UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACQUELINE STEVENS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	)	No. 22 C 5072 Judge Kennelly

DEFENDANTS' CONSOLIDATED REPLY IN SUPPORT OF EOIR'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Introduction

Nothing in plaintiff Jacqueline Stevens's response (Dkt. 43) to defendant Executive Office of Immigration Review's motion for summary judgment (Dkt. 39) presents a reason to deny EOIR's motion. Nor does Stevens offer any basis for awarding summary judgment in *her* favor, whether against EOIR or against any of the other defendant agencies that remain in this case. EOIR produced the records Stevens requested; it did not withhold any records; and its interpretation of Stevens's requests was reasonable. As for the rest of the agencies, Stevens says she is entitled to summary judgment because the agencies did not respond to her FOIA requests within 20 business days, but she is simply wrong about how FOIA's statutory deadline functions. The court should grant EOIR's motion for summary judgment and deny Stevens's cross-motion (Dkt. 43) against EOIR and the other agencies.

Argument

EOIR is entitled to summary judgment because EOIR produced the records Stevens requested in her FOIA requests; it did not withhold any records; and its interpretation of Stevens's

requests was reasonable. And although the other agencies may not have responded to Stevens's various FOIA requests before the statutory deadline, an agency's noncompliance with the statutory deadline does not entitle a requester to summary judgment. The court should deny Stevens's motion for summary judgment and allow the remaining agencies to finish their productions.

I. Summary Judgment for EOIR

As explained in EOIR's opening memorandum (Dkt. 40), EOIR is entitled to summary judgment because it produced the records Stevens requested; it did not withhold any records; and its interpretation of Stevens's requests was reasonable. Mem. at 3-7.

A. July 2020 Rubin Request

As explained, in response to Stevens's July 2020 request for the records that EOIR had previously produced to a person named Joel Rubin, EOIR sent her the requested records that same month. Mem. at 4. Stevens purports to dispute that EOIR produced the requested records on the grounds that she never *received* the records. Pl. Resp. to DSOF ¶ 24. But she does not dispute that EOIR *sent* them to her, so EOIR is entitled to summary judgment on this request.

B. The Other Four Requests

As explained, in response to Stevens's other four requests—the request in June 2021 for records regarding Miguel Silvestre, the request in August 2021 for records regarding Christopher Archie, the request in March 2022 for records regarding Toan Hoang, and the request in August 2022 for records regarding Pascal Charpentier—EOIR produced the requested records in October 2022. Mem. at 4. Stevens does not dispute that EOIR produced responsive records, but she says that that the timing of the productions violated FOIA and that EOIR's interpretation of her requests was unreasonable. Pl. Resp. to DSOF ¶¶ 26, 29, 31, 35, 37, 40, 43-44, 47. She also says that EOIR was obligated to create new records for her by taking screenshots and producing them. None of her arguments holds water, for the reasons below.

1. Timing

FOIA directs an agency to make a determination on a FOIA request within 20 business days, unless the agency invokes an additional 10-day extension. 5 U.S.C. §§ 552(a)(6)(A)(i), (B)(i). Stevens says that EOIR did not make the required determination within the statutory time period and that she is therefore entitled to summary judgment on Count I (which alleges as much). Resp. at 3-4. But a FOIA requester is not entitled to summary judgment simply because the agency did not respond by the statutory deadline. *Citizens for a Strong N.H., Inc. v. IRS*, 2015 U.S. Dist. LEXIS 115596 (D.N.H. Aug. 31, 2015) ("an agency's failure to comply with FOIA's timeliness requirements, alone, does not entitle the requesting party to summary judgment" but rather "merely entitles the requester to seek judicial relief"); *Hainey v. Dep't of Interior*, 925 F.Supp.2d 34, 42 (D.D.C. 2013) ("While the Court agrees that the Department's responses were untimely under the statute, the Department's untimely responses, in and of themselves, do not entitled Hainey to judgment in her favor."); *Barvick v. Cisneros*, 941 F.Supp. 1015, 1019 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond [by the statutory deadline] does not automatically entitle a FOIA requester to summary judgment.").

