UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FLETA CHRISTINA COUSIN SABRA	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.: 1:20-cv-681-CKK
	)	
U.S. CUSTOMS AND BORDER PROTECTION,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S REPLY
IN SUPPORT OF JUDGMENT ON THE PLEADINGS

Introduction

Plaintiff Fleta Christina Cousin Sabra ("Ms. Sabra") waited more three years for an answer to the expedited processing Freedom of Information Act ("FOIA") request she filed with Defendant U.S. Customs and Border Protection ("CBP") about the allegedly physical assault and verbal abuse she experience at CBP's San Ysidro Port-of-Entry. When CBP admitted in its Answer [5] to her Complaint [1] that the agency failed to make an expedited processing determination within the ten days allowed by law, and that the agency had failed to act on her request for nearly three years, Ms. Sabra sought Judgment on the Pleadings. [7].

Specifically, Plaintiff's motion seeks judgment as a matter of law that: (a) CBP violated 5 U.S.C. § 552(a)(6)(E)(ii)(I) (the "10-Day Rule") by failing make a determination on her expedited processing request within ten working days; and (b) CBP violated 5 U.S.C. § 552(a)(3)(A) (the "'Promptly Available' Requirement") by failing

to make records "promptly available" to her during the three-year period between filing her request and filing this lawsuit.

CBP's Response [12] in Opposition concedes that CBP violated the 10-Day Rule, but opposes entry of judgment in her favor. Def's Resp. at 2. That is because, the agency claims, "CBP in effect denied it," *id.*, and "[o]nce CBP provides its final response to Ms. Sabra's request, her request for expedited processing will be moot." The agency then requests, without citation to any authority, that this Court "hold the motion in abeyance until after CBP provides its final response." Resp. at 3. CBP previously informed the Court that it is "impossible to provide a useful estimate" of when at least some records in this case will be released. Def's [11] Status Report at 3. Accordingly, CBP's citation-less request to hold Plaintiff's motion in abeyance indefinitely so that it can become moot should be rejected. CBP's Response further cites to the statutory provisions governing when agencies must make determinations on FOIA requests, and says nothing at all about the FOIA's requirement that agencies make records "promptly available" to requestors after making such determinations. CBP offers no authority or compelling justification for denying Plaintiff's Motion. This Court should therefore grant it.

A. CBP's Only Cited Authority Supports Judgment as a Matter of Law in Ms. Sabra's Favor that the Agency Violated the 10-Day Rule.

CBP offers only a single citation to oppose Ms. Sabra's motion for judgment on the pleadings as to the 10-Day Rule violation. CBP cites this authority to support a theory that Ms. Sabra's motion should be denied or held in abeyance on the basis of its alleged mootness, that CBP avers will occur at some "impossible to . . . estimate" time in the future. But *Muttit v. Dep't of State* actually supports granting Ms. Sabra the relief she seeks. 926 F. Supp. 2d 284 (D.D.C 2013).

In *Muttit*, Judge Howell considered the applicability of the mootness doctrine in the context of a requestor's contention that the State Department's failure to grant fee waivers and expedited processing requests created live issues precluding summary judgment in State's favor. 926 F. Supp. 2d at 292. The Court ultimately ruled against the requestor, concluding that the agency's final, substantive production of records rendered his expedited processing claims moot.

Two key facts distinguish this case from *Muttit* and reveal why it actually cuts in Plaintiff's favor. First, unlike CBP here, and unlike the cases relied upon by the *Mutitt* court, *see* 926 F. Supp. 2d at 296-987, the State Department had completed its final production of responsive records. *Id.* at 296. This Court need not speculate as to the outcome of the mootness analysis in *Muttit* had State not completed its search and production. That is because the court specifically addressed such a scenario. After analyzing a wide array of Circuit precedents, including *Edmonds v. FBI*, 417 F.3d 1319 (D.C. Cir. 2005) (Garland, J.), Judge Howell concluded "the only scenario in which a court can properly grant relief to a FOIA requester 'on the merits' of an expedited processing claim is when an agency has not yet provided a final substantive response to the individual's request for records." 926 F. Supp. 2d at 296. In other words, the precise exception to the mootness rule CBP advances here appears explicitly in the only authority it offers.

Second, unlike Ms. Sabra here, Mr. Muttt failed to plead a pattern-and-practice claim as to the 10-day Rule. *Id.* 293-295.[1] The court readily acknowledged that pleading such a count would preclude summary judgment in State's favor on mootness grounds.

[1] This fact, and Count II of the Complaint, appears to have been lost on CBP, which contends, "as a practical matter, it is unclear why Sabra focuses on her request for expedited processing." Resp. at 2.

