over 95% of the FOIA requests that EOIR receives. Ex. A (Santiago Decl.) ¶ 14.

RESPONSE: Undisputed.

21. In Fiscal Year 2018, EOIR received 52,432 FOIA requests and had a backlog of 2,403 requests. Ex. A (Santiago Decl.) ¶ 14. In FY 2019, EOIR received 55,499 requests and had a backlog of 9,155 requests. Id. In FY 2020, EOIR received 48,885 FOIA requests and had a backlog of 10,923 requests. Id. In FY 2021, EOIR received 60,996 FOIA requests and had a backlog of 29,735 requests. Id. In FY 2022, EOIR received 56,544 FOIA requests and had a backlog of 47,070 requests. Id.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 21 are contained in the Santiago Declaration but irrelevant. **Disputed** in all other respects. FOIA mandates specific timelines and standards within which an agency must provide a determination on a properly submitted FOIA and produce responsive records. The Act also provides an extension of the

standard response time and a safety valve process where the agency is facing unusual circumstances and an unanticipated backlog. An agency is not free to ignore the mandatory language of the Act.

July 2020 Rubin Request

22. On July 8, 2020, Stevens submitted a FOIA request to EOIR seeking “all documents released to Joel Rubin for FOIA case no 2017-22261, Statistics.” Ex. A (Santiago Decl.) ¶ 16.

23. EOIR sent Stevens an acknowledgment letter on July 15, 2020. Ex. A (Santiago Decl.) ¶ 17.

RESPONSE: Undisputed.

24. On July 23, 2020, EOIR sent Stevens a final response letter and produced the six pages that had been released in FOIA case number 2017-22261. Ex. A (Santiago Decl.) ¶ 18.

RESPONSE: Disputed. Plaintiff has received no determination, no records responsive to this request, and no “final letter” dated July 23, 2020. (Stevens Decl. ¶78).

June 2021 Silvestre Request.

25. On June 22, 2021, Stevens submitted a FOIA request to EOIR seeking “all system records and other items maintained, produced, or distributed by EOIR pertaining to Miguel Silvestre. His ‘alien number’ is 077-166-008. He was born in Sacramento, on [here Stevens provided Silvestre’s birth date]. 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 Mr. Silvestre 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). Please include ALL calendar and case note records maintained by any EOIR digital systems, including screen shots of databases from which information on Mr. Silvestre is stored. The time frame for this request is 1/1/1996 to present.” Ex. A (Santiago Decl.) ¶ 19.

RESPONSE: Undisputed

26. EOIR interpreted the request to be a request for Silvestre’s record of proceedings

and sent Stevens an acknowledgement letter on July 2, 2021. Ex. A (Santiago Decl.) ¶¶ 20-21.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 26 are contained in the Santiago Declaration. **Disputed** to the extent that the Declaration suggests that it was reasonable for the Agency to ignore and disregard that the request specifically stated: "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 Mr. Silvestre generated or received by EOIR. [...] Please include ALL calendar and case note records maintained by any EOIR digital systems, including screen shots of databases from which information on Mr. Silvestre is stored. [...] satisfies the requirements imposed on the agency by FOIA." Whether the agency's interpretation of the request was reasonable is a legal not a factual issue; whether their response to the properly submitted FOIA request satisfies the requirements of the Act is the ultimate issue to be determined by the Court *de novo*.

27. Because Miguel Silvestre had had two immigration proceedings—one with an immigration court in Florence, and another with an immigration court in Phoenix—EOIR's FOIA office requested the records of proceedings from both courts. Ex. A (Santiago Decl.) ¶ 23.

RESPONSE: Undisputed.

28. EOIR's FOIA office received the first record of proceedings on September 2, 2021, and the office received the second record of proceedings on September 20, 2022. Ex. A (Santiago Decl.) ¶¶ 24-25.

RESPONSE: Undisputed.

29. EOIR's FOIA office sent both records of proceedings offsite to be scanned, and on October 24, 2022, EOIR sent Stevens a final response letter releasing both records of proceedings, consisting of 24 pages each. Ex. A (Santiago Decl.) ¶¶ 24-26.

RESPONSE: Disputed. As shown by the Santiago Declaration, the Agency did not comply with the mandatory response time mandated by FOIA: the request was filed on 22 June 2021 yet the agency did not serve its determination until 24 October 2022, thus, 16 months after the request was submitted and only in response to the initiation of this lawsuit. (Stevens Decl. ¶¶68-70).