Indeed, far from triggering *automatic summary judgment*, an agency's noncompliance with FOIA's statutory deadline merely triggers the FOIA requester's *right to file suit* in federal court. The plain language of the statute says as much. 5 U.S.C. § 552(a)(6)(C)(i) (FOIA requester "shall be deemed to have exhausted his administrative remedies" if the agency "fails to comply with the applicable time limit provisions"). As the *Citizens for a Strong N.H., Inc.*, court noted, "[b]y equating the agency's failure [to respond] with the requester's exhaustion of administrative remedies, Congress evidenced an intent to entitle the requester to seek a remedy in the form of judicial relief." 2015 U.S. Dist. LEXIS 115596 at *18. And the entitlement to seek judicial relief "cannot be read to automatically merit the entry of summary judgment in the requester's favor."

Id. ("such a reading would effectuate an additional remedy beyond that which Congress expressly created").

In other words, noncompliance with the statutory deadline simply provides the requester with a ticket *into* federal court. *Oglesby v. Dep't of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990) (statutory deadline's purpose is "to allow a FOIA requester, who has not yet received a response from the agency, to seek a court order compelling the release of the requested documents"); *Carmody & Torrance v. Def. Contract Mgmt. Agency*, 2014 U.S. Dist. LEXIS 33130, 2014 WL 1050908, *6 (D. Conn. Mar. 13, 2014) ("untimeliness is not a *per se* statutory violation entitling the requester to any specific remedy," because when an agency does not respond by the statutory deadline, "the recourse under FOIA is litigation in federal court," as the requester is deemed to have exhausted administrative remedies and may sue to compel disclosure); *Kimm v. DOJ*, 1996 U.S. Dist. LEXIS 13018, 1996 WL 509724, *3 (S.D.N.Y. Oct. 1, 1996) ("the government's failure to respond to Kimm's request within the statutory [deadline] does not give Kimm the right to obtain the requested documents; *it merely amounts to an exhaustion of administrative remedies* and allows Kimm to bring this lawsuit") (emphasis added).

In sum, there is no basis for awarding summary judgment to Stevens based on the simple fact that EOIR did not respond to her FOIA requests within 20 business days. When EOIR did not respond within 20 business days to the requests she submitted in June 2021, August 2021, March 2022, and August 2022, that gave Stevens the right to sue to procure her requested documents—a right she exercised when she filed this lawsuit in September 2022. Dkt. 1. Considering the not uncommon backlogs in FOIA processing across agencies, Stevens's position would mean that documents subject to Privacy Act, trade-secret, national security, etc. concerns would routinely be ordered disclosed notwithstanding various FOIA exemptions, and that is just not how it works.

2. Interpretation

Stevens says that it was not reasonable for EOIR to interpret Stevens's FOIA requests as being limited to the records of proceedings for the subjects of the FOIA requests. Resp. at 6, 8. She says that her requests sought "memoranda, notes, reports, email messages, and all other system records or communications," not simply records of proceedings. Resp. at 6. She says that a record of proceedings is an official court file, and that she intended to request the official court file *plus* "all non-privileged internal memos, notes, emails, scheduling notes, ECAS, CASE records, etc." Resp. at 7. But that "etc" does a lot of work to make Stevens's request unreasonable (and to make EOIR's interpretation of it reasonable). As EOIR explained in its opening memorandum, asking for "all system records and other items maintained, produced, or distributed by EOIR pertaining to Miguel Silvestre"—as Stevens did, DSOF ¶ 25 (admitted)—is not a reasonable description of desired records. *Marks v. DOJ*, 578 F.2d 261, 263 (9th Cir. 1978) ("sweeping requests lacking in specificity are not permissible"); *Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir. 1977) (request for "all correspondence, documents, memoranda, tape recordings, notes and any other material" on certain topic "typifies the lack of specificity that Congress sought to preclude in the requirement of 5 U.S.C. § 552(a)(3) that records sought be *reasonably* described") (emphasis added), *cert. denied*, 434 U.S. 877, *reh'g denied*, 434 U.S. 935.