Id. at 292. But the "admitted deficiency in his pleading" could not be cured through creative lawyering and attempts to shoehorn in the Prayer for Relief. *Id. at* 293. That is not the procedural posture of this case. Here, Ms. Sabra seeks judgment that CBP violated the 10-Day Rule as applied to her request as a precursor to the record she will present in support of her request for relief under Count II. Far from being moot "as a practical matter," CBP's pattern-and-practice of violating the 10-Day Rule encompasses half of Ms. Sabra's complaint, and a live issue on which she will seek summary judgment and a permanent injunction.

In sum, CBP offers no binding or persuasive authority in opposition to Plaintiff's Motion as to the agency's violation of the 10-Day Rule. This Court should consequently enter judgment in her favor.

B. CBP Provides No Substantive Response to Ms. Sabra's Contention that the Agency Violated the 'Promptly Available' Requirement by Admitting That It Failed to Act for Three Years.

CBP's opposition to the second ground on which Ms. Sabra seeks judgment as a matter of law fares no better. Describing Ms. Sabra's purported "misunderstanding of the FOIA," Resp. at 1, CBP walks through two of the Act's statutory timing provisions, and a single case interpreting them and holding that blowing these deadlines is an admission ticket inside the courthouse door, rather than a redemption ticket for judgment in a requestor's favor. *Id.* at 1-2 (citing 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(B)(i)), and *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 40-31 (D.D.C. 2014). But these provisions are not the source of the Congressional mandate on which Ms. Sabra seeks judgment as a matter of law in her favor. CBP fails to address the actual statutory provision on which Ms. Sabra moved: 5 U.S.C. § 552(a)(3)(A). CBP's implicit concession and waiver that the 'Promptly Available' Requirement has not been

satisfied in this case is thus sufficient for entry of judgment as a matter of law in Plaintiff's favor.

CBP's second line of defense to judgment for Plaintiff on the 'Promptly Available' Requirement boils down to, "So What?" Resp. at 1 ("The purpose of this Motion is unclear here, where CBP has advised that it completed its search and has begun its rolling productions of non-exempt, responsive records."). As a procedural matter, this alleged fact is outside the pleadings and unsupported by admissible evidence; consequently, Plaintiff requests that this Court exclude it pursuant to Fed. R. Civ. P. 12(d).[2] As a substantive matter, CBP is simply incorrect that judgment for Ms. Sabra will have no practical effect. Prevailing on her claim now will grant Ms. Sabra the same ticket that the requestors in *Gov't Accountability Project v. H.H.S.* got when this Court granted their motion for judgment on the pleadings: Judicial control of CBP's processing schedule. 568 F. Supp. 2d 55, 64 (D.D.C. 2008).

This Court has the power to order CBP to disclose where Ms. Sabra's request currently stands in the processing queue and when CBP will complete its response. *Id.* at 64. CBP's current position as to when Ms. Sabra will finally see the video of her alleged attack by CBP officers is that it is "impossible" to say – even impossible to "estimate." Def's Status Report at 3. By holding three years is not "prompt" within the meaning of the Act, requiring timely and fulsome information from CBP that it would rather not provide, *see* [9] Pltf's Status Report, and ultimately ordering production of all records by a date certain, this Court will bring the agency into compliance with Section

[2] If the Court elects to convert this Motion into Summary Judgment, Plaintiff submits that it should still be granted, insomuch as the government has offered no admissible evidence opposing the undisputed facts she cites. She would, however, request leave to submit additional materials and argument in support of summary judgment if that is the route the Court follows.

552(a)(3)(A). That, after all, is what "FOIA requires[.]" *Roth v. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011) (quoting *Assassination Archives Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003)).

C. The Relief Plaintiff Seeks Is Proper, Timely, and Necessary.

At its core, this case, and Plaintiff's Motion, is about a federal government agency that indisputably and admittedly violated the 10-Day Rule and the 'Promptly Available' Requirement and now asserts, with no citation to relevant authority, the right to continue its delay indefinitely.

This problem is not novel. Congress has acted time and again to ensure agencies fulfill the broken promise of FOIA's time limits and to incentivize them to respond more quickly. *See* 104 Cong. Rec. 47, 50 (daily ed. Sept. 17, 1996) (statement of Rep. Tate) ("Unfortunately—time after time—FOIA's promise to make Government information open and accessible has been broken. On many occasions—simple requests for information have languished—unanswered—for years. . . This legislation also addresses the problems many citizens face when requesting Federal records—unacceptable delays in getting an answer[.]") Because "**long delays in access can mean no access at all**," the 1996 FOIA Amendments endeavored to "increase public access to the electronic records of Federal agencies, and take long overdue steps to alleviate the delays in processing requests for Government records." 108 Cong. Rec. 76, 88 (daily ed. July 28, 1995) (statement of Sen. Leahy) (emphasis added). The delays in processing requests, which Congress noted with concern could take over two years in some cases, were described as "**intolerable**" and "**not the level of customer service the American people deserve from their public servants**," forming the catalyst behind the amendments. *See* 108 Cong. Rec. 76, 88 (daily ed. July 28, 1995) (statement of Sen.