August 2021 Archie Request

30. On August 16, 2021, Stevens submitted a FOIA request to EOIR seeking “all system records and other items maintained, produced, or distributed by EOIR on Christopher Archie, A#018-658-496, DOB [here Stevens provided Archie’s birth date]. This includes the record of proceeding for hearing(s), the case management interface outputs, as well as digital or audio recordings of hearing(s) and any email or other communications about his case. The time frame of this request is 1980 to present.” Ex. A (Santiago Decl.) ¶ 27.

RESPONSE: Undisputed.

31. EOIR interpreted the request to be a request for Archie’s record of proceedings and sent Stevens an acknowledgement letter on September 1, 2021. Ex. A (Santiago Decl.) ¶¶ 28-29.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 31 are contained in the Santiago Declaration. **Disputed** to the extent that the Declaration suggests that it was reasonable for the Agency to ignore and disregard that the request specifically stated that is sought “all system records and other items maintained, produced, or distributed by EOIR on Christopher Archie, A#018-658-496, DOB [here Stevens provided Archie’s birth date]. This includes the record of proceeding for hearing(s), the case management interface outputs, as well as digital or audio recordings of hearing(s) and any email or other communications about his case.” Whether the agency’s interpretation of the request was reasonable is a legal not a factual issue; whether their response to the properly submitted FOIA request satisfies the requirements of the Act is the ultimate issue to be determined by the Court *de novo*.

32. EOIR’s FOIA office requested the record of proceedings from the immigration court in Miami on September 7, 2021. Ex. A (Santiago Decl.) ¶ 30.

RESPONSE: Undisputed.

33. EOIR’s FOIA office received the record of proceedings on December 17, 2021. Ex. A (Santiago Decl.) ¶ 33.

RESPONSE: Undisputed.

34. EOIR's FOIA office sent the record of proceedings offsite to be scanned on October 4, 2022. Ex. A (Santiago Decl.) ¶ 33.

RESPONSE: Undisputed.

35. EOIR issued a final response on October 13, 2022, releasing the record of proceedings, which consisted of 54 pages and two audio files. Ex. A (Santiago Decl.) ¶ 34.

March 2022 Hoang Request

RESPONSE: Undisputed but irrelevant. As shown by the Santiago Declaration, the Agency did not comply with the mandatory response time mandated by FOIA: the request was filed on 16 August 2021 yet the agency did not serve its determination until 13 October 2022, thus, 14 months after the request was submitted and only in response to the initiation of this lawsuit.

(Stevens Decl. ¶¶74-77)

March 2022 Hoang Request

36. On March 10, 2022, Stevens submitted a FOIA request to EOIR seeking "all system records and other items maintained, produced, or distributed by EOIR pertaining to Toan Hoang. His 'alien number' is 025-105-060. He was born in Vietnam on [here Stevens provided Hoang's birth date]. 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 Mr. Hoang 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). Please include ALL calendar and case note records maintained by any EOIR digital systems. The time frame of this request is January 1, 1995 to the present." Ex. A (Santiago Decl.) ¶ 35.

RESPONSE: Undisputed.

37. EOIR interpreted the request to be a request for Hoang's record of proceedings and sent Stevens an acknowledgement letter on March 10, 2022. Ex. A (Santiago Decl.) ¶¶ 36-37.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 37 are contained in the Santiago Declaration. **Disputed** to the extent that the Declaration suggests that it was reasonable for the Agency to ignore and disregard that the request specifically stated that is sought "all

system records and other items maintained, produced, or distributed by EOIR on Toan Hoang [..] This includes the record of proceeding for hearing(s), the case management interface outputs, as well as digital or audio recordings of hearing(s) and any email or other communications about his case.” Whether the agency’s interpretation of the request was reasonable is a legal not a factual issue; whether their response to the properly submitted FOIA request satisfies the requirements of the Act is the ultimate issue to be determined by the Court *de novo*.

38. The record of proceedings for Hoang had previously been the subject of a FOIA request that EOIR had received on November 12, 2021. Ex. A (Santiago Decl.) ¶ 38.

RESPONSE: Undisputed.

39. In response to that earlier FOIA request, EOIR’s FOIA office had requested the record of proceedings for Hoang on December 6, 2021, and the office had received it on January 10, 2022, and had sent it offsite to be scanned. Ex. A (Santiago Decl.) ¶ 39.

RESPONSE: Undisputed.

40. EOIR sent Stevens a final response on October 28, 2022, releasing the record of proceedings, which consisted of 38 pages and one audio file. Ex. A (Santiago Decl.) ¶ 40.