A request for "any and all documents" that "refer or relate" to a particular person—which is what Stevens submitted here—constitutes an "all-encompassing fishing expedition" of offices around the country "at taxpayer expense." *Dale v. IRS*, 238 F.Supp.2d 99, 104-05 (D.D.C. 2002). The same can be said for Stevens's other requests. DSOF ¶¶ 30 ("all system records and other items" regarding Christopher Archie), 36 ("all system records and other items . . . pertaining to Toan Hoang"), 41 ("[a]ll system records and other items . . . pertaining to Pascal Charpentier"). And this is true regardless of whether an agency could "easily" search for records using the person

at issue's name, as Stevens suggests. Resp. at 8. A fishing expedition is a fishing expedition; no matter how "easy" it might be for an agency to search a particular location for a particular person's name, the point is that an agency is not obligated to search the entirety of its infrastructure for anything relating to a particular topic or name. *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982) (question is "whether the agency is able to determine precisely what records are being requested") (quotation omitted).

Stevens complains that EOIR has not identified "any search term used" or whether it attempted to search for records beyond the record of proceedings. Resp. at 8-9. But in fact, EOIR has stated in plain terms that it did *not* search for records beyond the records of proceedings: it interpreted Stevens's second through fifth requests to be requests *for* records of proceedings. DSOF ¶¶ 26, 31, 37, 43. And EOIR has explained in detail how it searches for and obtains records of proceedings in response to FOIA requests. DSOF ¶¶ 7-18. Specifically, EOIR's FOIA personnel enters the person's "alien" registration number, the person's name, or both into a database called "Case Access System for EOIR." DSOF ¶ 8.

Stevens cites case law standing for the proposition that, to win summary judgment, an agency must explain which files were searched and by whom, and that the explanation must reflect a "systemic approach" to document location. Resp. at 9. That might be true in a case where an agency had an obligation to "search" a variety of locations and the parties litigate on summary judgment whether the search was adequate. But again, in this case EOIR reasonably interpreted Stevens's requests to be for records of proceedings and explained in detail how its FOIA office identifies records of proceedings when they are requested. DSOF ¶¶ 7-18, 26, 31, 37, 43.

3. Creating New Records

As explained, EOIR was not required to comply with Stevens's request for "screen shots of databases from which information on Mr. Silvestre is stored," because producing screenshots

would require EOIR to create new records, which FOIA does not require. Mem. at 7. Stevens responds that the "1996 e-FOIA amendments" define "record" as including records maintained "in any format, including an electronic format." Resp. at 10. But the definition plainly refers to electronic *records* such as PDFs, Word documents, emails, and their ilk. The definition does not suggest that a temporary image on a computer screen displayed in the course of a search is a "record" under FOIA. Stevens should know this, since she has made this same argument before and lost. *Stevens v. Broadcasting Board of Governors, et al.*, No. 18 C 5391, Dkt. 71 (N.D. Ill. Mar. 30, 2021) (Rowland, J.) (screenshots "are beyond the scope of FOIA and [agency] is not required to produce them").

Stevens says that, under the amendments, an agency must provide a responsive record "in any form or format requested" as long as the record is "readily reproducible" in that form or format, that the amendments direct agencies to make "reasonable efforts" to maintain its records in reproducible forms or formats, and that EOIR has not shown that it cannot produce screenshots. Resp. at 10-11. But this puts the cart before the horse: EOIR almost certainly "could" take screenshots as it browses its computer systems, whether by using a computer program that captures the image on a given computer's screen or perhaps even by physically pointing a camera at a computer screen. None of that matters, because a *temporary* image on a computer screen is not the type of *record* that FOIA requires agencies to produce. *Brown v. Perez*, 835 F.3d 1223, 1237 (10th Cir. 2016) (FOIA does not require agency to create screenshots).

II. No Summary Judgment Against Remaining Agencies

The court should deny Stevens's motion for summary judgment against the remaining agencies—HHS, CBP, and ICE—because they have not even finished processing Stevens's FOIA requests. (DHS and DOJ also remain in the case as defendants, but only because they are the parent agencies of CBP, ICE, and EOIR.) Stevens says there is no factual dispute that the agencies

did not timely "make a determination" on her FOIA requests. Resp. at 4. But as explained above, a FOIA requester is not entitled to summary judgment simply because the agency did not respond by the statutory deadline. *Citizens for a Strong N.H., Inc. v. IRS*, 2015 U.S. Dist. LEXIS 115596 (D.N.H. Aug. 31, 2015) ("an agency's failure to comply with FOIA's timeliness requirements, alone, does not entitle the requesting party to summary judgment" but rather "merely entitles the requester to seek judicial relief"); *Hainey v. Dep't of Interior*, 925 F.Supp.2d 34, 42 (D.D.C. 2013) ("While the Court agrees that the Department's responses were untimely under the statute, the Department's untimely responses, in and of themselves, do not entitled Hainey to judgment in her favor."); *Barvick v. Cisneros*, 941 F.Supp. 1015, 1019 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond [by the statutory deadline] does not automatically entitle a FOIA requester to summary judgment.").