Leahy) (emphasis added). *See also* 104 Cong. Rec. 47, 51 (daily ed. Sept. 17, 1996) (statement of Rep. Maloney); S. Rep. No. 104-272, at 10 (1996) ("The bill is also intended to promote agency compliance with statutory time limits. Chronic delays in receiving responses to FOIA requests are the largest single complaint of persons using the FOIA to obtain Federal agency records and information.").

The 1996 amendments therefore extended the statutory time limit for an agency's initial determination from ten to twenty days, encouraged the implementation of a two-track processing system for simple and complex requests, and provided for expedited processing for certain requests. 108 Cong. Rec. 76, 88 (daily ed. July 28, 1995) (statement of Sen. Leahy).

Despite the 1996 amendments, delays in agency responses persisted. Congress again attempted to remedy agencies' recalcitrant untimeliness in 2007 by introducing legislation aimed at addressing the "growing backlog of FOIA requests" in order to "restore[] meaningful deadlines for agency action." S. Rep. No. 110-59, at 3 (2007). With the 2007 amendments, Congress abrogated the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), which created incentives for agencies to delay compliance. *See* S. Rep. No. 110-59, at 4 (2007). *Buckhannon* abolished the catalyst theory, which, as applied to the FOIA, allowed agencies to simply turn over records when sued, left requesters to bear the cost of agency timing violations, and allowed agencies to violate time limits without paying the price. *See* S. Rep. No. 110-59, at 4 (2007) ("When applied to FOIA cases, Buckhannon precludes FOIA requesters from ever being eligible to recover attorneys fees under circumstances where an agency provides the records requested in the litigation just prior to a court decision that would

have been favorable to the FOIA requestor. The bill clarifies that Buckhannon does not apply to FOIA cases"). By clarifying the award of attorneys fees to successful requesters, Congress sought to encourage FOIA litigation in order to hold agencies accountable. *See* S. Rep. No. 110-59, at 4, footnote 3 (2007) ("Under *Buckhannon*, it is now *theoretically* possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests . . . As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests[.]") (emphasis in original). But was not enough.

Again, in 2015, Congress expressed concern over the growing backlog in FOIA requests and the stubborn persistence of agencies in violating the FOIA's time limits. *See* S. Rep. No. 114-4, at 2 (2015) ("As the number of requests grows, so does the backlog of agency responses. A response to a FOIA request is considered to be backlogged if it has been pending with a Federal agency longer than the statutorily prescribed deadline to respond. At the end of Fiscal Year 2013, more than 95,000 responses to FOIA requests were backlogged with a Federal agency—a 33% increase from Fiscal Year 2012.") (footnotes omitted). The 2015 amendment imposed further costs to the agency to coerce compliance: search fees could not be assessed if the agency does not comply with the time limits. *See* 5. U.S.C. § 552(a)(4)(A)(viii)(I).

Each time Congress has amended the FOIA, its focus has remained on the necessity of meeting the Act's time limits. The continuing Congressional concern with agency timeliness supports the statute's plain language requiring records to be made "promptly available." Congress was aware of the pervasive noncompliance by agencies with the FOIA's time limits, yet it has not changed extended those time periods since 1996. Indeed, rather than lower the bar for agencies, Congress has raised the heightened

penalties of noncompliance. As such, the legislative time limits must be strictly followed and rigorously enforced, including the 'Promptly Available' Requirement.

In sum, CBP's theory of the FOIA's timing structure renders Plaintiff's admission ticket inside the courthouse door little more than a ticket to a different waiting line, where so long as the agency process and produces records monthly, the wait for those records to be made "promptly available" can be, in the agency's words, "impossible" to meaningfully estimate. Essentially, CBP invites this Court to read Section 552(a)(3)(A) as meaningless surplusage. That invitation should be rejected.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Judgment on the Pleadings should be GRANTED. This Court should (a) Declare that CBP violated the Freedom of Information Act's 10-Day Rule and enter judgment as a matter of law in Plaintiff's favor as to that aspect of Count I of her Complaint; (b) Declare that CBP violated the 'Promptly Available' Requirement and enter judgment as a matter of law in Plaintiff's favor on Count I as to the unlawful withholding that occurred as a result; (c) Order CBP to provide a date certain by which it expects to complete its review and produce non-exempt, responsive records with thirty (30) days of the Court's Order.

Dated: June 23, 2020

Respectfully submitted,

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