RESPONSE: Undisputed but irrelevant. As shown by the Santiago Declaration, the Agency did not comply with the mandatory response time mandated by FOIA: the request was filed on 10 March 2022 yet the agency did not serve its determination until 28 October 2022, thus, over 7 months after the request was submitted and only in response to the initiation of this lawsuit. Especially since the agency had already processed the Record of Proceedings in response to a prior FOIA request even before the Stevens request was filed. Whether the delay was justified and the agency action was in compliance with FOIA is the ultimate issue to be decided by the Court *de novo*.

August 2022 Charpentier Request

41. On August 18, 2022, Stevens submitted a FOIA request to EOIR seeking “All system records and other items maintained, produced, or distributed by EOIR pertaining to Pascal Charpentier, including but not limited to the Record of Proceedings, including all audio recordings. His date of birth is [here Stevens provided Charpentier’s birth date]. His country of birth is Germany but ICE has stated in error it is Haiti. His ‘alien’ number was 029001711, and in 2016 he was given this number: 020578103. 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 Mr. Charpentier generated or received by EOIR. Please include ALL calendar and case note records maintained by any EOIR digital systems. The time frame for this request is January 1, 1972 to August 18, 2022.” Ex. A (Santiago Decl.) ¶ 41.

RESPONSE: Undisputed.

42. Stevens requested expedited processing. Ex. A (Santiago Decl.) ¶ 42.

RESPONSE: Undisputed.

43. EOIR interpreted the request to be a request for Charpentier’s record of proceedings, sent Stevens an acknowledgement letter on October 6, 2022, and granted Stevens’s request for expedited processing. Ex. A (Santiago Decl.) ¶¶ 43-45.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 43 are contained in the Santiago Declaration. **Disputed** to the extent that the Declaration suggests that it was reasonable for the Agency to ignore and disregard that the request specifically stated that is sought “All system records and other items maintained, produced, or distributed by EOIR pertaining to Pascal Charpentier, **including but not limited to the Record of Proceedings**, including all audio recordings. [...] The 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 Mr. Charpentier generated or received by EOIR. Please include ALL calendar and case note records maintained by any EOIR digital systems.” Whether the agency’s interpretation of the

request was reasonable is a legal not a factual issue; whether their response to the properly submitted FOIA request satisfies the requirements of the Act is the ultimate issue to be determined by the Court *de novo*.

44. EOIR sent Stevens an interim response on October 11, 2022, providing access to twelve responsive audio recordings. Ex. A (Santiago Decl.) ¶ 47.

RESPONSE: Undisputed but irrelevant. As shown by the Santiago Declaration, the Agency did not comply with the mandatory response time mandated by FOIA: the request was filed on 18 August 2022 as an expedited request yet the agency did not serve its “interim” response until 11 October 2022, thus, two months after the request was submitted and only in response to the initiation of this lawsuit. (Stevens Decl. ¶¶ 79-81). Whether the delay was justified and the agency action was in compliance with FOIA is the ultimate issue to be decided by the Court *de novo*.

45. Because Charpentier’s immigration case had been appealed to the Board of Immigration Appeals on September 2, 2022, the Board had already scanned the report of proceedings. Ex. A (Santiago Decl.) ¶ 46.

RESPONSE: Undisputed.

46. On October 18, 2022, EOIR requested a copy of Charpentier’s electronic file from Pacific Architect and Engineers, which is the company that does off-site scanning of reports of proceedings. Ex. A (Santiago Decl.) ¶ 46.

RESPONSE: Undisputed.

47. Pacific Architect and Engineers sent the electronic file to EOIR on October 19, 2022, and on that same day EOIR sent Stevens a final response releasing the records, which consisted of 2,060 pages. Ex. A (Santiago Decl.) ¶¶ 46, 48.

RESPONSE: Undisputed but irrelevant. As shown by the Santiago Declaration, the Agency did not comply with the mandatory response time mandated by FOIA: the request was filed on 18 August 2022 yet the agency did not serve its determination until 19 October 2022, thus, over three months after the request was submitted and only in response to the initiation of this lawsuit.

(Stevens Decl. ¶¶ 79-81). Whether the delay was justified and the agency action was in compliance with FOIA is the ultimate issue to be decided by the Court *de novo*.

Miscellaneous

48. EOIR did not redact any records or withhold any records from production, for any of the FOIA requests discussed above. Ex. A (Santiago Decl.) ¶ 49.

RESPONSE: Undisputed.

49. Producing screenshots would require EOIR to create new records. Ex. A (Santiago Decl.) ¶ 50.

RESPONSE: Undisputed to the extent that the factual assertions in Fact 50 are contained in the Santiago Declaration but irrelevant. 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 address 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 or 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). Taken together 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.

Respectfully Submitted by

____ s/ Nicolette Glazer Esq. _____

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