Again, far from triggering *automatic summary judgment*, an agency's noncompliance with FOIA's statutory deadline merely triggers the FOIA requester's *right to file suit* in federal court. The plain language of the statute says as much. 5 U.S.C. § 552(a)(6)(C)(i) (FOIA requester "shall be deemed to have exhausted his administrative remedies" if the agency "fails to comply with the applicable time limit provisions"). As the *Citizens for a Strong N.H., Inc.*, court noted, "By equating the agency's failure [to respond] with the requester's exhaustion of administrative remedies, Congress evidenced an intent to entitle the requester to seek a remedy in the form of judicial relief." 2015 U.S. Dist. LEXIS 115596 at *18. And the entitlement to seek judicial relief "cannot be read to automatically merit the entry of summary judgment in the requester's favor." *Id*. ("such a reading would effectuate an additional remedy beyond that which Congress expressly created").

In other words, noncompliance with the statutory deadline simply provides the requester with a ticket *into* federal court. *Oglesby v. Dep't of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990)

(statutory deadline's purpose is "to allow a FOIA requester, who has not yet received a response from the agency, to seek a court order compelling the release of the requested documents"); *Carmody & Torrance v. Def. Contract Mgmt. Agency*, 2014 U.S. Dist. LEXIS 33130, 2014 WL 1050908, *6 (D. Conn. Mar. 13, 2014) ("untimeliness is not a *per se* statutory violation entitling the requester to any specific remedy," because when an agency does not respond by the statutory deadline, "the recourse under FOIA is litigation in federal court," as the requester is deemed to have exhausted administrative remedies and may sue to compel disclosure); *Kimm v. DOJ*, 1996 U.S. Dist. LEXIS 13018, 1996 WL 509724, *3 (S.D.N.Y. Oct. 1, 1996) ("the government's failure to respond to Kimm's request within the statutory [deadline] does not give Kimm the right to obtain the requested documents; *it merely amounts to an exhaustion of administrative remedies* and allows Kimm to bring this lawsuit") (emphasis added).

In sum, there is no basis for awarding summary judgment to Stevens based on the simple fact that the agencies did not respond to her FOIA requests within 20 business days. The untimeliness of the responses gave Stevens the right to sue to force compliance—which she did, filing suit and obtaining an injunction directing ICE to process records. Dkt. 36. The remaining agencies should be allowed to finish processing Stevens's requests before summary judgment briefing occurs.

One final housekeeping matter: as explained above, Stevens is not entitled to summary judgment against the agencies on Count I of her complaint, which alleges that the agencies violated FOIA by not complying with the statutory deadlines. Compl. at 20. But Stevens also seems to argue that she is entitled to summary judgment on either Count II or III as well, though it is unclear which count she means: the title of her cross-motion refers to Counts I and III, but the motion's subsection headings refer to Counts I and II. *Compare* Resp. at 1 *with* Resp. at 3-6. Whichever count Stevens means, she is not entitled to summary judgment on either of them. Count II alleges

that the agencies wrongfully denied her requests for expedited processing (Compl. at 20-21), but Stevens's cross-motion contains no argument on the point. And Count III alleges that the agencies have wrongfully withheld records, but as explained several times already, the agencies' failure to respond by the statutory deadline merely gave Stevens the right to sue in federal court, which—once again—she did, obtaining a preliminary injunction directing ICE to process records. Dkt. 36.

Conclusion

For the above reasons, and for the reasons in EOIR's opening memorandum, the court should enter summary judgment in EOIR's favor and deny Stevens's motion for summary judgment against EOIR and the other remaining defendants.

Respectfully submitted,

MORRIS PASQUAL
Acting United States Attorney

By: s/ Alex Hartzler
ALEX HARTZLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-1390
alex.hartzler@usdoj.gov